



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NO.3 OF 2014

JOSEPH KAMIRA WANJAU.....PLAINTIFF/RESPONDENT

-VERSUS-

1. REV. LLOYD K. KABAIYA

2. PRESBYTERIAN CHURCH OF EAST AFRICA NAKURU WEST PRESBYTERY

3. THE PRESBYTERIAN FOUNDATION OF THE of the PRESBYTERIAN

CHURCH OF EAST AFRICA.....DEFENDANTS/APPLICANTS

RULING

1. By a ruling dated the 6th December 2018, by this court, the plaintiff was ordered to refund to the defendants a sum of Kshs.906,867/= paid to the plaintiff upon warrants of attachments of the defendants property in execution of the decree in this suit within a period of 60 days.

This sum was, in my considered view as expressed in the ruling an overpayment that was occasioned by erroneous tabulation of interest on the decretal sum. Upon application by the defendant, I found the said sum having been paid and as a result I ordered a refund to defendants.

2. By the **application before me dated 28th January 2019**, the plaintiff seeks a stay order pending hearing and determination of an intended appeal. A Notice of Appeal was filed on the 14th December 2018.

The defendants oppose the application by grounds of opposition filed on the 12th February 2019.

3. I have considered the supporting affidavit as well as oral submissions by the defendants.

Order 42 Rule 6(2) of the Civil Procedure Rules provides the conditions that an applicant for stay must meet for an order of stay to be granted.

My duty is to determine whether there the applicant has met such conditions. These are

1. Substantial loss if stay is denied
2. Unreasonable delay
3. Security for due performance of the decree

4. Substantial loss

The applicant is under an obligation to prove what loss it would suffer if stay is not granted. This is a monetary decree. The sum was paid to the applicant not too long ago (June 2018) together with the substantive decretal sum of Kshs.5,500,000/= and costs.

It has not been urged that the defendant would be unable to repay back the said sum in the event that the appeal succeeds, nor that it is not able to pay the said sum.

5. It has not been disputed that the 2nd and 3rd defendants, The Presbyterian Church of East Africa Nakuru West Presbytery owns many churches and hotels (Milele hotels) in many parts of the country.

I am persuaded that whenever called upon by a court order, the sum of Kshs.906,867/= would be paid- **Machira t/a Machira & Co. Advocates –vs- East African Standard (2002), KLR 63.**

Consequently the applicant has not demonstrated what substantial loss or any loss that the applicant would suffer, if an order of stay is denied.

6. It is not enough to merely state that substantial loss will result by denial of a stay order. It must be proved with specific details and particulars that is supported by the decisions below.

Antoine Ndiaye -vs- African Virtual University (2015) e KLR, and James Wangalwa and Another –vs- Agnes Naliako Cheseto (2012) e KLR the thread running through the above decisions, among others is that if no proof of substantial loss, being the cornerstone of an application for stay, the order will not be granted.

7. Unreasonable delay

The applicant is fully compliant. Application was filed timetiously.

8. Security for due performance of decree

The applicant has not offered any security save to state that he will abide by any conditions the court may grant.

This I have no doubt as the applicant is not a man of straw, having stated during the hearing of the main suit that he is a businessman with investments in hotels(Cool Waters Hotel) and others.

9. The Court of Appeal in the case **Kenya Shell Limited -vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-88) KAR 1018** rendered that

“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.”

10. For the foregoing, I find no merit in the application dated 28th January 2019. It is dismissed with costs.

Signed, delivered and dated at Nakuru this 11th Day of July 2019.

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J.N. MULWA

JUDGE