



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 106 OF 2019**

**BETWEEN**

**CALVIN OUMA MIGANDA.....APPELLANT/APPLICANT**

**AND**

**SAMMY TRADERS LIMITED.....RESPONDENT**

**RULING**

1. By a notice of motion dated and filed on 05<sup>th</sup> November, 2019, brought under Order 22 rule 22 and Order 51 of the Civil Procedure Rules and all enabling provisions of the law, the Appellant/Applicant prays for orders **THAT:**

**1) That there be a stay of execution of decree of the judgment and consequential orders made on 04<sup>th</sup> September, 2019 in Kisumu CMCC No. 181 Of 2017 Calvin Ouma Miganda versus Sammy Traders Limited pending the hearing and determination of this appeal**

**2) Costs be in the cause**

2. The application is based on the grounds among others that the Applicant is dissatisfied with the judgment and has filed this appeal which has high chances of success and shall be rendered nugatory if stay is not granted.

3. The application is supported by an affidavit sworn by the Applicant on 05<sup>th</sup> November, 2019 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is the impugned decree and memorandum of appeal in this matter.

4. The application is opposed by of a replying affidavit sworn on 08<sup>th</sup> November, 2019 by Shahzad Ahmed Chaundhry who describes himself as the managing director of the Respondent. He avers that the Applicant has not explained the delay in seeking stay orders and has not demonstrated evidence of substantial loss. The deponent further asserts that the Respondent's whose principal business is sale of new and used cars has the ability to pay back the decretal sum in the event that the appeal succeeds.

**Analysis and Determination**

5. I have carefully considered the notice of motion *vis a vis* the on record.

6. Order 42 (6) of the Civil Procedure Rules provides:

**(2) No order for stay of execution 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**

**b. That the application has been made without unreasonable delay; and**

**c. 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.

**i. Unreasonable delay**

7. The impugned judgment was delivered on 04<sup>th</sup> September, 2019. The notice of motion herein was filed on 05<sup>th</sup> November, 2019 which is two months from the date of the impugned judgment. The two months' delay has not been explained.

**ii. Substantial loss**

8. There are a myriad of cases on what constitutes substantial loss. In **Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu** the Court stated-

**“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”**

9. Similarly in **Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd** the Court stated-

**“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 suits.”**

10. Additionally, the court in **ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002** held that:

**“Each party bears a specific burden regarding proof of substantial loss in a case such as before us. ....So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”**

11. The Respondent was awarded general damages in the sum of Kshs. 1,175,000/-. The Applicant has not demonstrated that the Respondent is not in a position to refund the said sum in the event that the appeal succeeds. (See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**).

12. From the affidavit evidence, I am not convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

**iii. Security**

13. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Applicant has not offered to furnish security for due performance of the decree herein pending the hearing and determination of the appeal.

14. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court's discretion under section 3A of Civil Procedure Act to afford the Appellant an opportunity to prosecute his appeal.

15. The upshot of the foregoing is that the notice of motion dated 05<sup>th</sup> November, 2019 is considered and allowed in the following terms:

**1) That there be a stay of execution of proceedings in Kisumu CMCC No. 181 Of 2017 Calvin Ouma Miganda versus Sammy Traders Limited pending the hearing and determination of this appeal on condition the total decretal sum be deposited into an interest earning account in the names of the advocates both parties within 30 days from today's date**

**2) Costs shall abide the costs of the appeal.**

**DELIVERED AND SIGNED IN KISUMU THIS 14TH DAY OF NOVEMBER 2019**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - **Amondi/Okodoi**

For Appellant/Applicant - N/A

For the Respondent - Mr. Mwesigwa