



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 9 OF 2016.**

**ZEDCA TECHNICAL LIMITED.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT**

**RULING**

1. The applicant filed this application under a Notice of Motion dated 16<sup>th</sup> May, 2019 seeking for orders:-

1) That there be stay of execution of the ruling and order delivered by this honorable court on the 15<sup>th</sup> May, 2019 pending the hearing and determination of the application interparties.

2) That there be stay of execution of the ruling and order delivered by this honorable court on the 15<sup>th</sup> May, 2019 pending the hearing and determination of the intended appeal.

2. The application was based on the grounds that the applicants being aggrieved and dissatisfied with the ruling and order delivered by this honorable court on the 15<sup>th</sup> May, 2019 herein intend to appeal against the said ruling.

3. The applicants are willing to provide security for stay pending appeal. Also that the respondent is a company of straw hence if the decretal dues are paid out it may be unable to refund the same in the event that the appeal succeeds.

4. The applicants are apprehensive that unless the prayers sought herein are granted, the appeal shall be rendered nugatory and that they stand to suffer substantial loss and damage unless the orders sought herein are granted.

5. Lastly, that the application has been made without undue delay and therefore it is just and fair that the application herein be allowed pending the hearing and determination of the appeal.

6. The application was opposed by the respondent through a replying affidavit sworn by MARTIN CHEMONGES SIWA on the grounds that first, the applicants have not demonstrated that their appeal has high chances of success as alleged.

7. Secondly, that the applicants had already admitted that Kshs. 11, 437,700 had already been approved and this application is therefore misguided.

8. Further, that the respondent has suffered loss as he used loans obtained from banks to construct Moiben Hospital which the applicant has defaulted to pay him.

9. The applicants in their submissions stated that being an application for stay of execution pending appeal, they urged the court to exercise its discretion in a manner that would not prevent the appeal.

10. In an application, for stay of execution pending appeal, the condition to be met are set out under the provisions of Order 46 rule 6(2) of the Civil Procedure Rules.

11. That there is a danger that the respondent may execute against the applicants hence rendering the appeal nugatory.

12. The purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant.

13. Secondly, that the sum is a substantial amount of money and if the same is paid over to the respondent, he will not be able to refund it if the intended appeal succeeds. Thereby occasioning substantial loss to the defendants.

14. Lastly, that the applicant is ready and willing to deposit due security in a joint interest earning account held between the advocates of the parties for due performance of the money involved.

15. The respondents on their part submitted that the applicant has not laid down sufficient grounds and reasons to warrant stay of execution and that this application is just aimed at denying the plaintiff enjoyment of the fruits of his judgment.

16. Further, that the respondent alleged that the plaintiff is a company of straw and if paid out will lead to loss, has no basis upon which to assess the risk and loss if any, that the applicant may suffer if stay is not granted.

17. The applicant has not discharged the requirements for granting of stay, and in any event it is not enough to allege that the plaintiffs company will not be able to repay the money without putting before court sufficient evidence to confirm that the defendant will suffer substantial loss.

18. Lastly, the applicant has not annexed a draft memorandum of appeal to this application to demonstrate whether indeed there are triable issues to warrant grant of orders of stay of execution.

19. Failure to annex a draft memorandum of appeal is a clear indication that the applicant does not have arguable appeal which is enough reason to warrant a dismissal of the application.

20. Order 42 Rule 6 (1) & (2) provides as follows:-

***1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***2. No order of stay shall be made under sub rule (1) unless-***

***a. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and***

***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***

21. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

22. However, it is necessary to weigh the considerations for granting applications for stay pending hearing and determination of an appeal.

23. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)* while considering an application of this nature had this to say:-

***i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

***iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.***

***iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.***

24. It is clear from the wording of Order 42 Rule 6 (1), that for an applicant of this nature to succeed, the applicant must satisfy the following conditions, namely;

***(a) Substantial loss may result to the applicant unless the order is made;***

***(b) The application has been made without undue delay;***

***(c) Such security as to costs has been given by the applicant.***

25. I have considered that the issue before the court involves a colossal sum of money which is Kshs.29,437,700/-. The applicant intends to appeal against the ruling dated 15<sup>th</sup> May, 2019.

26. The application before this court was brought on 16<sup>th</sup> May 2019. There was therefore no inordinate delay. There is expression that the respondent may not refund the amount if paid, and the appeal succeeds. The respondent has not demonstrated otherwise.

27. The applicant is willing to deposit the amount in both advocates jointly registered interest earning account, pending hearing and determination of the appeal.

28. Given the foregoing considerations, this court finds the application merited. The applicant should deposit Kshs. 26,447,700 in both advocates jointly registered interest earning account within 30 days. The appeal should also be filed within the said 30 days. Orders of stay are granted pending hearing and determination of the appeal. If the conditions granted are not met, the orders cease.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF OCTOBER, 2019.**

In the presence of:-

Ms. Wamalwa for Plaintiff/Respondent

Mr. Too for defendants.

Ms Abigael - Court clerk