



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 941 of 2007

ROYAL RESERVE MANAGEMENT COMPANY LTD.....1ST APPELLANT

ELITE VACATIONS LIMITED.....2ND APPELLANT

VERSUS

GERALD WAMWANGI MAHINDA.....1ST RESPONDENT

SUSAN N. MAHINDA.....2ND RESPONDENT

R U L I N G

By a notice of motion filed on 21st August, 2008, Royal Reserve Management Company Ltd and Elite Vacations Ltd, (hereinafter referred to as the applicants) seek an order for stay of execution of the decree in Milimani CMCC No.3209 of 2005 pending the hearing and determination of their appeal filed herein. The applicants have lodged an appeal against the judgment delivered on the 24th day of October, 2007 in CMCC No.3209 of 2005. The applicants maintain that unless an order for stay of execution is granted they will suffer substantial loss as the decree is a colossal amount now standing at over Kshs.1 million. The applicants further maintain that if the amount is paid to the respondents, they may not be in a position to repay the monies to the applicants if required to. The applicants are ready and willing to deposit half the decretal sum in an interest earning account in the joint names of the counsels pending the hearing of the appeal. The applicants maintain that their application has been brought without undue delay as they had first filed an application for stay of execution in the lower court and brought this application just about a month after the dismissal of the application in the lower court.

In support of the current application, counsel for the applicants submitted that the respondents have not revealed their businesses or income to demonstrate to the court that they will be able to refund the decretal sum should that become necessary. Counsel for the applicants relied on *HCCC No.2695 of 1997 Savings and Loan Kenya Ltd vs Mary Wahito Mbugua*, wherein the court granted an order for stay of execution in a monetary decree. Counsel further relied on *Butt vs Rent Restrictions Tribunal Case No. (Nai) 6 of 1979*, wherein the Court of Appeal held that, the power of the court to grant or refuse an application for stay of execution, is a discretionary power, and the discretion should be exercised in such a way as not to prevent an appeal. Also relied upon was *HCCA No.276 of 2003 DWA Estate Ltd vs Charles Oyuer*, where an application for stay of execution was allowed in a situation where the respondent was a farmer earning Kshs.600/= . Finally *Standard Chartered Bank Kenya Ltd vs Ayaga M. Sangale Civil Appeal No.247 of 2004*, was relied upon, for the proposition that the onus to show substantial loss was discharged by an averment that the respondent is currently unemployed and has no

sources of income, a fact which was not controverted.

In the replying affidavit sworn by the 2nd respondent Susan N. Mahinda, the 2nd respondent swears that her husband Gerald Wamwangi Mahinda, who is the 1st respondent, and herself would be in a position to refund the decretal sum to the applicants if required. It is contended that the applicants' allegation that they will suffer substantial loss or that the appeal will be rendered nugatory is totally baseless. It is further contended that the application was not brought timeously as judgment was delivered on 24th October, 2007 and the applicants' application in the lower court filed on 6th December, 2007 and dismissed on 18th July, 2008 but the applicants did not file their application in this court until 21st August, 2008.

Counsel for the respondents submitted that the applicants had failed to demonstrate that they will suffer substantial loss if an order for stay of execution is not granted. It was maintained that the respondents have stated under oath that they are financially capable of refunding the decretal sum. It was further contended that the applicants had not brought their application without undue delay. Moreover, the delay has not been explained.

I have carefully considered the application before me. Under Order XLI Rule 4(2) of the Civil Procedure Rules. An application for stay of execution pending appeal can only be granted if the applicant satisfies the court that substantial loss may result to him unless the order for stay of execution is made. The applicant must also satisfy the court that he has brought his application for stay of execution without undue delay and that he is ready to provide such security as the court may require.

In this case, the applicants have deponed that they will suffer substantial loss if the stay of execution is not granted "as the amount owing with respect to the decree is colossal being over Kshs.1,000,000/= and if the said sum is paid to the respondents and the appeal is successful, the respondents will not be in a position to repay the monies paid by the appellants."

In her replying affidavit, the 2nd respondent, has averred that the respondents are in a position to refund the decretal sum. The 2nd respondent has however not deponed to, or revealed anything about the respondents' sources of income or financial stability. A sum of Kshs.1,000,000/= is not a small amount and it was necessary for the respondents to give an indication of their means so as to justify their contention that they are in a position to refund this sum if required to. I think that in the circumstances of this case, the applicants' apprehension is not unfounded. However, it is necessary to balance the interest of the respondents who have a judgment in their favour against the interests of the applicants. For these reasons, I will grant an order for stay of execution pending appeal on the following conditions: -

- (i) The applicants shall deposit the full decretal sum into an interest earning account in the joint names of the parties' advocates within 21 days from the date hereof.
- (ii) The sum of Kshs.400,000/= already deposited in court shall be released forthwith to the parties' advocates so as to comply with condition No.(i) above.
- (iii) The applicants shall file and serve a record of appeal within 90 days from the date hereof.
- (iv) The applicants shall take all necessary action to facilitate the speedy disposal of the appeal.
- (v) In the event that the applicants fail to comply with condition No.(i) or (iii) above, the order for stay of execution shall lapse.
- (vi) Costs of the application shall be in the appeal.

Those shall be the orders of this court.

Dated and delivered this 15th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Maina H.B for Kamau for the applicants

Masinde H/B for Mubea for the respondents