



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 318 OF 2015

OMULO OKOTH.....PLAINTIFF

-VERSUS-

SAM NYAMWEYA.....1ST DEFENDANT

FOOTBALL KENYA FEDERATION (Being sued

through its officials Sam Nyamweya,

Michael Esakwa, Robert Asembo).....2ND DEFENDANT

CITIZEN WEEKLY.....3RD DEFENDANT

RULING

- 1) On 30th July 2020, this court entered judgment in the sum of ksh.9,000,000/= plus interest and costs in favour of the plaintiff and against the 1st and 2nd defendants jointly and severally. Being aggrieved by the aforesaid judgment, the defendants filed a notice of appeal to challenge the decision in the Court of Appeal. The defendants have now taken out the motion dated 20th August 2020 the subject matter of this ruling in which they seek for an order for stay of execution of decree pending appeal.
- 2) The defendants filed the affidavit sworn by Samson Keengu Nyamweya in support of the motion. When served with the motion, the plaintiff filed the replying affidavit he swore to oppose the application.
- 3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submissions made by learned counsels.
- 4) It is the submission of the defendants that they filed the aforesaid application without unreasonable delay. They also argued that unless the order for stay of execution is granted, they will suffer substantial loss in that the plaintiff may commence execution proceedings.
- 5) It is further pointed out that the plaintiff will not be in a financial position to refund the judgment sum when required upon the conclusion of the appeal. The defendants also indicated their willingness to abide by the terms that this court may set as security for the due performance of the decree.
- 6) The plaintiff vehemently opposed the application by contending that the defendants have not annexed to the affidavit filed in support of the motion a draft memorandum of appeal so that the court can determine whether the appeal has any chance of success. It is for this reason that the plaintiff argued that the application is meant to vex and delay his enjoyment of the fruits of his judgement.
- 7) The plaintiff annexed to the replying affidavit copies of the title deeds in respect of the three parcels of land to show that he is capable of making a refund of the decretal amount when required. The plaintiff implored upon

this court to issue an order directing the defendants to pay him half the principal sum i.e. ksh.4,500,000/= and to deposit the other half in an interest earning account in the joint names of advocates and or firms of advocates if the court is inclined to grant the order for stay of execution.

8) In the alternative, the plaintiff urged this court to order the defendants to deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter.

9) The principles to be considered in determining an application for stay of execution pending appeal are set out under Order 42 rule 6 of the Civil Procedure Rules. **First**, an applicant must show that the application was filed without an unreasonable delay. The record shows that this court delivered its judgment on 30th July 2020 and the defendant filed the Notice of appeal on 4th August 2020. I am therefore satisfied that the application was filed without unreasonable delay.

10) The **second** condition to be considered is that the applicant must show the substantial loss he would suffer if the order for stay is denied. The applicants have stated that the plaintiff may not be in a financial position to make a refund. The plaintiff has shown that he owns landed properties hence he is in a sound financial position to make a refund required.

11) I have perused those title deeds. The plaintiff did not avail the valuation reports, therefore, it is difficult to conclude that the same if sold can raise the amount equivalent to the judgment sum. I am satisfied that the defendants have shown the substantial loss they would suffer if the order for stay is denied.

12) The **third** and final condition is that an applicant should provide security for the due performance of the decree. The plaintiff has beseeched this court to make an order that he should be paid half the decretal sum. I have already concluded that the plaintiff has failed to tender credible evidence to show that he is capable of making a refund therefore such a request cannot be granted.

13) The defendants have stated that they are ready to abide by any conditions imposed by this court for the grant of the order. I am of the view that the defendants should deposit the decretal amount or in the alternative provide a bank guarantee.

14) In the end, the motion is allowed. Consequently, an order for stay of execution of the decree pending appeal is granted on condition that the defendants **either**, deposit the principal sum of ksh.9,000,000/= in an interest earning account in the joint names of advocates and or firms of advocates appearing in this matter within 60 days from the date hereof. In the alternative the defendants should provide a bank guarantee from a reputable bank for ksh.9,000,000/= within a similar period of 60 days. In default, the motion will be treated as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 9th day of October, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant