



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 51 OF 2007**

**JOSEPH C. CHEPKWONY.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**KIPTANGICH TEA ESTATE.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**VITALIS KEITANY.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. Judgment in this case was delivered on the 13<sup>th</sup> April 2017. A notice of appeal was subsequently filed against the whole judgment on the 25<sup>th</sup> April 2017 by the 1<sup>st</sup> Defendant now the Applicant.

In its Notice of Motion application dated 7<sup>th</sup> June 2017, the 1<sup>st</sup> Applicant sought an Order of stay of Execution pending hearing and determination of the Appeal. It is brought under Order 42 Rule 6 of the Civil Procedure Rules.

2. It is stated in its grounds in support of the application that the appeal has high chances of success and will be rendered nugatory if stay is not granted, and that the Applicant will suffer substantial loss.

The decretal sum (costs yet to be taxed) ordered to be paid by the 1<sup>st</sup> Defendant/Applicant is Kshs.1,440,000/= plus interest and costs.

3. The Respondent/Plaintiff has filed a replying affidavit in opposition to the application. It is his argument that being a money decree, no stay should be ordered, that the Respondent being a successful businessman is able to repay the decretal sum should the appeal be successful, and therefore should not be kept out of his judgment fruits.

4. The Applicant has offered to deposit sufficient security for the due performance of the decree. He however did not address the court on what substantial loss the applicant would suffer by a denial of the order of stay, nor on the alleged high chances of success of the appeal as stated in the affidavit in support.

5. Substantial loss is the cornerstone of an order for stay of execution – **Order 42 Rule 6 of Civil Procedure Rules**. See **Court of Appeal decision in Nyeri C.A No. 93 of 2017 - Jubilee Hauliers Ltd & Others -vs- Muchiri Waihenya (2017) e KLR**.

It is also trite that a party should not be shut out of the fruits of its judgment save when justice of a case demands so, and when a denial of a stay order would render the appeal nugatory. In this respect, a party ought to satisfy the court of the chances of success of the appeal, by showing the merits of the said appeal, albeit not arguing the merits of the appeal.

- No submissions were offered.

6. Whether or not an appeal will 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 party aggrieved as stated in the case **Reliance Bank Ltd -vs- Norlake Investments Ltd (2002) IEA 227**.

7. This is a money decree. It has not been said that the Respondent is unable to refund the money. Indeed, the Respondent in his Replying Affidavit has deposed that he is not a man of straw, and has shown assets he owns being vehicles and land that he would liquidate to pay back the money should the appeal be successful.

He is also willing to deposit a title deed to any of the properties in court to secure the decretal money. A Valuation of the properties was exhibited.

8. To that end, I am not satisfied that any substantial loss would be occasioned to the applicant if the decretal sum is paid out to the respondent as none was demonstrated by the applicant – See **Reliance Bank Ltd case above.**

9. I am also not satisfied that a denial of the order of stay would in any way render the appeal nugatory. On the converse, such order would prejudice the Respondent by keeping his judgment sum away from him when he has demonstrated clearly that he is capable of paying back should the appeal be successful – **Machira t/a Machira & Co. Advocates -vs- East African Standard (No.2) (2002) e KLR.**

10. In its totality, the applicant has failed to meet the conditions set out under **Order 42 Rule 6(1) and (2) of Civil Procedure Rules.**

I find the application devoid of merit and I dismiss with costs.

**Dated, signed and delivered this 17<sup>th</sup> Day of May 2018.**

**J.N.MULWA**

**JUDGE**