



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 412 A OF 2014**

**BENVAR ESTATES LIMITED.....APPELLANT**

**VERSUS**

**ASHWIN BHANDERI.....1<sup>ST</sup> RESPONDENT**

**DEEPAK BHANDERI.....2<sup>ND</sup> RESPONDENT**

**BHANDERI ENTERPRISES LIMITED.....3<sup>RD</sup> RESPONDENT**

*(An appeal from the ruling delivered by Honourable B. J. Bartoo (Resident Magistrate)*

*on behalf of Honourable S. N. Telewa (Ms) on 4<sup>th</sup> August, 2014*

*in Civil Suit No. 488 of 2013*

**RULING**

The Respondents/Applicants have moved this Honourable court by way of notice of motion dated the 5<sup>th</sup> day of March, 2019, under Sections 1A, 1B and 3A of the Civil Procedure Act and orders 42 Rule 6(1) Order 51 Rule 1 of the Civil Procedure Rules seeking a stay of execution of the judgment delivered by the High Court on the 7<sup>th</sup> day of February, 2019, pending the hearing and determination of the intended appeal.

They have also prayed for costs of the application.

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 Ashwin Bhanderi on the 5<sup>th</sup> day of March, 2019.

The deponent has averred that, vide its judgment delivered on 7<sup>th</sup> February, 2019, the High court set aside the ruling of the trial court dated the 14<sup>th</sup> day of August, 2014 and since there is no stay of execution the Respondent may execute the warrants of attachment anytime.

That the Respondents/Applicants being dissatisfied with the said judgment have filed a notice of appeal against the same and have requested for certified copies of the judgment and typed proceedings. They have an arguable appeal with high probability of success and if stay of execution is not granted, the appeal will be rendered nugatory. That they have approached the court without delay.

The deponent who is one of the directors of the 3<sup>rd</sup> respondent states that he has been undergoing treatment and he only managed to appear before his advocates to sign the affidavit on the 20<sup>th</sup> February 2019 as he is restricted in movements.

In opposition to the application, the Appellant/Respondent filed a replying affidavit sworn by Magdalene Njoki Mbugua, on 13<sup>th</sup> March, 2019. The deponent who is the Commercial Manager of the Appellant/Respondent has deponed that the application as filed is bad in law and an abuse of the court process and the same should be dismissed. She depones that, the respondent is desirous to execute the judgment as the same reflects a sound determination of the court and that no threat has been issued so far, as to the execution of the same.

The deponent further avers that the Applicants, despite indicating that they have an arguable appeal, they have not demonstrated to the court their willingness to deposit security. That the Applicants do not have an arguable appeal for the reason that the issue of service being raised had been determined by the trial court which position was affirmed by the court. The Respondent contended that the Applicants have not demonstrated the prejudice that they will suffer if the stay is not granted and therefore the Respondent should be left to enjoy the fruits of

their judgment.

By way of a supplementary affidavit sworn on 18/03/2019, the Respondents offered to deposit in court half of the decretal amount in monthly payment of Kshs. 100,000 until the same is paid in full considering the financial constraints that its director, Ashwin Bhandari is undergoing as a result of his medical condition after he was diagnosed with kidney failure.

The application was canvassed by way of written submissions which this court has thoughtfully considered alongside the application and the respective affidavits.

The application which is brought mainly under Orders 42 Rule 6 and 51 Rule 1 seeks for an order of stay of execution pending the hearing and determination of the intended appeal. Under Order 42 Rule 6(1) of the CPR the Applicant must satisfy the court that:

- a. Substantial loss may result unless the order is made and that the application has been made without unreasonable delay.
- 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.
- c. The Applicant must also show that he has an arguable appeal.

On the question of delay, the judgment of the High Court was delivered on the 7<sup>th</sup> day of February, 2019. The Applicant filed an application for stay of execution on the 20<sup>th</sup> February, 2019 which they later withdrew. The present application was filed on 5<sup>th</sup> March, 2019. The reason for the delay in filing the application according to the first Applicant was that he was undergoing treatment and he only managed to appear before his advocates to sign the affidavits on the 20<sup>th</sup> February, 2019. He has annexed copies of the treatment records as annexure to his affidavit. In my view, the delay has been sufficiently explained.

On the question of substantial loss, it is trite law that substantial loss is the cornerstone of the jurisdiction of the court to grant an order for stay of execution under order 42 Rule 6(1). While dealing with a similar application in the case of *Masisi Mwita vs. Damaris Wanjiku Njeri 2016*) eKLR Justice Mativo had this to say about substantial loss.

***“The cornerstone of the jurisdiction of the court under Order 42 Rule (6) of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.*** (5) What constitutes substantial loss was broadly discussed by *Gikonyo J.* in the case of *James Wangalwa & another vs. Agnes Naliaka Cheseto* (6) where it was held inter alia that;

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR. This is because execution is a lawful process”.***

In support of this ground, the 1<sup>st</sup> Respondent depones that the Respondents are apprehensive that the Applicant will execute the judgment, the reason for the apprehension being the contents of the replying affidavit sworn by Magdaline Njoki on 13/03/2019 in which she has deponed that the Applicant is desirous of executing the judgment. He contends that if execution is levied, this could lead to huge business losses including termination of business contracts and loss of clients, this being a challenge that will have a permanent negative effect on the Applicant’s business. The Applicant has relied on the case of *James Wangalwa* (Supra) where the judge held inter alia that;

***“The Applicant must establish other factors which saw that the execution will create a state of affairs that will irreparably affect or negate the very essential case of the Applicant as the successful party in the appeal.***

This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*.....

***The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.***

The Applicants have argued that if the stay orders are not granted, the appeal will be rendered nugatory yet they have an arguable appeal with the probability of success.

On the part of the Respondents, it was submitted that the Applicant has not shown the substantial loss that he is likely to suffer if stay of execution is not granted, in that they do not have an arguable appeal. The Respondent has further urged that the Applicants have not demonstrated that the appeal will be rendered nugatory if stay is not granted.

The court has considered the positions and arguments made by the respective counsels in regard to substantial loss. In dealing with an application for stay of execution, the court should strive to balance the interests of the parties in that the Applicant has a right of appeal while the Respondents have a lawful decree which they have a right to execute, the ordinary principle being that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success in any stage.

The court has noted that the decree issued by the trial court is money decree. It has not been deponed that the Respondent will not be in a position to refund the decretal sum in the event that the appeal is successful. The court however notes that the 1<sup>st</sup> Applicant is suffering from a kidney ailment which condition has affected his business negatively. In the interest of justice and in balancing the interest of the parties

herein, the court hereby grants an order for stay of execution but on condition that half of the decretal sum be deposited in court within 30 days from the date of this ruling failing which, the stay order shall lapse.

The cost of the application shall abide the outcome of the appeal.

As to whether the signature on the affidavit in support of the application is a forgery, it's my considered view that this court is not well equipped to make a conclusive finding on that as there is no document examiner report on the basis of which a finding can be made.

Dated, signed and delivered at **NAIROBI** this **2<sup>ND</sup>** day of **OCTOBER, 2019**.

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent