



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 14 OF 2017**

**HANIF IQBAL KHAN.....APPELLANT/APPLICANT**

**-VERSUS-**

**WINES AND SPIRITS KENYA LTD .....RESPONDENT**

**CORAM: Justice R. Nyakundi**

**Ms Wambui h/b for Mr. Lughanje**

**Hanif Iqbal Khan**

**RULING**

The matter involves a notice of motion filed in court on 25<sup>th</sup> June 2019 pursuant to **section 1(A) & 3(A), Order 42 Rule 6(1) & (2)** of the Civil Procedure Act and procedure Rules seeking a stay of execution of the Judgment of this Court delivered on 20<sup>th</sup> June 2019 pending the hearing and determination of the applicant's appeal.

In support of the application was the affidavit sworn by Hanif Iqbal Khan.

According to the record the court process server duly effected service upon the respondent with the certificate of urgency and notice of motion. On perusal of the affidavit of service against the respondent the court deems that service was properly effected and owing to non-appearance the motion proceeded as undefended suit.

The applicant in the affidavit deponed that he is aggrieved with the decision of the court dismissing his appeal on the substantive claim in dispute with the respondent.

**The Law**

In an application for stay of execution made by way of notice of motion under **Order 42 Rule 6** of the Civil Procedure Rules a grant of such orders one must meet the following conditions:-

**(1) That the application has been filed without undue delay. (2) That the applicant will suffer substantive loss if the stay is not granted. (3). That the condition on security for due performance of the decree has been provided for by the applicant.**

The Court of Appeal in **Kiambu Transporters v Kenya Breweries 2000 ECLR** outlined these conditions ought to be satisfied before stay of execution can be allowed in favour of the applicant.

Another important condition for any applicant seeking stay of execution is for him to demonstrate that unless the application is allowed the intended appeal or appeal if successful would be rendered nugatory.

The test is subjective to the circumstances of each case as was stated in **Reliance Bank vs Norlake Investments Ltd 2002 1 EA 227**. Along with this, the court must also be satisfied that the application for stay of execution must not be frivolous meaning that it's arguable.

In Light of the above principles I have considered the notice of motion and the evidence in support of the application and cases cited as a guide on exercise of discretion.

Although the court did not have the advantage of the respondent material I am of the view that the general legal principles that an appeal shall not operate as a stay of execution which will deny the successful litigant the fruits of his judgment.

Having said that it appears to me that the appellant continues remitting rent to the respondent even as the judgment of the court ruled against his appeal.

The applicant in his affidavit deposes that he has been in occupation of the suit premises for some time that at no time as he defaulted in payment of rent. Therefore he avers that if stay of execution is not granted he will be ruined as he believes that the appeal has high chances of success.

Applying the above tests to the facts in the present case it is evident that the applicant has satisfied the following basic requirements.

**a. That the application has been filed without undue delay (b) That if the stay of execution is not granted and the respondent proceeds with eviction he will suffer irreparable harm. (c) That in the earlier orders for stay he had deposited security for Kshs.500,000/= for due performance of the decree and the same should be held as security in this new arrangement until final orders from the Appeal Court.**

**In the result I would allow the notice of motion dated 25<sup>th</sup> June 2019 and there shall be a stay of execution of the Judgment delivered on 20<sup>th</sup> June 2019 pending the determination of intended appeal. The applicant be at liberty to prepare and serve the record of appeal within 30 days from todays date. Costs of the application to be in the cause.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 8<sup>TH</sup> DAY OF JULY 2019**

.....

**R NYAKUNDI**

**JUDGE**