



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 577 OF 2018

GEORGE GATHUKI NG'ANG'A.....APPELLANT/APPLICANT

-VERSUS-

ELDAVINE INVESTMENT LIMITED.....RESPONDENT

RULING

1. The application currently before this court is the Notice of Motion dated 6th December, 2018 filed by the appellant/applicant. The Motion is supported by the grounds set out on its face and the facts deponed to in the affidavit sworn by the applicant. The applicant in this instance is seeking the substantive order for a stay of execution pending the hearing and determination of the appeal lodged against the judgment and decree of Honourable Usui (Ms.) (Senior Principal Magistrate) delivered on 16th November, 2018.

2. In his affidavit, the applicant stated inter alia, that in the event that his goods are attached prior to the conclusion of his appeal, he stands to suffer grave harm and prejudice, adding that the financial means of the respondent are unknown as it stands and it is possible that he may not be able to recover the decretal sum from the respondent should the appeal succeed.

3. The applicant also asserted that the respondent does not stand to be prejudiced should the order for a stay of execution be granted as sought. Further, the applicant conveyed his willingness to provide security as may be ordered by this court.

4. In opposition to the aforesaid Motion, the replying affidavit sworn by *Walter Ngotie*, a Director of the respondent, was filed on 15th March, 2019. The deponent averred that the applicant has fallen short of demonstrating substantial loss or either of the requisite conditions to warrant granting of the orders sought, maintaining that the respondent is well capable of refunding the decretal amount in the eventuality of a successful appeal. The deponent further stated that the execution process is yet to commence.

5. The Motion was argued orally before this court. *Mr. Nyakeri*, advocate for the applicant, reiterated the substantial loss that his client stands to suffer unless the order for a stay of execution is granted, contending that the burden has shifted to the respondent to demonstrate its ability to refund the decretal sum. *Mr. Nyakeri* also indicated his client's willingness to deposit half of the decretal sum as security.

6. On her part, *Miss Njoroge* learned counsel for the respondent responded by arguing that her client is ready to accommodate the applicant so long as he ensures to deposit the entire decretal amount. The advocate further submitted that her client has availed its financial statements as attached to the replying affidavit filed in court, thereby confirming its ability to repay the requisite sums should the need arise.

7. I have considered the grounds set out on the face of the Motion; the affidavits both in support of and in opposition to the same; and the rival oral arguments placed before this court.

8. I am guided by the conditions carefully laid out under *Order 42, Rule 6 (2)* of the *Civil Procedure Rules* for the granting of a stay of execution, which are:

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. On the issue of delay, the memorandum of appeal filed on 6th December, 2018 indicates that the impugned judgment was entered on 16th November, 2018 while the present application was filed on 6th December, 2018. I am thus satisfied that there has been no unreasonable delay

in filing the same.

10. I will now address the second condition on substantial loss which constitutes the cornerstone of any application for a stay of execution, as portrayed in **Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR** with reference to **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** thus:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

11. In the present instance, the applicant has communicated his apprehension that the respondent’s financial means are unknown, thus making it plausible that he may not be able to recover the decretal sum from the said respondent should his appeal ultimately succeed.

12. Such a scenario was considered by the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** and the following reasoning taken:

“...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...”

13. From the foregoing, it would then be the responsibility of the respondent to prove its ability to refund the decretal sum. I have studied the replying affidavit and noted a copy of the financial statement for First Assurance Company Limited attached thereto and marked as “WN 1.” I have also noted the respondent’s explanation that First Assurance Company Limited is its insurer; however, no additional evidence has been tendered before me to support this position, thereby making it impossible for me to ascertain the respondent’s ability to refund the decretal amount. In the circumstances, I am satisfied that there is a likelihood of substantial loss in this instance.

14. On the third and final condition on the provision of security, I am guided by paragraph 6 of the replying affidavit of *Walter Ngotie* which sets the decretal amount at Kshs.187,927/=. The applicant has communicated his willingness to deposit half of the decretal amount; whereas the respondent insists on the deposit of the entire amount. Suffice it to say that **Order 42, Rule 6(2) (b)** requires that the security offered be adequate in ensuring the due performance of the decree.

15. Ultimately, I find the Motion to be meritorious and will grant the order for a stay of execution sought on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates/firm of advocates within 30 days from today, failure to which the order for stay shall automatically lapse. Costs of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 2ND day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent