



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 120 of 2006

BETTY CHEPCHIRCHIR SEGUTON.....PLAINTIFF

VERSUS

KUNSTE HOTEL LIMITED.....DEFENDANT

RULING

The applicant in the notice of motion dated 17th June 2009 seeks an order for the stay of this court's decree issued on 5th March 2009. The application is premised on the grounds that:

1. The applicant/judgment debtor has lodged a competent notice of appeal against the judgment and decree.
2. That a proclamation has been issued in execution of the decree.
3. That the applicants' appeal has high chances of success and would be rendered nugatory if the stay herein is not granted.
4. That the execution of the decree if not stopped is likely to paralyze the applicant's operations.
5. That the respondent/decree holder is a person of unknown worth and that payment of the decretal sum to her is likely to occasion the applicant irreparable loss.
6. That the judgment debtor/applicant has paid half of the decretal sum and is willing to furnish security for the performance of the decree or any ultimate order of the court as may be binding upon it.
7. That the wider interests of justice would be met if the stay herein sought is granted.

The application is supported by an affidavit sworn by the applicant's general manager on 17th June 2009.

In opposing the application the decree-holder/respondent filed a lengthy replying affidavit in which it is deponed, inter alia, that the requirements of Order XLI rule 4 of the Civil Procedure Rules, which govern applications of this nature, have not been met. At the hearing of the application, counsel for the parties herein made lengthy submissions to buttress their clients' respective positions and cited several authorities. Their submissions, together with the various authorities referred to have been duly considered.

The power to stay or not to stay execution pending appeal is a discretionary one. Courts will ordinarily grant a stay if sufficient cause is shown, provided, however, that the applicant satisfies the

court that substantial loss may result to the applicant if execution is not stayed and also furnishes such security as the court shall order for the due performance of such decree or other order as may be ultimately binding on the applicant. Another prerequisite for the grant of a stay is that the application is made without unreasonable delay.

For the purposes of Order XLI Rule 4, an appeal is deemed filed when a notice to that effect has been filed. This means that the merits of the appeal, which cannot be assessed until a memorandum of appeal is filed, are not part of the essential considerations to be made when deciding whether or not to grant the order at this stage.

The judgment herein was passed on 6th February 2009. A notice of appeal was filed on 17th March 2009 but was not served upon the respondents until 18th June 2009, two days after a proclamation notice was served in execution of the decree. Between the time the judgment was passed to the time the Notice of Appeal was served, the advocates on record exchanged correspondence in regard to the payment of the decretal sum. Counsel previously on record for the applicants arranged for the part-payment of Shs 1,500,000/= by the applicants' insurers and intimated to the respondents' advocate that the applicant would be paying the difference. This arrangement was accepted by the respondents' advocates. Counsel for the applicants also approved the draft decree and entered into a consent with the counsel for the respondent in regard to party and party costs.

Before the attachment herein commenced, a demand of the payment of the applicants' portion of the decretal sum was made, followed by a reminder, a warning and a final notice, all of which have been exhibited in the replying affidavit. All this took place after the filing of the Notice of Appeal which still remained not served. In these circumstances I am of the considered opinion that the time taken to file this application constitutes unreasonable delay.

The applicants have not demonstrated what substantial loss they are likely to suffer and have not given any evidence to show that the respondent is a woman of straw. It is not enough, in my view to merely allege that the respondent is a person of unknown worth, and that for that reason alone, the applicant fears that she may not be in a position to pay back the decretal sum in the event that the appeal is successful. To the contrary, the respondent has demonstrated that she is endowed with means and would be in a position to repay the sum owed to her by the judgment-debtor under the terms of the settlement.

The conduct of the applicants, from the time the judgment herein was passed to the time the application herein was filed clearly shows that they had no serious intention of challenging the judgment and only filed the notice of appeal as a precautionary measure. Taking all the circumstances into consideration, I am of the opinion that the application for stay is an afterthought intended solely to buy time and to deliberately delay the judgment debtor's enjoyment of the benefit accruing from the decree.

I am persuaded that the conditions for granting a stay under Order XLI rule 4 have not been met and do hereby dismiss the application with no order as to costs.

Dated signed and delivered at Nakuru this 8th day of October, 2009

M. G. MUGO

JUDGE