



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 1 OF 2008

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CHAPTER 7,
PARLIAMENTARY AND PRESIDENTIAL ELECTIONS REGULATIONS THE NATIONAL ASSEMBLY (ELECTION
PETITION) RULES, THE ELECTION OFFENCES ACT, CHAPTER 66**

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR MAGARINI CONSTITUENCY

BETWEEN

ESPOSITO FRANCO.....PETITIONER

AND

AMAZON KINGI JEFFAH.....1ST RESPONDENT

AMINA KALE.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Otara for the Applicant

Mr. Charles Kioko for the Respondent

RULING

The applicant filed a notice of motion in terms of Section 1A, 1B and 63(e) of the Civil Procedure act seeking the following orders:

- 1. That upon interpartes hearing herein be stayed pending the determination of Nairobi Civil Application No. 248 of 2008 against the respondents in Nairobi Court.***
- 2. The costs to this application be provided for.***

The applicant is relying on the contents of the affidavit dated 11th September, 2019. The affidavit sets the out the circumstances which led to the application for stay of execution.

In details the applicant depones that the notice to show cause against him for the sum of Kshs.1,247,607 be stayed to await the outcome of Nairobi Civil application Number 248 of 2008. The respondent thought the firm of Charles Kioko opposed the application by filing grounds of opposition dated 18th September, 2019. It was also accompanied with a replying affidavit dated 18th September, 2019. The overall consideration by this court is to decide whether the applicant has satisfied the criteria to grant or refuse the application for stay as embodied

in the notice of motion.

Analysis and Determination

The provisions on stay of execution is to be found under Order 42 Rule 6 of the Civil Procedure Rules. The principles upon which the court exercises its unfettered discretion is for the applicant to show that the application has been brought:

1. Without undue delay
2. That unless the order for stay of execution is granted the applicant would suffer substantial loss
3. That, the court could not grant stay of execution without making provisions for deposit of security for due performance of the decree.

In **Halsbury's Laws of England 4th edition Vol. 17** states as follows:

“The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will as a rule, only grant a stay if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing.”

As regards the nature of the considerations and principles to apply I adopt the reasoning in the persuasive case from **Solomon Islands in Giles Prince (As Trustees) 2003 civil Appeal 005 of 2003** where the court held as follows:

“I adopt with undisputed position that the court does have unfettered discretion to grant a stay or not to do so. The Attorney General Emurson 1890 24QBD 56.

I also restate the principle that a judgement creditor is enacted to reap the fruits of his judgements. See (the Annoclyte 1886) 11 P.D 114). As against the principle is the contrary principle that the court may order a stay where refusing to do so would render the appeal nugatory (pointless). So there has to be a balance between the rights of the judgement creditor and the rights of the judgement debtor.

The scale is likely to tip in favor of the judgement debtor if he can prove special circumstances in his favour.

A case of special or exceptional circumstances would be where serious injury would be done to the judgement debtor if execution takes place following an appeal especially where the appeal has got merits to it. Counsel for the respondents Mr. Silvan, cited two instances showing serious injury arising in this regard. The first is where execution would ruin the judgement debtor beyond simply causing hardship.”

The present application this court is being asked to stay execution arising out of taxed bill of costs to await the outcome of Civil Appeal No. 248 of 2008.

It is trite as stated in **Cotena Inspection SA v Hims Group Trading Company Ltd CA No. 303 of 2000** that whether the court exercises discretion to grant stay or deny the relief really depends upon the particular circumstances of the case, but of essence is whether there is a risk of injustice to one or both parties to the litigation if stay is granted or denied. If the new judgement appealed from is a money decree some of the factors to bear in mind will be that the risk of injustice to the judgement creditor in recovering or enforcement of the impugned judgement in the event the appeal succeeds therefore. The applicant has to satisfy the criteria on substantial loss that he will be financially ruined or suffer hardship if the judgement is enforced by way of an execution. Additionally the court has stated in **Stephen Wanjohi v Central Glass Industries Ltd Civil Case Number 6726 of 1991** the evidence outlined in the affidavit of the applicant must satisfy that there is:

- a) ***Sufficient cause***
- b) ***Substantial loss***
- c) ***No unreasonable delay***
- d) ***Security***

The fact that this case concerns money does not make it to be dealt with outside the ambit of Order 42 Rule 6 of the CPR. At the outset every issue of evidence was so hotly contested by the respondent that the burden of proof shifted to the applicant that he was deserving of the discretion by this court. Apart from this there was no really material on the record enabling this court to say that the circumstances would occasion substantial loss if stay is denied.

In light of the circumstances of this notice of motion, I am of the view that the applicant has failed to satisfy the requirements of Order 42 Rule 6 of the Civil Procedure Rules. The ordinary rule that the applicant has realistic prospect of suffering substantial loss test for exercise of discretion falls short of a prima facie case to grant stay of execution.

I agree with counsel for the respondents that none of the elements contained in the Civil Procedure Rules and the operative test in the cited authorities has been met by the applicant. There is therefore no motion in strength or quality of evidence to justify the orders of stay of execution.

For the above reasons the motion is denied.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE