



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 115 OF 2011

**AHMED OSMAN AYUB BACHANI T/A AVISZ DRIVING
SCHOOL.APPELLANT**

VERSUS

**TANDEM INVESTMENT LIMITED.
RESPONDENT**

RULING

The application before the court is a Notice of Motion dated 18th July 2011, seeking for a stay of execution of the Judgment and decree, pending the hearing and final determination of the appeal filed through a Memorandum of Appeal dated 10th March, 2011.

The relevant judgment was delivered by the lower court on 15th February, 2011. It ordered a permanent injunction restraining the Applicant/Appellant and its agents and servants from occupying, possessing or otherwise interfering in any way whatsoever, with the Respondent/Plaintiff's possession of the certain premises then occupied by the Appellant as tenant. The Applicant/Appellant was similarly ordered to pay certain special damages amounting to Ksh.1,883,870/- plus costs of the suit less a setoff of Ksh.140,148/-

The record shows that the Appellant/Applicant herein filed an appeal to this court which still pends. In the meantime, the Appellant/Applicant did not vacate the premises in which it was a tenant and from which it was ordered evicted and after such eviction, restrained from entering or interfering with possession.

It is otherwise shown on record and not denied, that the Appellant has from time to time by applications, mainly in the lower court, sought stay of execution of the decree of the lower court, pending the intended hearing and determination of the appeal in respect of which this application was brought. All such lower court applications, did not however succeed, leading to this application under O. 42, rule 6 of the Civil Procedure Rules. It does not, however, escape the attention of this court, that the Appellant/Applicant, of necessity, obtained interim orders of stay each time it filed an application of stay until the final rulings were made.

The Applicant asserts that it filed this application without delay. it also stated that if stay is not granted it is likely to suffer substantial loss in that it will have to pay the sum of Ksh.1,883,870/- due under the decree, with the risk that the Respondent will not have ability to pay it back when the appeal succeeds. It added that its business is not steady and it will have difficulty to raise such a large sum if stay is not granted.

On the other hand, the Respondent asserted that this application was filed five months delay after the judgment was delivered, which delay, has not been explained in any way to show it was unavoidable. The Respondent also stated that substantial loss to be suffered by the Applicant, has not been demonstrated since the Applicant is by the material filed on record by the Respondent, shown to be owning substantial properties in different trading firms. The Respondent also asserted that it is capable of refunding the decretal sum if the appeal succeeds since it is economically sound and not made of straw.

Finally, the Respondent also argued that it is entitled to the fruits of its judgment since the applicant failed to give reasons why the same should be delayed and be enjoyed.

I have considered the material on record after carefully examining the written submissions of both parties. In my finding there is no reasonable explanation for the delay of five months between the date of delivery of the relevant judgment and the filing of this application for stay. The Applicant did not even bother to allude to such delay.

Secondly, it is trite that a decree-holder is first and foremost, entitled to the fruits of a judgment declared in his favour. It is only good and exceptional reasons which can be applied, in relevant and proper circumstances, to postpone the decree-holders rights in such judgment. I accept and apply the statement by Kuloba, J in **Machira t/a Machira & Co. Advocates Vs. East African Standard, HCCC No. 612 of 1996**: -

“... from the point of view of the party who is, at least for the time being successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails... The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage...”

In the same judgment the judge added the following: -

“Any subsequent decision of the court which tends to impede the normal flow of justice by suspending the enjoyment of the consequential benefits of one’s success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness.”

In this case the Applicant has not placed before me any material that should persuade me that there are good reasons which in the interest of fairness and justice, should suspend and/or postpone the decree-holders right to execute the decree. Such reasons to postpone and suspend execution could only rightly have been placed before the court through an affidavit. However, the affidavit supporting this application, dwells on the history of the matter without explaining out the grounds for seeking stay. The supporting affidavit to this application is also not only misleading but is undated and therefore incompetent. For example the Applicant affidavit refers only to the earlier application for stay dated 11th March, 2011 which he swears in exhibit AAB2. Yet **“Exhibit AABZ”** is a Memorandum of Appeal. Also he swears that this **“Exhibit AABI”** is the Memorandum of Appeal, when **“Exhibit AABI”** is a letter to the bank dated 8th March 2011.

The applicant further, had in his application averred that he had an arguable appeal which might be rendered nugatory when it succeeds if the intended execution is carried out. However, before me, the Applicant failed to agitate this ground, probably deliberately. While at this stage, this court should not put a lot of weight on whether or not the appeal has high chances of success, nevertheless the court will not grant a stay if a glance over the grounds of appeal show very little chance of the appeal succeeding. It is possible to say that this might be the reason why the Applicant chose to ignore this issue.

The Applicant/Appellant on the balance of probabilities needs to demonstrate a possible substantial loss if stay is not granted. He argued that the Respondent may not be able to refund the funds of about Ksh.2,000,000/- which would be recovered in execution. The Applicant however was not able to demonstrate that the Respondent was made of straw and would not be able to refund if the appeal succeeded. On the contrary, the Respondent demonstrated that it was economically sound and would be

able to refund the said sum.

The Applicant also argued that it will not be able to raise the decretal sum if executions were to be allowed to proceed. In the court's view, that is not an issue that this court should consider in favour of an applicant for stay of execution. If anything, the court in such circumstances would consider ordering for sufficient security in case it wishes to order for a stay of execution. It is however, possible to think that the decree-holder may use this ground to seek for faster or earlier execution.

Having considered all the arguments placed before me and the principles governing stay of execution, I have come to the conclusion that the Applicant/Appellant has not succeeded to persuade this court that it is entitled to a stay of execution in this appeal. In the circumstances, this application is dismissed with costs to the respondent. Orders are made accordingly.

Dated and delivered in Nairobi this 17th day of September, 2012.

.....

D A ONYANCHA

JUDGE