



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 51 OF 2014**

**SHAFFIQUE ALLIBHAL.....PLAINTIFF/RESPONDENT**

**VERSUS**

**WILLIAM OCHANDA ONGURU T/A**

**OCHANDA ONGURU & CO. ADVOCATES.....1ST DEFENDANT/APPLICANT**

**JOHNSTONE KIPLIMO ARAP CHEMOS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of Motion dated 25<sup>th</sup> February 2019 seeks an order for stay of execution of the Judgment of 18<sup>th</sup> May 2017 and or other consequential orders pending the hearing and determination of an intended Appeal from that decision.
2. The Applicant filed a Notice of Appeal on 23<sup>rd</sup> May 2017 intimating his intention to appeal the Judgment. He avers that he will stand to suffer substantial loss and damages if stay is not granted.
3. The Application is opposed.
4. The substantive anchor for an application of this nature is Order 42 Rule 6 of the Civil Procedure Rules which is cited by the Applicant. Sub-rule 2 is important and provides:-

**“(2) No order for stay of execution shall be made under subrule (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.”**

5. As is evident the two conditions set out in Sub-rule 2 must be satisfied before a Court grants stay of execution. Both must be met, they are not in the alternative. In addition, the application must be brought without undue delay.

6. In the application the applicant states that he will suffer substantial loss and damages if stay is not granted. He neither specifies or elaborates on the nature of the substantial loss and why he harbours such apprehension. Ordinarily, that would have been the end of the matter because the Court is not satisfied that substantial loss may result to the Applicant unless the order is made. Yet I will give the application a chance because Miss Kilonzo for the Plaintiff did not overly press this point.

7. Instead, she asked the Court to consider that it would be unfair for her client to be kept out of the fruits of a judgment in his hands. In particular considering that these were client’s funds and that the 1<sup>st</sup> Respondent can pay them out and seek indemnity from the advocate to whom they released the funds. That it is inequitable to grant a stay whose effect would be to put funds belonging to her client from his reach.

8. Secondly, counsel stated that although the Applicant had, through oral address of his advocate, offered title to a house as security, the Respondent has never been shown evidence of the security offered.

9. The Respondent also thought the current application to be *res judicata* that of 5<sup>th</sup> July 2012 filed earlier by the Applicant. This is a matter I should deal with at once. The principle prayer in that application was an application for review and or setting aside of the Judgment of 18<sup>th</sup> May 2017. A subsidiary, but nevertheless important prayer, was a prayer for stay of execution of the Judgment and although not specified it was presumably pending the hearing and determination of the review application. The Court determined the review application which it dismissed but did not consider the stay application at all because the Court granted orders of stay from time to time until the application was heard and determined. There has been no other application for stay of Judgment pending hearing of the intended appeal and the current application is a first. That objection fails.

10. Having heard both sides, I think that I need to balance the competing interests of the Applicant and the Respondent. There is always a tension. The Applicant should enjoy the fruits of his Judgment and since the Respondent has not raised a doubt of his ability to repay it back if the appeal succeeds, stay ought not to be granted. On the other hand, the Applicant is pursuing his right of appeal and may succeed. The Applicant would then have been placed under hardship if he were in the meantime to pay the entire decretal sum which is not insubstantial.

11. Balancing these two interests, I allow the application of 25<sup>th</sup> February 2019 but on the following conditions:-

(i) The Applicant shall within 45 (forty five) days hereof pay to the Respondent half of the decretal sum.

(ii) The Applicant shall within 60 (sixty) days hereof furnish a Bank guarantee from a Bank of repute for payment of the balance of the decretal amount.

(iii) Costs in the cause.

**Dated, Signed and Delivered in Court at Eldoret this 2<sup>nd</sup> Day of June 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Kethi Kilonzo for the Respondent.**

**No appearance for the Applicant**