



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 124 OF 2020**

**KARTAR SINGH DHUPAR & COMPANY LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**MAU WEST LIMITED.....RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 11<sup>th</sup> March, 2020 brought by the appellant/applicant herein and supported by the grounds set out on its body and the facts stated in the affidavit of Nirhmal Singh Dhupar, a director of the applicant. The applicant sought for the orders hereunder:

***i. Spent.***

***ii. THAT this Honourable Court do grant an order for stay of execution as regards the enforcement of the judgment and orders granted in CMCC NO. 5982 OF 2009 which judgment was granted on 13<sup>th</sup> February, 2020 against the appellant.***

***iii. THAT this court does order for a stay of execution of any decree obtained or extracted in pursuance of the said judgment for the sum of Kshs.773,460.64 in the first instance, or such lesser sums, pending the hearing and determination of the application and the hearing and determination of the appeal.***

***iv. THAT this court does order that the calculation of interest from 10<sup>th</sup> September, 2020 to 29<sup>th</sup> February, 2020 on the judgment sum of Kshs.299,264/ is flawed and contradictory to the judgment and decree of the trial court.***

***v. THAT the costs of the application be in the cause.***

2. To oppose the Motion, the respondent put in a replying affidavit sworn by its director, Alice Muthoni Muchuku and Grounds of Opposition. In its Grounds of Opposition, the respondent put forth the following grounds:

***i. THAT the application is frivolous, vexatious, scandalous and the same amounts to an abuse of the court process.***

***ii. THAT the application is misconceived, incompetent, bad in law and aimed at wasting the court's judicial time and further delaying the respondent from enjoying the fruits of its lawfully acquired judgment.***

***iii. THAT the applicant has not satisfied the conditions for grant of stay by this Honourable Court of execution of the decree pending appeal as provided under Order 42, rule 6(2) of the Civil Procedure Rules.***

***iv. THAT the applicant's memorandum of appeal filed herein does not raise any triable issues but consists of mere denials and as such the same should be struck out.***

3. The applicant rejoined with the supplementary affidavit of Nirhmal Singh Dhupar.

4. When the Motion came up for interpartes hearing before this court, the parties were directed to put in written submissions.

5. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion, the Grounds of Opposition and the rival submissions and authorities cited.

6. On the merits of the Motion, the guiding provision in considering an application seeking for an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following principles to be taken into account in determining an application for stay.

7. The first condition is that the application must have been made without unreasonable delay. On his part, Nirhmal Singh Dhupar stated in his affidavits that the Motion has been timeously filed. This position was restated in the submissions of the applicant dated 27<sup>th</sup> July, 2020.

8. In her replying affidavit, Alice Muthoni Muchuku stated that there has been undue delay in bringing the Motion and that there no reasonable explanation given for such delay.

9. I have perused the record and I note that the impugned judgment was delivered on 13<sup>th</sup> February, 2020 whereas the instant Motion was filed on 12<sup>th</sup> March, 2020. In my view, a delay by a month does not amount to inordinate delay.

10. Under the second condition, the applicant must show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied. It is the position of the applicant that unless an order for a stay of execution is granted and the decretal sum is paid to the respondent, it may not be able to refund the decretal sum in the event the appeal succeeds. The applicant adds that in that event, the appeal will be rendered nugatory.

11. In opposition, the respondent is of the view that the applicant has not shown the substantial loss it will suffer and has not discharged the burden of proof that the respondent will not be able to refund the decretal sum. In its submissions, the respondent cited the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** where the court held as follows:

*“In the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, it was held as follows;*

*“In these kinds of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars...where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...” ”*

12. It has previously been held by this court that substantial loss which constitutes the cornerstone of an application for stay ought to be demonstrated and that imminent execution is not in itself a ground on which a party can rely to show substantial loss. The reason for this is that execution is a lawful process and no successful litigant should be denied the fruits of his or her judgment save where sufficient reason(s) have been given.

13. The above position was reaffirmed by the Court of Appeal in the case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** when it rendered that in order for an application for a stay of execution to succeed, a party must demonstrate inter alia, that he or she will suffer substantial loss.

14. Furthermore, in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** cited in the respondent's submissions, the court held that:

*“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”*

15. I note that the respondent's financial ability to refund the decretal sum once the same is paid was brought to question in the supplementary affidavit of Nirhmal Singh Dhupar. I also note that the respondent's response on the same as indicated hereinabove.

16. The legal position is that upon a party's apprehension concerning the opposing party's inability to refund the decretal sum, the evidentiary burden shifts to the opposing party to demonstrate that he or she has the financial means to refund the decretal sum.

17. It is apparent from the record that whereas the decretal sum is not substantial in nature, the respondent has not brought any evidence to prove that it is financially capable of refunding the decretal amount. On those grounds, I am convinced that the applicant has shown the substantial loss it stands to suffer should this court decline to grant an order for stay of execution, thereby plausibly rendering his appeal nugatory if successful.

18. In respect to the final condition which is the provision of security for the due performance of such decree or order, the applicant indicated its readiness and willingness to deposit such security as may be ordered by this court. The respondent on its part urged that the entire decretal amount be paid to it within a period of 14 days from the date of the order.

19. I however appreciate that the provision of security for the due performance of the decree is a pre-requisite to the granting of an order for a stay of execution.

20. In the end, the Motion dated 11<sup>th</sup> March, 2020 succeeds. Consequently, an order for stay of execution pending the hearing and determination of the appeal is granted on the condition that the applicant deposit the entire decretal sum in an interest earning account in the joint names of the parties' advocates and or firms of advocates within 30 days of this day, failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal. The Grounds of Opposition is hereby dismissed with no order on costs.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 9<sup>th</sup> day of October, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent