



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 656 OF 2007

CITY HOPPER LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

THE STANDARD LIMITED.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant in the present instance has taken out the Notice of Motion dated 1st April, 2019 supported by the grounds laid out on its body together with the affidavit sworn by *Caroline Cheruiyot*. The applicant is seeking the substantive order for a stay of execution against the judgment delivered on 31st May, 2018 pending the hearing and determination of an appeal to the Court of Appeal.
2. In reply thereto, the plaintiff/respondent has filed a replying affidavit sworn by its director, *Judy Thuo*.
3. The Motion was argued orally before this court on 29th April, 2019 with *Echesa*, counsel for the applicant reiterating that any delay in filing the Motion was caused by the recent attempts by the respondent at executing the decree. The applicant further stated that the respondent's ability to refund the decretal amount is in doubt since the documentation availed does not reflect the respondent's financial status. Counsel also pointed out that his client is ready and willing to deposit the entire decretal sum within 45 days in a bank account.
4. In his opposing arguments, Mr. *Limo* learned advocate for the respondent stated that the respondent's name has since been changed to 'Fanaka Merchants Limited, arguing that the respondent has sufficiently shown its ability to refund the decretal sum. On the issue of delay, it is the respondent's submission that there has been undue delay in bringing the application.
5. I have taken into consideration the grounds presented in the Motion and the affidavits filed in support and in opposition thereto. I have similarly considered the oral arguments of the parties' advocates.
6. The respondent had instituted a defamatory claim against the applicant vide the plaint dated 17th September, 2007. The same was heard before this court and judgment was entered in favour of the respondent on 31st May, 2018 as follows:
 - a. General damages Kshs.6,000,000/=
 - b. Aggravated damages Kshs.2,000,000/=
 - c. Costs of the suit.
7. The applicant is now desirous of lodging an appeal against the aforesaid judgment, hence the application for a stay of execution pending the hearing and determination of the intended appeal.
8. Having laid out the above, I now turn to the merits of the Motion. The principles to be considered in determining an application for stay are set out under Order 42 rule 6(2) of the Civil Procedure Rules as follows:
 - a. The application must be brought without unreasonable delay;**
 - b. The applicant must demonstrate that substantial loss may result; and**

c. Provision should be made for security.

9. This court delivered its judgment on 31st May, 2018. The application for stay was filed on 2nd April, 2019. According to the supporting affidavit of Caroline Cheruiyot, the applicant had applied for typed proceedings, which proceedings are yet to be finalized, adding that a certificate of delay was issued by the court.

10. I have perused the record and it is clear that the applicant had made a follow up on the typed proceedings and decree soon after the delivery of judgment.

11. This court on various occasions has held that what amounts to unreasonable or inordinate delay is dependent on the circumstances of each case. In the present instance, it is apparent that execution has not commenced. I do not agree with the applicant's argument that there was delay to file the application for stay because there was no threat to execute. However, I am satisfied that there was a considerable delay in supplying the applicant with typed proceedings. Therefore I am satisfied that though there was delay, the same has been explained hence it is excusable.

12. On the second condition of substantial loss, I have taken into account the applicant's apprehension regarding the likelihood that the decretal amount may not be recoverable from the respondent once the same is paid and the appeal succeeds.

13. I have also considered the financial statements availed by the respondent belonging to 'Fanaka Merchants Limited' for the year ending 31st December, 2017 which the applicant has challenged on the basis that they do not bear the respondent's name.

14. The record discloses that a change of name was carried out in 2013 and there is a certificate of change of name from 'City Hopper Limited' to 'Fanaka Merchants Limited' dated 28th February, 2013. What is not clear is that there is no evidence to show that the new outfit took over the liabilities and assets of the old outfit. However, it would appear the change is merely that of change of name only.

15. I have perused the financial statements annexed to the replying affidavit of Judy Thuo as evidence of its financial standing. On the premise of the said statements, I am satisfied that the respondent has sufficiently demonstrated its ability to refund the decretal sum if need be.

16. In **Edward Kamau & another v Hannah Mukui Gichuki & another [2015] eKLR**, while the court observed that the applicant had not demonstrated substantial loss, it reasoned thus:

“Therefore, to ensure that the parties to the suit fight it out on a level ground on equal footing, stay can be granted on terms, since there is no absolute guarantee that the appeal as filed shall be successful on all fours, while appreciating the respondent has a lawful judgment whose execution is being suspended...”

17. Equally, the court in *Ongetta Hesbon Momanyi v Advocates Disciplinary Tribunal & another [2018] eKLR* held that the inability to refund the decretal sum had not been demonstrated. Nevertheless, it went ahead to render the following:

“In the final analysis, to balance the competing interest of the parties, I will exercise discretion and allow the application for stay of execution pending the hearing of the Appeal...”

18. As concerns the final condition, the applicant has expressed its readiness and willingness to provide the requisite security.

19. I am convinced that the defendant/applicant is entitled to an order for stay of execution having met the conditions for the grant of the order.

20. Consequently, the Motion dated 1st April, 2019 is allowed on condition that the applicant deposits the entire decretal amount of Kshs.8,000,000/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this matter within 45 days from this day, In default the motion will be treated as having been dismissed. The Costs of the Motion shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 18th day of July, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/ Respondent

..... for the Defendant/Applicant