



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 78 OF 2016

BRENDA NYABOKE MICHIRA.....PLAINTIFF/RESPONDENT

-VERSUS-

GERMAN INTERNATIONAL

CO-OPERATION GIZ.....DEFENDANT/APPLICANT

RULING

1. Before me is an application by the Defendant brought under provisions of Order 42 Rule 6(1) and (6) of Civil Procedure Rules and Section 3A of the Act. It is dated 18th January 2018.

2. The Applicant seeks an order of stay of execution of this court's judgment delivered on the 3rd November 2017 pending hearing and determination of an appeal to the Court of Appeal. The Notice of Appeal was filed on the 25th November 2017. The Respondent seeks enhancement of damages on loss of earnings and physiotherapy services. The Applicant too filed its Notice of Appeal against the whole of the said judgment/decreed on the same date, 25th November 2017.

3. During hearing of the application on the 9th May 2018, the Respondent did not oppose the orders being granted save that the court was urged to set the conditions for the stay of execution – and cited the hardship that the Respondent (plaintiff) being a paraplegic young adult is undergoing, and proposed that a sum of Kshs.18 Million be released to the Respondent and the balance be deposited in an interest earning account pending hearing of the appeal.

4. The Applicant urged that a sum of 3 Million is what the defendant's insurers are ready to release to the plaintiff stating that the defendant, being an international Non Governmental Organisation (NGO) relies on donations, and therefore is not able to pay more, but offered to provide a bank guarantee within 60-90 days for the balance. No financial statements were placed before the court for the court to confirm its ability or inability to pay the decretal sum.

5. I have considered counsel arguments. The conditions that an applicant ought to meet are stated under **Order 42 rule 6 (2) of Civil Procedure Rules**. The application was made without undue delay, and security for due performance of the decree has been offered. The matter of substantial loss was not addressed at all.

6. What I have to consider is whether the security offered by the Applicant is sufficient taking into account the plaintiffs interests *viz-a-viz* those of the defendant, as well as whether a denial of the orders will cause substantial loss to the Applicant, which is the cornerstone in an application for stay of execution pending appeal – See **Kenya Shell Ltd -vs- Kibiru & Another (1986) e KLR**.

7. The court's discretion is thus called for when deciding on this issue of stay. In **Machira t/a Machira & Co Advocates -vs- East African Standard (No.2) (2002) e KLR** the Court held that:

“--- the ordinary principle is that a successful party is entitled to the fruits of its judgment -----that it is trite knowledge that is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way of applications for stay of further proceedings or execution pending appeal --- which is to do justice in accordance with the law and prevent abuse of the court---”.

8. **The Court of Appeal in Nyeri Civil Application No. 93 of 2017 Jubilee Hauliers Ltd & Others -vs- Brian Muchiri Waihenya** considering an application for stay of execution of the decree pending appeal from my judgment in **HCCC No. 34 of 2014** – a case very similar to the present one involving a paraplegic young man, the court found the application devoid of merit, the two important conditions not having been met, that is, the Applicant failed to establish the arguability of the Appeal being rendered nugatory and the substantial loss that may be occasioned if the orders are denied.

The Applicant did not address the court on the alleged substantial loss that the applicant may suffer should the order of stay be denied.

The Affidavit in support too does not aver to any loss - **Order 42 rule 6(2) (a) of Civil Procedure Rules**. Mere statements cannot be sufficient.

The court must be satisfied that substantial loss may be suffered by a denial of an order of stay - **Kenya Shell Ltd -vs- Kibiru & Another (1986) e KLR**.

9. This is a money decree. No allegation or at all was made that the Respondent may not be able to pay back monies released to her should the appeal be successful – **Reliance Bank Ltd -s- Norlake Investments Ltd (2002) EA 227 Page 222** nor that the appeal may be rendered nugatory, to enable her offer a rebuttal to the allegations.

10. On whether or not an appeal may be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the aggrieved party as stated in the **Reliance Bank Ltd Case** above.

I am not satisfied that a denial of the order sought would render the pending appeal nugatory.

11. That as it may, the Respondent having agreed to an order of stay pending appeal subject to conditions as the court may order, and upon consideration of all the factors stated, **I hereby grant a stay of execution of the Judgment/Decree dated 3rd November 2017 upon the following conditions:**

1. The Applicant shall pay to the Respondent a sum of Kshs.15,442,244/= (being 50% of the decretal sum – (costs yet to be taxed) within a period of 45 days from the date of this order.

2. The balance of the decretal sum (minus taxed costs) being Kshs.15,422,244/= shall be secured by a Bank guarantee from a reputable bank within 75 days of this order.

3. That upon taxation of the Respondents costs, 50% thereof shall be paid to the Respondent within 30 days of the certificate of costs or 30 days upon hearing and determination of an objection/Reference should one be filed.

4. Failure and/or none compliance by the Applicant with the above conditions shall terminate the stay of execution orders.

5. Costs of the application shall be in the cause.

Dated, signed and delivered this 11th Day of May 2018.

J.N. MULWA

JUDGE