



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CAUSE NO.122 OF 2008

DALBIT PETROLEUM LIMITED.....PLAINTIFF

VERSUS

VICTORY CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 25th October 2018 in which the Defendant/Applicant seek Orders:-

“1. THAT there be a stay of execution of the Judgment and decree of this Honourable Court pending the hearing and determination of an appeal the Defendant/Applicant have preferred against the decision of this court made on 26th September 2018.

2. THAT costs of the application be costs in the cause.”

(2) The application was supported by the Affidavit sworn on 25th October 2018 by AMRITPAL SINGH SURI a Director of the Defendant Company. The Plaintiff/ Respondent filed a Replying Affidavit dated 8th November 2015 opposing to the application for stay. The application was premised upon **Order 42 Rule 6 of the Civil Procedure Rules, Section 3A** of the Civil Procedure Act and all enabling provisions of the law and was argued orally before the Court on 3rd December 2018.

(3) In a judgment dated 2nd August, 2018, Hon. Lady Justice Olga Sewe gave judgment in favour of the Plaintiff/Respondent for the sum of **Kshs.5, 826,200**. The Defendant/Applicant being aggrieved by that decision filed the Notice of Appeal dated 8th October 2018. It is on this basis that the Defendant/Applicant filed this present application seeking a stay of execution of the judgment, pending the hearing and determination of their intended appeal.

(4) **Order 42 Rule 6(2)** of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under sub rule (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.”

The above are the two main considerations the court is required to bear in mind in deciding whether or not to grant a stay of execution pending appeal.

(5) In the present case the judgment though dated 2nd August 2018 was actually delivered on behalf of the trial judge on 26th September 2018. The Defendant/ Applicant filed their Notice of Appeal on 8th October 2018 roughly one month after delivery of the judgment. I do find that this application for stay which was filed on 25th October 2015, was filed without undue delay and in a timeous manner.

(6) Counsel for the Defendant/Applicant has submitted that his client stands to suffer substantial loss if the order of stay is not granted. It was submitted that the Plaintiff Company is no longer doing business and would therefore not be in a position to refund the decretal sum should the appeal be successful. It is trite law that **“he who alleges must prove.”** The Defendant/ Applicant has tendered no evidence whatsoever to prove their allegation that the Plaintiff Company is no longer operational. It has been averred for the Plaintiff/Applicant that the company is operational and is quite capable of refunding the decretal sum if so ordered by the court. In the absence of any proof to the contrary the Defendant/Applicant’s allegations remain just that - mere allegations.

(7) This is a money decree where it is being alleged that the Respondent will not be in a position to refund the decretal sum. As such the burden lies upon the Applicant to prove that this is in fact the case. The Defendant/Applicant has not provided any details and/or particulars of the loss it stands to incur if the decretal sum is paid out. In **ANTOINE NDIAYE –VS- AFRICAN VIRTUAL UNIVERSITY [2015] eKLR** the Court held as follows:-

“Therefore in a money decree like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant, following the long held legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.....”
[own emphasis]

It is not enough for the Defendant/Applicant to merely allege that the Plaintiff/Respondent has ceased operating and will therefore not be in a position to refund the decretal sum if and when called upon to do so. It must be proved through tangible evidence that this in fact is the case.

The Applicant has submitted that it stands to suffer substantial loss if the orders of stay are not granted. In the case of **KENYA SHELL LIMITED –VS- BENJAMIN KARUGA KIGIBU & RUTH WAIRIMU KARUGA (1982-1988) KAR 1018**, the Court of Appeal held thus

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.....”

How then is substantial loss established?

In **PETER NDUNG’U MBAE & 2 OTHERS –VS- JOHN MUGANE KAROMO [2015]eKLR** it was held:-

“To prove substantial loss, the applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the court will there from determine whether such loss will ensue.”

It is a cherished principle of law that a successful party is entitled to the fruits of his judgment. The mere fact that an appeal has been filed or is contemplated is not sufficient grounds upon which to negate this principle of law. In **SAMVIR TRUSTEE LIMITED –VS- GUARDIAN BANK LIMITED Nairobi HCCC 795 of 1997, Hon Justice Warsame** (as he then was) held as follows:

“.....The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scale of justice by ensuring that an appeal is not rendered nugatory, while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind, that a successful party is prima facie entitled to the fruits of his judgment.....[own emphasis].

In short the court must weigh the likely consequences of granting or not granting a stay and should opt for lower risk.

(10) In this case it has not been satisfactorily demonstrated that the Defendant/Applicant stands to suffer substantial loss if a stay is not granted nor has it been proved that the Plaintiff/Respondent would not be in a position to refund the decretal sum should the appeal be successful.

(11) Accordingly I find no merit in the application. The same is dismissed in its entirety with costs to the Plaintiff/Respondent.

Dated and Delivered in Nairobi this 15th day of FEBRUARY 2019.

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Justice Maureen A. Odera