



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 492 OF 2003

BINDI SHAH.....PLAINTIFF

VERSUS

DR. JONARDAN D. PATEL.....DEFENDANT

RULING

The Defendant/Applicant has moved this court by way of a Notice of Motion dated the 15th day of April, 2019 under the provisions of Article 50 and 159 (1) (d) of the Constitution of Kenya, Sections 1A, 1B, 3A and 75 of the Civil Procedure Act and Orders 42 Rule 6 (1) and 51 (1) of the Civil Procedure Rules seeking for stay of execution of the judgment delivered on the 4th day of March, 2019 and all consequential actions arising therefrom, pending the hearing and determination of the appeal.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Dr. Janardan D. Patel, on the 15th day of April, 2019.

In his affidavit, the Applicant has deponed that the court on the 4th day of March, 2019, delivered a judgment awarding the Respondent/Plaintiff Kshs. 21,535,459/- plus costs of the suit. That he intends to file an appeal against the same and has instructed his advocate to file a notice of appeal. He avers that the appeal has high chances of success and if stay is not granted, the respondent shall proceed to execute the decree thus rendering the appeal nugatory.

He further deposes that he stands to suffer substantial loss unless the orders sought are granted in that, the Respondent has no known source of income or assets and in the event that the decretal sum is paid to her he will not be able to recover the same. That, if execution is allowed to proceed, the same will create a state of affairs that will irreparably affect or negate the very essential core of his appeal in the event that the same is successful adding that he has brought the application timeously. He states that he is ready and willing to abide by any such terms and/or conditions as this honourable court may deem fit to impose.

The application is opposed vide a replying affidavit sworn by Bindi Shah, the plaintiff herein, on the 13th day of May, 2019. In the said affidavit, she depones that she is a member of a family that owns several companies which are worth a billion shillings and through the said companies, she will be able to refund the decretal sum in the event that the appeal does not succeed.

She further depones that the applicant's appeal is unarguable in that, there was sufficient evidence by way of medical reports proving negligence on the part of the respondent and also that there was no consent of the plaintiff to the two surgeries that the applicant conducted.

The respondent also contended that the notice of appeal filed by the applicant was served out of time hence there is no valid notice of appeal on record.

In a supplementary affidavit filed on 12th June, 2019, the applicant depones that the Respondent has not demonstrated that she is a person of means in that the companies that she has listed are not parties to these proceedings. He has offered to deposit a title deed for his property LR N. 1870/VI/101 as security for the due performance of the decree.

The court has considered the application, the affidavits in support of and in opposition to the same and the submissions filed by the parties. The same seeks orders for stay of execution pending appeal and its brought under Order 42 Rule 6(1) of CPR. Under the said order, a court of law shall not issue an order for stay of execution unless;

- a. It 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 due performance of such decree or order as may ultimately be binding on him, has been given by the applicant.

Substantial loss was defined in the case of ANNE NJERU vs. MUZAFFER MUSAFEE & ANOTHER (2014) eKLR in which the court cited the case of Daniel Chebutul Rotich & 2 others vs. Emirates Airlines Civil case number 368/2000 as follows;

***“.....substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that the applicant is therefore forced to pay the decretal sum.*”**

In this regard, the applicant submitted that the Respondent has not demonstrated to the court her financial capability of refunding the decretal sum.

In her replying affidavit she has deponed that she is a member of a family that owns a number of companies which are worth a billion shillings. The court notes that the respondent has not disclosed whether she has a legal interest in those companies by showing either that she is a director or a shareholder of the companies. Secondly, no valuation report or statement of accounts were availed to court to support the financial worth of those companies.

As submitted by the applicant, and rightly so, a company is a legal person separate from the directors and/or shareholders. In the absence of evidence proving her legal interest in those companies, the court finds that she has failed to discharge the evidential burden of proving her capability to refund the decretal sum in the event that the appeal is not successful.

The court of appeal in the case of National Industrial Credit Bank Limited vs. Aquinas Francis Wasike Civil Application number 238/2005 when dealing with an application for stay of execution had this to say;

“This court has said before and it would bear repeating that while the legal duty is on the applicant to prove allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is not reasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”

I fully concur with that finding by the court of appeal and state that with the material before me, the respondent did not discharge that evidential burden.

Consequently, the applicant has proved that he shall suffer substantial loss if the order for stay is not granted.

On the delay, judgment in this matter was delivered on the 4th day of March, 2019 while the application herein was filed on the 15th day of April, 2019. The same was filed timeously and without delay.

On the issue of security, the applicant has offered to deposit a title document for land parcel number 1870/VI/101 as security for due performance of the decree, which offer the respondent has no problem with, at least going by the contents of paragraph 6(b) of her replying affidavit as an alternative to an order for depositing the whole decretal sum in court.

The court has considered the submissions of the parties in that regard. I have also noted the nature of the security offered by the applicant and the fact that the decretal sum is colossal. There is also a pending appeal on both quantum and liability.

In balancing the interests of the parties herein, the court will grant an order for stay of execution on **CONDITION** that;

- i. The applicant do deposit a total of Kshs. 5 million in an interest earning account in joint names of the Advocates on record.
- ii. The applicant do deposit in court a title deed/certificate of lease in his name with a valuation report, the value of which should be equal to or more than the balance of the decretal sum herein. The said title document to be held as security pending the hearing and determination of the appeal.
- iii. The applicant to comply with orders (i) and (ii) above within (60) days from the date of this ruling failing which the stay order shall lapse.

Cost of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this **17TH Day** of **OCTOBER, 2019.**

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Plaintiff

.....For the Defendant