



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 370 OF 2009**

**RURAL DISTRIBUTORS ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**EXPRESS COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**SURAJ GOPINADHAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling seeks to determine the Notice of Motion dated 16<sup>th</sup> January, 2018 and filed under the provisions of Orders 22 Rule 22, 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The Defendants seek orders to have the judgment entered in favour of the Plaintiff on 20<sup>th</sup> December, 2017 stayed pending the hearing of the Application and the intended Appeal. The judgment sought to be stayed was entered in a defamation suit in which the Plaintiff was awarded the sum of Kshs. 7,000,000/= in general damages together with costs of the suit. The grounds in support of the Application are contained on the face of the Application and in the Supporting Affidavit of the 2<sup>nd</sup> Defendant dated 16<sup>th</sup> January, 2018.

2. The grounds are that the Applicants are intending to appeal against the whole of the judgment and that they have an arguable appeal with high probability of success. If the stay is not granted, it is the Applicants argument that they will suffer irreparable loss as the execution of the decree for Ksh.7million plus costs would affect their cash flow. It is further deponed that there is the risk that the Respondent would not refund the money in case the Appeal is successful. The Applicants further state that they are ready and willing to comply with such reasonable conditions as to security as court may order. It is further deponed that the application was made without unreasonable delay considering that the judgment was delivered on 20<sup>th</sup> December, 2017 shortly before the Christmas break time between 21<sup>st</sup> December 2017 to 15<sup>th</sup> January, 2018.

3. The Plaintiff/Respondent opposed the application via a Replying Affidavit dated 31<sup>st</sup> January, 2018 sworn by **ABDUL OSMAN**, a director of the Respondent. He deponed that the Plaintiff ought to enjoy the fruits of the judgment and any subsequent decision which tends to impede justice can only be rendered in exceptional circumstances which have not been demonstrated by the applicants. It was averred that the application is not made in good faith and it is merely intended to delay the execution of the decree, and to frustrate the Plaintiff from enjoying the fruits of its judgement, that no substantial loss has been established and the requirements for stay have not been met.

4. This Application was canvassed orally in Court on 19<sup>th</sup> April, 2018 in which the parties broadly expounded on the contents of their Affidavits. The Respondent filed a list of authorities but the Applicant did not rely on any authorities. I have considered the arguments together with the authorities filed. I have perused the three authorities relied on by the Respondent and I find that they are not applicable in this case. In all those cases, the applications were dismissed for the reason that the Applicants did not raise and/or address the issue of whether or not if the decretal sum is paid, the applicant may not recover the decretal sum from the Respondent. In the instance case, the Applicant has raised the issue in the application as well as during submissions. The Applicant stated that they would suffer substantial loss for the reasons that the decretal amount is a lot of money which would affect their cash flow and that the Respondent would not be able to refund the same in case the appeal succeeds. The Respondent did not address this issue in the Replying Affidavit as well as in the submissions. In an application for stay of execution, when an applicant raises the issue touching on the Respondent's inability to refund the decretal sum, it is incumbent upon the Respondent to demonstrate its financial capability. This was not demonstrated.

5. On the issue of delay, considering that judgment was delivered on 20<sup>th</sup> December, 2017 and the instant application was filed on 15<sup>th</sup> January, 2018, I find that the same was filed without undue delay. Under Order 50 Rule 4 of the Civil Procedure Rules the period between 21<sup>st</sup> December in any year and fourteenth January in the year next following both days included, time does not run provided that the rule shall not apply to any application in respect of a temporary injunction.

6. The Applicant is ready to abide by any orders of this Court as to security. Even though the Respondent has submitted that the applicant has not committed to offer any security, the fact that they have intimated that they are ready to abide by the court orders as to security its good enough, for they are willing to be bound by whatever terms the court shall impose.

7. **Order 42 Rule 6 of the Civil Procedure Rules** provides the conditions for granting an order of stay of execution being that the application has been made without unreasonable delay, security for the decree or order has been given, and that substantial loss may result to the Applicant unless the order for stay is made.

8. The purpose of an application for stay of execution pending an appeal is to preserve the status quo of the parties so that the rights of the appellants are safeguarded and the appeal if successful is not rendered nugatory. The power to grant an application for stay of execution pending appeal is a discretionary one exercised on sufficient cause being shown, where the applicant may suffer substantial loss, the application is made without unreasonable delay and on provision of such security as the Court may impose.

9. The Applicant has demonstrated a case for the orders sought in that the application was filed without delay, the Respondent may not be able to refund the decretal sum in case of a successful appeal and that they are ready to abide by any conditions as to security. On the contrary, the Respondent has failed to demonstrate that they are willing and/or capable of refunding the decretal sum in the event that the Appeal is successful. The upshot of the above is that the Application dated 16<sup>th</sup> January, 2018 is allowed on condition that half of the decretal sum be deposited in a joint interest earning account to be opened in the names of both counsels. The money to be deposited within 30 days from today failing which the orders of stay shall lapse.

Dated, Signed and Delivered at Nairobi this **10<sup>th</sup>** Day of **May, 2018**.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Applicant*

.....*For the Respondent*