



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 359 OF 2019

SMART BRANDS LIMITED.....1ST APPELLANT/APPLICANT

KENNEDY MULI MUSEM.....2ND APPELLANT/APPLICANT

VERSUS

ANN NYAWIRA MUCHUNU & MICHAEL NDAIGAA MURUGU (Suing as the

administrators of the estate of SAMUEL MURUGU MUCHUNU- Deceased)....1ST RESPONDENTS

GOOD BRANDS LIMITED.....2ND RESPONDENT

RULING

1. This ruling is the product of the Notice of Motion dated 18th December, 2019 brought by the appellants/applicants in this instance and supported by the grounds laid out on its face and the facts deponed to in the sworn affidavit of *Mohamed Ali*, director of the 1st applicant. The application is seeking the substantive order for stay of execution of the ruling delivered on 20th June, 2019 by Honourable D. Ocharo (Senior Principal Magistrate) in which the trial court declined to set aside an ex parte judgment, pending the hearing and determination of the appeal lodged against the said ruling.

2. In his affidavit, the deponent stated that unless the order for stay of execution is granted, the applicants are likely to suffer substantial and irreparable loss in the sense that the respondents will at any point proceed with execution of the decree, having already proclaimed some of the applicants' goods.

3. In the same regard, it was the deponent's assertion that the respondents' assets and means are unknown hence it is possible the applicants will be unable to recover the decretal amount of Kshs.3,104,120/ from them, thereby causing the appeal to be a mere academic exercise. The deponent also expressed the applicants' willingness and commitment to provide security for due performance of the decree.

4. *Michael Ndaigaa Murugu*, one of the 1st respondents, put in a replying affidavit averring that the ruling in question did not include any orders on execution hence there is no merit in the application.

5. The aforementioned deponent contended that the 1st respondents' action of executing the decree is deemed a lawful process, further contending that there has been an inordinate delay in filing the application.

6. Moreover, it was the deponent's assertion that the applicants have not demonstrated the substantial loss they stand to suffer, hence the more reason as to why the order for stay should not be granted.

7. The 2nd respondent did not file any responding documents.

8. The Motion was disposed of through written submissions. *Miss Odipo* counsel for the applicants restated the averments appearing in the application and supporting affidavit, while *Mr. Ochieng* advocate for the 2nd respondent submitted that his client was in full support of the Motion, arguing that the 1st respondents have not stated or shown their ability to refund the decretal amount once they receive the same and the appeal eventually succeeds.

9. On his part, *Mr. King'ara* counsel representing the 1st respondents echoed the facts stated in the replying affidavit, to which *Miss Odipo* rejoined with the submission that any delay in bringing the application was caused by a similar application which was filed before the subordinate court on 14th November, 2019.

10. I have considered the grounds present on the face of the Motion, the facts contained in the affidavits supporting and resisting it as well as the rival oral arguments.

11. In answering an issue raised by the 1st respondents pertaining to whether the application is competent on the ground that the appeal lies against a ruling and not the judgment and consequent decree, it is not in dispute that judgment was entered in favour of the 1st respondents and against the applicants. It is equally not controverted that the applicants sought to have the ex parte judgment set aside but were unsuccessful in their attempts, hence the appeal. To my mind therefore, while it is correct that execution derives from the decree, it is also correct that the applicants' issue lies with the trial court's refusal to set aside the judgment triggering that decree, thereby making the application for stay of execution competently before me.

12. Now to the merits of the Motion, the conditions pertaining to the granting of an order for stay of execution are governed by **Order 42, Rule 6(2)** of the **Civil Procedure Rules** and are three (3) in kind.

13. The *first* condition has to do with whether the application has been brought without unreasonable delay. According to the record, the impugned ruling was delivered on 20th June, 2019 while the Motion was filed six (6) months later on 19th December, 2019. The record shows that in between, both the applicants and the 2nd respondent filed applications dated 21st June, 2019 seeking an order for stay of execution pending appeal. It is not clear when, if ever, the aforesaid applications were heard and determined.

14. Needless to say that the above unfolding of events supports the explanation for delay given by counsel for the applicants in her submissions. Further to this, I have considered the time which lapsed between delivery of the impugned ruling and the present application and I do not find the delay to be inordinate.

15. The *second* condition relates to substantial loss. The courts have maintained that this condition, forming the cornerstone of an application seeking an order for stay of execution, must be satisfied by the applying party. Such was the case in **Antoine Ndiaye v African Virtual University [2015] eKLR** where the court with reference to a variety of authorities, articulated that:

“So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed.”

16. I have taken into account the sentiments offered by the applicants on this principle as well as the retorts on the part of the 1st respondents. In my opinion and while drawing guidance from judicial renditions previously made on the subject, I find that owing to the apprehension raised by the applicants regarding the 1st respondents' capability of refunding the decretal sum, the 1st respondents ought to have dispelled such apprehension by demonstrating their financial ability. I respectfully disagree with the 1st respondents' argument that it fell upon the applicants to bring evidence to that effect.

17. The moment their financial standing was brought to question, the evidential burden shifted to the 1st respondents, which burden they ought to have discharged but did not. I therefore associate myself with the reasoning taken by the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** when it held the following:

“...Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

18. In view of the foregoing, I am satisfied that the applicants have shown that they stand to suffer substantial loss if the order for stay of execution is declined.

19. The *third* and final condition touches on the provision of security for due performance of the decree. While the applicants conveyed their willingness to deposit the decretal sum, they did not propose any preferred options on the same. The 1st respondents did not address this issue.

20. In the end, I find merit in the Motion and will allow prayer 4 of the application on condition that the applicants do prosecute the appeal within 60 days from today failing which the order shall lapse. Cost of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 13th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the 1st and 2nd Appellants/Applicants**

..... for the 1st Respondent

..... for the 2nd Respondent