



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 115 OF 2020

BETWEEN

MICRONET POWER SYSTEMS LIMITED.....APPELLANT

VERSUS

KINYORI & ASSOCIATES.....RESPONDENT

RULING

1. **MICRONET POWER SYSTEM LIMITED**, the appellant, was sued before the Senior Principal Magistrate's Court at Ruiru by **KINYORI & ASSOCIATES**, the respondent. The appellant failed to file a memorandum of appearance and defence to that action and default judgment was entered in favour of the respondent. By an application dated 16th July, 2019 before that court, the appellant sought to have set aside that default judgment. The said court by its Ruling dated 22nd September, 2020 dismissed that application by the appellant. That dismissal aggrieved the appellant and hence this appeal before this Court.

2. The appellant filed before this Court a Notice of Motion application dated 28th September, 2020 by which it is sought to stay the execution of the decree of the trial court.

3. When the appellant approached this Court ex parte with that application, an interim stay of execution was granted on condition that the appellant would deposit into this Court the entire decretal sum. Although it is not material to my determination of the application before me my perusal of the court file has not shown that, that condition of interim stay was met by the appellant.

4. The affidavit in support of the application was by Patrick Wamae who described himself as director of the appellant. That director deponed that if stay of execution is not granted, the appellant will suffer substantial loss.

5. The application is opposed by the respondent. The respondent termed the application as frivolous and abuse of the court process. Further, that the appellant's application to stay execution of the decree was intended to waste the court's time because the appellant, by letter dated 6th February, 2014, had acknowledged indebtedness to the respondent and had made part payment of the debt.

ANALYSIS

6. **Order 42 Rule 6(2)** of the Civil Procedure Rules Provides:-

“(2) 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. The decree the appellant seeks to stay is a money decree and appellant needed to show sufficient reason why the respondent should be prevented to enjoy the fruits of his judgment. The above **Order 42 Rule 6(2)** plainly shows that stay of execution is not granted as of right. Execution of decree is a normal progression of a case where judgment has been entered. The appellant was obligated to show to this Court that he will suffer substantial loss if stay of execution is not granted. It was not enough for the appellant to state he will suffer substantial loss without identifying what that loss will be. The appellant through its director's affidavit merely stated it would suffer substantial loss

without more. I concur with the holding in of the case HENRY SAKWA MALOBA VS. BONFACE RAPANDO TSABUKO (2020) eKLR as follows:-

“9. Similarly, in CENTURY OIL TRADING COMPANY LIMITED VS. KENYA SHELL LIMITED NAIROBI [2008] eKLR, the court stated:

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that ... Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

8. The fact that execution of the decree was commenced by the respondent did not amount to substantial loss. This is because execution is a lawful process. See Henry Sakwa Maloba (supra)

9. The appellant having failed to prove the essential ingredient of granting stay of execution under **Order 42 Rule 6** of the Civil Procedure Rules, the application will fail.

DISPOSITION

10. The application by Notice of Motion dated 28th September, 2020 is without merit. It is dismissed with costs.

RULING DATED and DELIVERED at KIAMBU this 4th day of NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Nancy

For the Appellant: No appearance

For the Respondent: Miss Nyoguto

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE