



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. E765 OF 2020**

**ODERA OBAR & CO ADVOCATES.....APPLICANT/RESPONDENT**

**VERSUS**

**AQUVA AGENCIES LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. Through the application dated 12<sup>th</sup> May 2021, the applicant seeks the following orders: -

***1. Spent.***

***2. That the honourable court be pleased to issue interim order of stay of execution pending the hearing and determination of the application.***

***3. That this honourable court be pleased to issue an order of stay of execution of the decree pending hearing and determination of the appeal.***

***4. That costs of this application be provided for.***

2. The application is supported by the affidavit of **Rajnikant Patel** and premised on the grounds that; -

***1. That the appellant/applicant is dissatisfied with the ruling of the court.***

***2. That the appellant/applicant has filed their Notice of Appeal dated 29<sup>th</sup> April 2021.***

***3. That proclamation has been done and execution shall be done any time from now.***

***4. That the appellant/applicant is exposed and execution has commenced whereas she has lodged an appeal which is yet to be heard for determination.***

***5. That unless the execution is stayed the appeal will be rendered nugatory.***

***6. That it is in the interest of justice that the orders sought herein be granted***

***7. That the appellant/applicant is ready to abide with the conditions that the court may impose.***

3. The respondent opposed the application through a replying affidavit of **Odera Obar Kennedy** who avers that the application is incompetent for failure to invoke the proper jurisdiction of the court under Order 42 rules 6 of the Civil Procedure Rules. He observes that the applicant has not demonstrated why the respondent should be deprived of the fruits of the judgment. He further avers that the respondent is able to repay the decretal sum in the event the appeal succeeds and faults the applicant for failing to show the damages it would suffer if the order for stay was not granted.

4. The application was canvassed by way of written submissions wherein parties reiterated the positions stated in the pleadings.

5. I have considered the pleadings and the rival arguments made by the parties. The main issue for determination is whether the applicant has made out a case for the granting of orders of stay of execution pending appeal.

6. **Order 42 Rule 6(1) of the Civil Procedure Rules** provides that: -

*No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.*

**Order 42, Rule 6(2)** on the other hand states that: -

*No order for stay of execution shall be made under sub-rule (1) unless: -a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

7. In summary an applicant for the relief of stay of execution pending appeal, must demonstrate that the application was filed without undue delay, that he would suffer substantial loss and that he is ready to furnish security for the due performance of the decree.

8. On substantial loss, the applicant submitted that failure to obtain an order of stay the execution would bring down its business completely and urged the court to be cognizant of the prevailing economic environment in light of the Covid 19 Pandemic. The respondent, on the other hand, submitted that the respondent did not disclose the nature of the loss to be suffered should the execution be allowed to proceed.

9. In *James Wangalwa & Another vs Agnes Naliaka Cheseto Miscellaneous Application 42 of 2012 eKLR* it was held *inter alia* that: -

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.”*

10. On the issue of security for the due performance of the decree, the applicant submitted that it was willing to deposit security that would be binding in the event the appeal is unsuccessful. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was held that: -

*“... 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.”*

11. Further in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed:

*“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”*

12. In the instant case, I find that even though the applicant did not establish that it will suffer substantial loss if the stay orders are not granted, the applicant indicated that it was willing to offer security for the due performance of the decree. The application of stay of execution invokes the discretionary power of the court. This means that the court is required to be mindful to balance the interest of the decree-holder, to the fruits of its judgment and that of the appellant, to the right of appeal. This is the position that was taken in *Tabro Transporters Ltd v Absalom Dova Lubasi* [2012] eKLR where the court held that: -

*“the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage, but administers the justice that the case deserves.”*

13. Guided by the above decision, I find that the appropriate order to issue in this case is to allow the present application but on condition that the applicant pays half of the taxed costs to the Advocate/respondent within 30 days from the date of this ruling failure of which the respondent will be at liberty to proceed with the execution.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1<sup>st</sup> day of July 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:**

Mr. Odera for the Advocate/Respondent.

Mr. Gachomo for the Appellant.

Court Assistant: Sylvia.