



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 502 OF 2012**

**PAPIUS KIROGOTHI MUHINDI.....1<sup>ST</sup> PLAINTIFF**

**BEN GAKERE NYUTHO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES NJUGUNA MWANGI.....2<sup>ND</sup> DEFENDANT**

**MARY WANGAI WAMAE.....3<sup>RD</sup> DEFENDANT**

**KENNETH MBAABU MUCHIRI.....4<sup>TH</sup> DEFENDANT**

**GERALD GACHOKA WARUI.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Background**

1. On 8<sup>th</sup> February 2016, this court, differently constituted, delivered a judgment in which it awarded the Plaintiffs/Respondents the sum of Kshs 138,921,815.20.
2. The Defendants are aggrieved by the said judgment and intend to appeal against it.

**Application.**

3. This ruling is in respect to the application dated 9<sup>th</sup> September 2020 wherein the defendants seeks the following substantive orders: -

**1. Spent**

**2. Spent.**

**3. The Honourable court be pleased to grant an order staying execution of the Judgment and Decree of Honourable Lady Justice S. Amin delivered on 8<sup>th</sup> February 2016 pending the filing, hearing and determination of the intended appeal in the Court of Appeal from the said Judgment and Decree.**

**4. That costs of this application do abide the outcome of the intended appeal.**

4. The application is supported by the applicant's advocate's affidavit and is premised on the main grounds that: -

**a. The applicant has an arguable appeal which shall be rendered nugatory if the respondents proceed to execute the Judgment and Decree.**

**b. The Applicant is ready and willing to offer security in the form of bank guarantee or an insurance bond to secure the entire**

*decree amount.*

*c. The Applicants will suffer undue prejudice and substantial loss if the order of stay is not granted*

5. The Respondents opposed the application through the Grounds of Opposition dated 6<sup>th</sup> July 2020 wherein they listed the following grounds: -

*a. The applicants have not demonstrated that they are likely to suffer substantial loss unless the orders of stay are granted as required by Order 42 rule 6 (2) (a) of the Civil Procedure Rules and are therefore undeserving of the orders sought.*

*b. The applicants cannot in any event suffer substantial loss and damage if the Applicants proceed to settle the decree herein as, by its own reckoning and admission at paragraph (c) of the grounds in support of its application, it has a large portfolio of customers and deals in wide range of roofing products(sic).*

*c. The Applicants have not demonstrated that they have given such security as is adequate for the due satisfaction/performance of the decree herein as required by Order 42 rule (2)(b) of the Civil Procedure Rules and are therefore undeserving of the orders sought. The proposed security in the form of a bank guarantee or an insurance bond to secure the entire decretal amount is not such acceptable security. The claim by the 1<sup>st</sup> Defendant/Applicant that it is experiencing cash flow problems is a total lie that is negated by its recent half year financial announcement in August 2020 of Kshs 9.1 Billion in Half Year Profit. Besides, a bank guarantee must be backed by hard cash deposited with the guaranteeing bank, thus the excuse for not providing the usual security does not wash.*

*d. The intended appeal is in any event, not arguable and lacks any probability of success and as such the orders sought, if granted, would be in vain; and*

*e. The application is otherwise unmerited and ought to be dismissed with costs to the plaintiffs.*

6. Parties canvassed the application by way of written submissions which I have considered.

7. The main issue for determination is whether the applicants have made out a case for the granting of orders for stay of execution pending an intended appeal.

8. The law governing applications for stay of execution is well settled. Order 42 Rule 6(1) of the Civil Procedure Rules (CPR) stipulates as follows on the conditions to be fulfilled in order to obtain an order for stay pending appeal.

***“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”***

#### **Delay**

9. It is a legal requirement that an application for stay of execution pending appeal be made without unreasonable delay. The instant application was filed on 9<sup>th</sup> September 2020 while the judgment giving rise to the appeal was delivered on 8<sup>th</sup> February 2016. It is clear that the application was brought at least 4 and a half years after the delivery of the judgment in question which, in my considered opinion, is a delay that is not only inordinate but was also not explained by the applicants.

#### **Substantial loss.**

10. It goes without saying that a successful party is entitled to the fruits of his judgment. The applicants' case was that the respondents are not persons of means and may therefore be unable to refund the decretal sum should the same be paid to them and the appeal turns out to be successful. The respondent, on the other hand, stated that they are Senior Managers with substantial shareholding in the 1<sup>st</sup> defendant's bank and will therefore be capable of making a refund should the appeal be successful. I am not satisfied that the applicants have established that they stand to suffer substantial loss should the decree be executed.

#### **Sufficient cause.**

11. The applicants also argued that stay of execution is necessary, as the respondents' advocates had written to them demanding the payment of the entire decretal sum. On their part, the respondents argued that the reasons advanced by the applicants for seeking stay of execution were not plausible and would be tantamount to determining the merits of the appeal at an interlocutory stage.

12. My finding is that the execution of court decree is an automatic consequence of a court judgment and cannot, *per se*, be a reason for the granting of orders of stay of execution

#### **Security.**

13. The applicants stated that they are ready and willing to offer security in the form of a bank guarantee or an insurance bond to secure the entire decretal sum and/or abide with such conditions as the court may impose. On their part, the respondents argued that the security offered by the applicants is vague and lacks specificity as to the issuer, existence and acceptability. For this argument, the respondents cited the decision in *Mwaura Karuga t/a Limit Enterprises Ltd v Kenya Bus Ltd & 4 Others* [2015] eKLR wherein it was held: -

**“..... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6(2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”**

14. Courts have however taken the position that in determining whether or not to grant orders for stay of execution pending appeal, they must be cautious to balance the interests of the decree holder to the fruits of his judgment debtor to the right to appeal. This court did not however also lose sight of the fact that the applicants have not filed any appeal 4 years after delivery of the impugned judgment.

15. Having regard to the findings that I have made in this ruling and in balancing the interests of both sides, I find that it will serve the interests of justice to make the following final orders:

***a. That there shall be a stay of execution of the decree and judgment of Honourable Lady Justice Farah Amin delivered on 8<sup>th</sup> February 2016 pending filing, hearing and determination of the intended appeal but on the following conditions: -***

***i. That the applicants pay half of the decretal sum being 100,000,000 to the respondents within 30 days from the date of ruling.***

***ii. That the remaining part of the decretal sum, being kshs 91,418,486.10 be deposited in an interest earning account with a banking institution of repute to be held in the joint names of the advocates for both the applicants and the respondents within 30 days from the date of this ruling.***

***iii. In the event of failure comply with orders in a(i) and a(ii) above, the stay of execution orders shall automatically lapse/be vacated and the respondents shall be at liberty to proceed and execute the decree.***

***b. I award the respondents the costs of the application.***

Dated, signed and delivered via Microsoft Teams at Nairobi this 3rd day of June 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Ms Koske for Kiche for Defendant/Defendant.

Mr. Thiga for Plaintiffs/Respondents.

Court Assistant: Sylvia.