



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 611 OF 2010**

**C. J. SECURITIES LIMITED.....PLAINTIFF**

**VERSUS**

**S. S. SEHMI GENERAL BUILDING &**

**CIVIL CONTRACTORS LIMITED.....DEFENDANT**

**RULING**

1. The Notice of Motion dated 22<sup>nd</sup> January 2020 seeks to stay the execution of the Judgment of this Court delivered on 11<sup>th</sup> December 2019 pending the hearing and determination of the intended Appeal from that decision.
2. The decision was a money Judgment for Kshs.3,546,000.00 with interest thereon at Court rates from the date of filing the suit until payment in full. It was in favour of the Plaintiff as against the Defendant.
3. As correctly cited by the Defendant/Applicant, the home for an application to the High Court for stay of its decision pending an intended Appeal therefrom is order 42 Rule 6 of the Civil Procedure Rules which reads:-

“Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate

jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

4. The conditions to be satisfied before grant of the orders are three and all three must be satisfied. The application must be brought without undue delay; the applicant must show that he may suffer substantial loss if the order is not granted and; the applicant is willing to furnish such security as the Court orders for the performance of the ultimate decree or order.

5. Whether or not the intended Appeal is arguable is not one of the factors to be considered in an Order 42 Rule 6 application and any arguments made in that regard will not be discussed at all.

6. That the application brought on 22<sup>nd</sup> January 2020 to stay a decision of 11<sup>th</sup> December 2020 is brought timeously is not contested. That is about 10 days more than a month after the Judgment but in reality is much less given the period of Christmas recess (23<sup>rd</sup> December 2019 to 14<sup>th</sup> January 2020). That is a tick for the application.

7. Regarding whether substantial loss may be suffered by the Applicant if stay is not granted, Saranjit Singh Sehmi in an affidavit sworn on 22<sup>nd</sup> January 2020, avers:-

(9) THAT, if execution is allowed to proceed at this point, I will greatly be prejudiced and execution will cause me serious and irreparable economic hardship loss, harm and damage rendering my intended Appeal nugatory.”

8. In the written submissions by the applicant’s counsel, he makes the argument that there is reasonable apprehension as to the ability of the Respondents to repay the decretal sum if the intended Appeal succeeds. But the argument fails because it is not supported by any material before Court because the Applicant has not ,either on the grounds in support of the application or in the affidavit in support, raised an issue about the Respondent’s ability to repay the decree if ultimately required to do so.

9. The submission by the Applicant’s counsel that the Respondent, in Paragraph 9 of the replying Affidavit avers, that the Applicant does not know the financial ability of the Respondent is not accurate at all. This is what paragraph 9 reads:-

“(9) THAT ....the Plaintiff does not know the Applicant’s financial worth hence it risks being exposed if the application is allowed as sought.”

10. The truth is that it is the Respondent who questions the financial ability of the Applicant and not the other way round.

11. I would have excused that argument by the Applicant’s counsel as an accidental slip but he again raises something that did not feature in either the application itself or the replying affidavit. That the Applicant is currently unemployed. But again, that presents the Applicant as financially unable to meet the decree and not the Respondent if the Appeal succeeds.

12. And when the Applicant asserts that execution will cause it serious and irreparable economic hardship loss, harm and damage, it does not tender any evidence to demonstrate or back the averment.

13. In the end I find that the Applicant has not demonstrated that it may suffer substantial loss if the stay is not granted and that should, ordinarily, be the end of the road for the application.

14. However, the Court will allow a conditional stay partly on the basis on what the Respondent states should be the condition if the Court were to be minded to grant the order.

15. In the end I allow the Application of 22<sup>nd</sup> January 2020 on condition that the Applicant pays half the decretal sum and provides a Bank Guarantee from a reputable Bank for the remaining half within 45 (forty five) days of the order. Costs of the Application to the Respondent as it should really have been for dismissal.

**Dated, Signed and Delivered in Court at Nairobi this 20<sup>th</sup> Day of July 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:**

**Oduyo for the Plaintiff.**

**Rutto for the Defendant.**