



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Civil Case 1304 of 2001

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

SUN CITY PROPERTIES LIMITED1ST DEFENDANT/APPLICANT

MERIDIAN PROPERTIES LIMITED.....2ND DEFENDANT/ APPLICANT

SADRUDIN K. KURJI.....3RD DEFENDANT/ APPLICANT

SHEMSHERALI K. KURJI.....4TH DEFENDANT/ APPLICANT

ZAHERALI K. KURJI.....5TH DEFENDANT/APPLICANT

JIWANI AKBARALI KURJI.....6TH DEFENDANT/APPLICANT

R U L I N G

1. The Application for determination is a Notice of Motion dated 30th March 2012 and filed on the 3rd April 2012. The Defendants seek orders of stay of execution of the **Decree/ Judgment** delivered on the **5th March 2012** by Hon. Odunga J, pending the hearing and determination of an intended Appeal.

2. The Motion is supported by the Affidavit of Sadrudin K. Kurji, the 3rd Defendant and a Director of the 1st and 2nd Defendant. In it, the Defendants contend that being dissatisfied with the decision of the High Court, they instructed their lawyers to lodge an Appeal of which a Notice of Appeal was duly filed and certified copies of proceedings and judgment herein applied for. Mr. Kurji deponed that the defendants have an arguable appeal, that the amount decreed is substantial and if the plaintiff is allowed to proceed with execution the defendants will suffer substantial loss, that should execution be carried out, the 1st and 2nd Defendant Companies' operations shall be crippled and completely grounded resulting to substantial loss. It was further deponed that the 3rd, 4th, 5th and 6th defendants shall be adversely affected by the execution as it will directly affect their source of livelihood. The Defendant contended that the application was made without undue delay. The Defendants are also willing to offer an insurance bond as security for the due performance of the decree.

3. The Plaintiff opposed Application by way of a Replying Affidavit sworn on the 17th April, 2012 by Simon T. N. Gathiari. The Plaintiff contended that the fact that the decretal amount is substantial is not indicative per se, of the loss that the Defendants shall suffer as they have not shown that the Plaintiff cannot repay the amount if the Defendants are successful on their appeal. The Plaintiff further contends that the Defendants have not by means of Affidavit evidence sufficiently demonstrated the loss that they

would suffer. The Plaintiff was also apprehensive that the security offered by the Defendants to secure the decree was not sufficient and therefore urged that the decretal sum as reflected in the Decree be deposited in a joint interest earning account to secure the Decree.

4. The conditions for granting a stay of execution pending appeal are well known. An order for stay is a discretionally remedy which discretion is however fettered by the conditions set out under Order 42, Rule 6 of the Civil Procedure Rules. These are that the application should be made without undue delay, substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court.

5. Judgment was delivered on 5th March, 2012 and the application was filed on 3rd April, 2012. I am satisfied that in the circumstances of this case, the application was filed timeously. As regards substantial loss the defendants contend that the amount awarded in the judgment is substantial and that if the Plaintiff is allowed to proceed with execution, the Defendants stand to suffer substantial loss. In paragraph 8 of the supporting affidavit, Mr. Sadrudin K Kurji deponed that, if execution is proceeded with the 1st and 2nd Defendants' Companies' operations shall be crippled and completely grounded and that the other Defendant's source of livelihood the Plaintiff contended that the fact that the decretal amount is substantial, is not indicative of the loss that the Defendants shall stand to suffer and that the Defendants had not shown that the Plaintiff cannot repay the amount if the appeal are succeeds. The Court in the case of **Adah Nyabok –vs- Uganda Holding Properties Limited (2102) ,Mwera , J** stated that

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”

The question that therefore arises is - what is substantial loss and how should it be demonstrated? **Musinga J** in the case of **Daniel ChebutulRotich& 2 Others vs. Emirates Airlines Civil Case 368 of 2001 ,** stated that;

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur.....“Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.”

I fully agree with that statement of the law. So have the Defendants demonstrated substantial loss should the grant of execution be denied? From the extracted Decree the amount due on the judgment is Kshs.51,302,000/-. I do agree that the said sum is quite substantial. If the same is paid over at once, it may well have the effect of grounding the operations of the 1st and 2nd company as contended by the Defendants. Such grounding of operations will not only deprive the 3rd, 4th, 5th and 6th defendant of a source of livelihood but may affect 3rd parties like employees of the 1st and 2nd Defendants.

6. In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be always be balanced. I am not in doubt that the Plaintiff is a reputable financial institution with good financial standing that is capable of refunding any monies recoverable under the Decree should the appeal succeed. But what if by that time the 1st and 2nd Defendants would have closed shop? In my view, the Defendants have demonstrated that if a stay is not granted, they stand to suffer substantial loss.

7. The Defendants have offered to give an insurance bond as security for the due performance of the decree. The Plaintiff has urged that the decretal sum be deposited in a joint interest bearing account. Under Order 42 rule 7, the court has the discretion of determining what constitutes security for the performance of the Decree. In the case of **Visram Ravji Halai & Ano. vs. Thorntorn & Tupin [1963] Ltd Civil App. No. NAI 15 of 1990 ,** the Court of Appeal held that the court ought not to place the Plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the

fruits of his litigation due to the inadequacy of the security ordered.

8. In this case, it is not up to this court to access the merits of the Appeal but such a task befalls the Court of Appeal. What must be ascertained is whether the Security offered is adequate. The court at this juncture is unable to determine this, since the Defendants only merely makes mention as to the offering of an Insurance Bond. The Plaintiff's fears are well founded. The decree herein is for a substantial amount and the Defendants must demonstrate their ability to meet the decree. There is therefore need for the Defendants to provide adequate security to ensure that the Plaintiff will be able to realize the fruits of its judgment if the appeal is unsuccessful.

9. To this end, it is only proper that the Defendants do deposit in an interest earning account in the joint names of the Advocates firms representing the parties a sum of Kshs.30,000,000/- within 45 days of today. Accordingly, the application is allowed as prayed subject to the Defendants depositing the sum of Kshs.30million within 45 days as aforesaid in default the stay shall lapse. It is so ordered.

DATED and delivered at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE