



**Masinde v Anne Wanja t/a Kanini Merchants (Commercial Civil Case 431 of 2016)  
[2021] KEHC 35 (KLR) (Commercial and Tax) (14 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 35 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 431 OF 2016  
DAS MAJANJA, J  
SEPTEMBER 14, 2021**

**BETWEEN**

**KENNEDY MASINDE ..... PLAINTIFF**

**AND**

**ANNE WANJA T/A KANINI MERCHANTS ..... DEFENDANT**

**RULING**

1. On 28<sup>th</sup> July 2020, the court (Kasango J.) entered judgment for the Plaintiff against the Defendant for KES. 6,824,750.00 together with costs. The Defendant has filed an appeal against the judgment. She also has also filed the Notice of Motion dated 26<sup>th</sup> August 2020 seeking to stay execution of the judgment and decree pending hearing and determination of the appeal to the Court of Appeal under Order 42 rule 6 of the Civil Procedure Rules. The application is supported by the affidavit of Allan George Njogu Kamau, the Plaintiff's advocate, sworn on 26<sup>th</sup> August 2020 and opposed by the Plaintiff through his affidavit sworn on 13<sup>th</sup> October 2020.
2. Upon determination of costs, the Plaintiff proceeded to execute by way of attachment of the Defendant's property. The Defendant filed another Notice of Motion dated 27<sup>th</sup> July 2021 seeking stay of execution. The application is supported by the affidavit sworn on the same day by Allan George Njogu Kamau. After the matter came up for directions, I requested the parties to come seek agree on reasonable terms for stay but the negotiations did not bear any fruit. As a result, I have to determine the matter based on the depositions filed by the parties.
3. Both counsel appearing for the parties made brief oral submissions in support of their respective positions which I have considered bearing in mind the principles for granting stay clearly stated in Order 42 rule 6 of the Civil Procedure Rules. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application



has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be.

4. There is no doubt that the Defendant has filed its appeal in the Court of Appeal and filed the initial application without delay. What is in issue is whether the Defendant has demonstrated that she will suffer substantial loss and has provided security for due performance of the decree.
5. I have gone through both depositions by the Advocates and I have not seen how the Defendant will suffer substantial loss if execution proceeds. *Kenya Shell Limited v Kibiru and another*, Platt Ag. JA., had this to say about substantial loss;

The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts...

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It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money. [Emphasis mine]

6. In this case, the deposition is sworn not by the Defendant but by her counsel and at para. 8 of the supporting affidavit, he states:
  8. The applicant stands to suffer substantial and irreparable harm if the order for stay of execution is not issued and in the event that the said judgment sum of Kshs. 6,824,750.00 plus interest at court rates from the date of filing suit until payment in full is paid to the Respondent the same may never be recovered.
7. The statement aforesaid is insipid and lacks any evidential or factual support. While I am aware of course that a person's ability to refund the decretal sum is a matter within his or her own personal knowledge, the applicant must lay a factual or evidential basis so that the respondent is able to respond. I cannot say that on the basis of the material before the court, the Defendant has established substantial loss.
8. Apart from establishing substantial loss in the event the order of stay is not granted, the applicant must furnish appropriate security. In this case, Defendant depones as follows:
  11. That the applicant is willing to abide by any condition and terms as to security as the court may deem fit to impose.
9. In my view, it is not for counsel to merely depone that the Defendant is ready and will to comply with terms as to security. The applicant must proceed to set out the nature and extent of the security it is ready and willing to provide. This is important to enable the other party assess the appropriateness or otherwise of the offer and also for the court to adjudicate on the respective positions of the parties in



order to come to a just conclusion on the security. In this case, the Defendant has not disclosed, in the depositions, the type and form of security it wishes to proffer.

10. I would remiss, if I did not state that I gave the parties an opportunity to resolve the matter. I was informed that the Defendant has proposed to put up some land as security which the Plaintiff rejected. The details of the land, its identity, value and other important facts are not before the court to enable the court conclusively deal with the matter.
11. I do not find any basis to grant a stay of execution pending appeal from the judgment of this court. Consequently, I dismiss the applications dated 26<sup>th</sup> August 2020 and 27<sup>th</sup> July 2021 with costs to the Plaintiff.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of SEPTEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Wasike instructed by WEW and Associates Advocates for the Plaintiff.

Ms Mbirwe instructed by AGN Kamau Advocates for the Defendant.

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