



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 609 of 1996

SAID ABDALLA AZUBEDI.....PLAINTIFF/APPLICANT

VERSUS

TRUST BANK LTD.....DEFENDANT/RESPONDENT

RULING

The applicant herein is Said Abdallah Azubedi. Judgment was entered against the applicant on 19/5/2011 for Kshs.13,634,904/-. By an application dated 12/3/2012, the applicant seeks an order of stay of execution of the judgment pending the hearing and determination of the appeal. The applicant filed an affidavit in support of the application in which he depones that execution is imminent and that if it proceeds, he is likely to suffer substantial loss. In the grounds in support of the application, the applicant indicated that he was ready and willing to offer security as the court may direct. When the applicant moved the court under certificate of urgency on 13/3/2012, the court granted an order of temporary stay pending the hearing of the application inter partes on condition that the applicant deposited Kshs.5,000,000/- in court as security within 7 days, in default, the order of stay would vacate.

Before the above application was heard, the applicant filed another application dated 20/3/2012, requesting the court to enlarge the time within which the applicant ought to deposit the security ordered by the court on 13/3/2012, and in the alternative, the court be pleased to order that the applicant furnishes an alternative security in lieu of the monetary security. In the affidavit in support of that application, the applicant deponed that despite efforts made to procure the required security, he has not been able to comply and beseeches the court to exercise its discretion to enlarge the time or order that he furnishes a different form of security.

Adam Mahamed Bor the Liquidation Agent of Trust Bank Ltd and working with Deposit Protection Fund, the Liquidator of Trust Bank, deposed that the application for stay has been brought with inordinate delay, judgment having been delivered on 19/5/2011; That the delay has not been explained; that no substantial loss will result if stay is not granted; that the Deposit Protection Fund is a Department of the Central Bank of Kenya and able to refund to the plaintiff the money in the event the appeal succeeds and lastly that no security has been offered by the applicant.

In reply to the 2nd application, Mr. Wamaasa, counsel for the respondent submitted that the applicant did not offer any security and it was just out of the court's generosity that an order that the applicant deposit security was made; that the applicant failed to comply with the court's order to deposit cash and the court should not allow the applicant to deposit a title.

For the court to exercise its discretion under **Order 42 Rule 6** of the **Civil Procedure Rules**, the applicant needs to demonstrate that the application is brought without undue delay; that the applicant will suffer substantial loss if an order of stay is not granted and lastly that the applicant is willing to offer

security for due performance of the decree.

Judgment was entered against the applicant on 19/5/2011. It is not until 13/3/2012, about 10 months later, that the applicant moved the court for stay orders. I have read the affidavit in support of the application and there is really no explanation as to why it took the applicant 10 months to file this application. At paragraph 6 of the affidavit, he only mentioned that he has applied for copies of the proceedings. But applying for certified copies of proceedings is not a bar to the making of this application. Upto now, no proceedings have been typed. In my view there was unexplained delay in filing this application.

As to whether the applicant will suffer substantial loss, the applicant merely states that the decretal sum put together with the costs of the counter claim, he will suffer great loss. Indeed the decretal sum of about Kshs.14,000,000/- is colossal. But the respondent is a Government body and is able to refund the sum in the event the appeal succeeds.

The applicant did not offer any security but this court, in the exercise of its discretion ordered that the applicant to deposit Kshs.5,000,000/- as security, when the applicant came ex parte under certificate of urgency. He has not complied with the said order. He has exhibited a copy of title for his plot in Milimani area of Nakuru, a search certificate and an evaluation report to show that the plot is worth Kshs.15,000,000/-.

The court has taken all these issues into consideration. Although the applicant has not explained the delay in filing this application, in my view, the decretal sum is colossal. I take into account the fact that this matter has dragged in the courts since 1996, over 15 years; however, in exercise of the court's discretion, the applicant cannot be denied his right of appeal. For that reason, I hereby allow the applicant to substitute the monetary security with his property in Milimani on condition that a fresh valuation of the property is done by a Government body, a fresh search is carried out, and be confirmed to emanate from the Land Registrar, Nakuru and the authenticity of the title is verified. All the incidental costs to be borne by the applicant and should be done within 7 days hereof.

Costs will abide the appeal. Mention on 23/10/2012 to confirm compliance.

DATED and DELIVERED this 12th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Muchela holding brief for Mr. Murimi for the plaintiff/applicant

Ms Njoroge holding brief for Hamilton Harrison & Mathews for the defendant/respondent

Kennedy – Court Clerk