

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 496 of 2000

BETHEUL MUIRURI BENJAMIN.....PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA.....DEFENDANT

RULING

The defendant made an application under the provisions of **Order XLI rule 4(1) of the Civil Procedure Rules** seeking to stay the execution of the decree of this court pending the hearing and determination of the intended appeal filed by the defendant against the decision of this court to the Court of Appeal. The application is based on the ground stated on the face of the application and supported by the annexed affidavit of Cerestine Aoko Otieno, the company secretary of the defendant. The application is opposed. The plaintiff has sworn a replying affidavit opposing the said application.

At the hearing of the application Mr. Kiura, learned counsel for the defendant submitted that the defendant, being dissatisfied by the decision of this court, had filed a notice of appeal indicating its intention to appeal to the Court of Appeal against the said decision. He submitted that the applicant would suffer substantial loss if the decretal amount of Kshs 2.6 million is paid to the plaintiff. He submitted that the defendant was ready and willing to deposit the said decretal amount in an interest earning account in the name of the parties to the suit pending the hearing and determination of the said appeal. He further submitted that if the said amount is paid to the plaintiff, the defendant would unlikely recover the same if it were to be successful on its said appeal. He argued that although the plaintiff had stated that it owned several properties of a value more than the decretal sum, there was no evidence that the said properties were free of encumbrance. He urged this court to allow the application so that the appeal to be filed would not be rendered nugatory.

Mr. Githua, learned counsel for the plaintiff opposed the application. He submitted that the defendant had not established that he would suffer substantial loss if the decretal amount is paid to the plaintiff. He submitted that the plaintiff had satisfied the court that he would be able to pay the decretal amount were the defendant to be successful on its appeal. He argued that a successful litigant should not be deprived of the fruits of his judgment without good cause. He further submitted that the plaintiff had established that he was a man of means and would therefore be in a position to refund the decretal amount in the event that the appeal would be successful. He urged this court to dismiss the application with costs.

I have read the pleadings filed by the parties to this application. I have also carefully considered the rival submissions which were made before me by the counsel for the defendant and the counsel for the plaintiff. The issue for determination by this court is whether the defendant has established a case to enable this court grant it the order of stay of execution sought. **Order XLI rule 4 of the Civil Procedure Rules** requires a litigant who is seeking an order of stay of execution to satisfy the court that he would suffer substantial loss if the order of stay of execution is not granted. Further, he is required to provide security for the due performance of such decree or order as may ultimately be binding on him. The decree issued by this court is a money decree. The sum is not insubstantial. The defendant in its affidavit has stated that it would suffer substantial loss if the said amount is paid to the plaintiff as there is a likelihood that it would not recover the said amount if its appeal were to be successful.

On the other hand, the plaintiff has submitted that he is a man of means and would be able to refund the decretal amount if the defendant were to be successful on its appeal. He further submitted that he should not be deprived the fruits of his judgment just because the defendant has filed an appeal to the Court of Appeal.

Having carefully considered the rival arguments in this application, I do hold that the defendant has established that it is entitled to the grant of stay of execution pending determination of the intended appeal. As was held in the case of **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at p. 420 by Madan JA:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett L.J. in Wilson –vs- Church (No. 2) 12 C h D(1879)454 at p. 459. In the same case, Cotton L.J. said at p. 458

“I will state my opinion that when a party is appealing, exercising its undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

In this case the defendant has offered to deposit the entire decretal sum in an interest earning account in the joint names of the parties in this suit pending the hearing and determination of the intended appeal by the Court of Appeal. Although the plaintiff would suffer prejudice by not immediately enjoying the fruits of his judgment, in the circumstances of this case, the defendant has established that would suffer substantial loss if stay is not granted because it is unlikely that it will recover the decretal amount if the appeal filed is successful. The appeal would be rendered nugatory if the defendant would ultimately be unable to recover the decretal amount if the appeal is successful.

I will therefore allow the application for stay of execution of the decree of this court pending the hearing and determination of the appeal. The defendant is ordered to deposit the entire decretal amount including the taxed costs in a joint interest earning account in a reputable bank to be opened by the counsel for the defendant and the counsel for the plaintiff. The said amount should be deposited within the fifteen days of today’s date or in default the stay of execution granted herein shall automatically lapse. The costs of this application shall abide the outcome of the intended appeal.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE