



**REPUBLIC OF KENYA**

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

**HCCA NO. 27 OF 2017**

**NYOTA TISSUE PRODUCTS.....APPELLANT**

**VERSUS**

**LAWRENCE LAWI KUBOKA.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF GOVERNORS**

**NAMBALE SECONDARY SCHOOL.....2<sup>ND</sup> RESPONDENT**

**NAMBALE SECONDARY SCHOOL.....3<sup>RD</sup> RESPONDENT**

**PASCAL DINDI OMUSA.....4<sup>TH</sup> RESPONDENT**

**LYDIA GATURUHU.....5<sup>TH</sup> RESPONDENT**

**[Being an application for stay of execution of the judgment decree from Civil case Eldama Ravine Magistrate's Court No. 22 of 2013 delivered on the 3<sup>rd</sup> day of November , 2015 by Hon. R.Yator, SRM]**

**RULING**

**Introduction**

1. The applicant had sued as a 5<sup>th</sup> defendant in a series of the lower court civil suits. Then after hearing of the suits the judgment was delivered on 3<sup>rd</sup> November 2015 for all the 30 cases. The court held that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents were held 20% liable whereas the 4<sup>th</sup> and 5<sup>th</sup> defendants were held 80%. Perusal of the files shows that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have already paid their part of the decretal sum. The 5<sup>th</sup> defendant/ applicant herein made an application for stay of execution which was granted by the Senior Principal Magistrate Eldama Ravine on the 12<sup>th</sup> May 2016. The court granted stay on condition the 5<sup>th</sup> defendant/applicant pays 50% of the decretal amount herein to the respondents within 45 days and to further deposit the other 50% in an interest earning account in the joint names in the party's advocates herein within 60 days as security for performance.

2. The 5<sup>th</sup> defendant/applicant herein moved to the High Court and filed a Notice of Motion application dated 13<sup>th</sup> June 2016 under order 42 Rule 6 (1) , (2) and (6) and order 42 Rule 7. The appellant/applicant sought for the following specific orders :

a. ....

b. Stay of execution of the Judgment/Decree in Eldama Ravine SPM CC NO. 22 of 2013 pending the hearing and determination of this application.

c. That this Honorable court be pleased to order that the appellant do deposit a bank guarantee or insurance bond as security of Ksh. 7,468,988/= being 80% of the judgment sum attaching on the appellant.

d. That there be a stay of execution of judgment delivered in Eldama Ravine SPMCC NO. 22 of 2013 together with all the consequential orders pending the hearing and final determination of the appeal filed herein.

e. That cost of this appeal be in the cause.

The said application was supported by an affidavit sworn by Vivian Onyino the Legal Officer of the appellant's Insurance Company. The parties filed their replying affidavits and submissions.

## **SUBMISSIONS**

### **The Appellant's Submission**

3. The appellant/applicant's substantive prayer was stay of execution of the judgment delivered on 3<sup>rd</sup> November 2015. It is their submission that they have filed an appeal which has high chances of success and if the stay is not granted then the appeal shall be rendered nugatory. Also that there was no undue delay occasioned by the applicant on filing this instant application as judgment was delivered on 3/11/2015 and application was filed on 12/1/16. and undue delay is occasioned if a party files an application after 6 months to 1 year after delivery of judgment.

4. Further, that the 1<sup>st</sup> respondent has not shown how he may repay the colossal decretal award in the event the appeal succeeds. The amount payable by them was Ksh. 7,468,988/= which was so huge and substantial loss may occur if the execution occurs. This would amount to substantial loss. In *Channan Agricultural Contractors (K) Ltd v. Nicodemus Mugara [2006] eKLR* it was held that the evidential burden is on the respondent to show that he has the means or resources to repay the decretal dues, if not then it would result to substantial loss unless stay is granted.

5. In addition to this, they urged that they were willing and ready to furnish security for the due realization of the judgment. That the essence of security is to protect both sides pending resolution. That in the event the respondent succeeds the funds are available to satisfy the decree as well as held in *Kilimanjaro Safari Club Limited v. County Council of Okejoado & Anor (2007) eKLR*. In *Dilpack (K) Limited v. William Muthama Kitonyi & Anor (2015) eKLR* the court held that the most important fact to be considered in the provision of security is that it must be sufficient to ensure the due performance of any decree that may have been granted by a court. In view of this the applicant urged that they are willing to deposit a bank guarantee or Insurance bond.

6. Lastly, they urged that the respondent have not demonstrated how this instant application is an afterthought and was made in bad faith and an abuse of the court process.

### **The 1<sup>st</sup> Respondent's Submission**

7. Counsel urged that the appellant had made an application for stay of execution before the trial court at Eldama Ravine which order was granted on condition that was not fulfilled. The instant application seeks the same orders resulting to duplication of suits. The appellant only appealed against 3 matters out of the 30 suits. The allegation that the respondent may be unable to refund the sum in the event the appeal succeeds is untrue. The burden is on the appellant/applicant to demonstrate to the court that the respondent shall not be able to pay back. They relied in *Andrew Kuria Njuguna v. Rose Kuria (Nairobi Civil Case No. 224 of 2001)* (unreported) and in *Machira, t/a Machira & Co. Advocates v. East Africa Standard (2002) KLR 63*.

8. Further he urged that though the amount in question is colossal there is no guarantee that the appeal will succeed. There was no liability against the claimants and the payment was to be made by the appellant. In *Republic v. The Commissioner for Investigation and Enforcement & Exparte Wananchi Group Kenya Ltd, Misc App No. 51 of 2013* it was held that it was not sufficient to state the decretal sum is a lot of money and the applicant would suffer loss if the money is paid, the applicant should show the damages it would suffer if the order is not guaranteed. It is their submission that the appellant was denying the 1<sup>st</sup> respondent the fruits of his judgment.

9. In addition, Counsel urged that since the appellant is willing and ready to deposit security in the form of a bank guarantee or an insurance bond, then the ruling of the lower court should be obeyed by the appellant as was the position held in *Misc. App No.78 of 2015 Edward Kamau & Anor v. Hannah Mukui Gichuki Gestetne Ltd* and in *Nairobi HCC No. 422 of 2006 Antoine Ndiaye v. African Virtual University*. Finally, they urged that the applicant has not properly discharged the requirement outlined under order 42 Rule 6 (1) and 2 of the Civil Procedure Rules.

### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Submissions**

10. The Counsel urged that the appellant/applicant seeks for a stay of execution of the judgment decree in Eldama Ravine SPMCC No. 22 of 2013 pending the hearing and determination of the appeal. The lower court had already granted stay on condition that the 5<sup>th</sup> defendant/applicant (appellant/applicant herein) pays 50% of the decretal sum to the respondents within 45 days and to further deposit the other 50% in an interest earning account in the joint names of the parties' advocates within 60 days as security for performance. The appellant herein did not comply with the order but filed this instant application which amounted to multiplicity of applications which was an abuse of court process. They urged the court to refer to the *Standard Chartered Bank Ltd v. Jenipher Atieno Odok [2015] eKLR* where the court held that it was not within the rights of parties to engage in multiplicity of suits since it obstructed the due process of law.

11. The appellant/applicant had introduced a new issue in this application when they pleaded that they could deposit a bank guarantee or insurance bond or security of Ksh. 7,468,988/= being the judgment decree which issue was never a subject of argument before the lower court. They referred to *Adetoun Oladeji (NIG LTD) v. Nigerian Breweries PLC S.C 91/2002* where it was held that parties were bound by their pleadings and that any evidence led by any of the parties which does not support the averment in the pleadings should be disregarded. Also in *Openda v. Ahn [1984] KLR 208* the court set out the principles applicable to objections to new points not raised at the lower court being canvassed on appeal and further that court cannot consider or deal with issues that were not canvassed or pleaded or raised in the lower court.

12. Further, the court in granting stay of execution has to look at the ordinary principle which was set in **Machira t/a Machira & Co. Advocates v. East Africa Standard (2002) eKLR** where the court must have its sight firmly fixed in upholding the **overriding objective** of the rules of procedure which is to do justice in accordance with the law and to prevent abuse of the process of the court. In this regard, they have already complied with the judgment which the applicant wants stayed yet they have not met the threshold in Order 42 Rule 6 (2) of the Civil Procedure Rules 2010.

13. Also the allegation that the decretal amount is substantial and if paid out will lead to substantial loss has not been proved as set out in section 107 (1) and (2) of the Evidence Act Cap 80 Laws of Kenya. There is no basis on which to assess the risk and loss since a mere allegation or fear of non-repayment does not constitute substantial loss for purposes of grant of an order of stay of execution. They have been dragged into a case which has inconvenienced them and it is an abuse of court process. There is need for security of costs to be provided in the event they are successful and the applicant is unable to pay costs. The court was referred to **Keary Development Ltd v. Tarmal Construction (1995) 3 ALL ER 534** which lays a basis to guide the court in exercising its discretion whether to order a Plaintiff Limited Company to provide security for costs. Reference was made to section 401 of the Companies Act which is a statute law governing the provision of security for costs where a limited company is a plaintiff. The court was of the view the same law should apply where a limited company is the appellant in an appeal and security for costs of the appeal is being sought against such company.

14. Finally, they urged that the appellant/applicants application should be dismissed and the appeal do proceed to hearing.

### **Determination**

15. The appellant/applicant moved the court seeking for order of stay of execution of the judgment order dated 3/11/15 in Eldama Ravine SPMCC No. 22 of 2013 vide a Notice of Motion. The Civil Procedure Rules in Order 42 Rule 6 (2) sets out the conditions for grant of an order for stay of execution as follows:

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 and that 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.
- c. Notwithstanding anything contained in sub-rule (2) the court shall have power without formal application made to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

16. In regard to the above, the appellants have urged that the subsequent decree sum in question Ksh. 7,468,988/= is huge that the respondents may be unable to recover. They referred the court to the case in **Channan Agricultural Contractors (supra)**. In this case the burden was on the respondent to show that they could pay. However, in this instant application, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have shown that they have honored their part of 20%. The appellant only stated that payment of the amount in question would be detrimental in the event the appeal succeeds and the respondents are unable to pay the decretal amount. This court is guided by the case in **Kenya Shell Limited v. Benjamin Karuga Kibiru & Anor [1986] eKLR** where the court held as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo *should remain as it were before judgment*. *What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay*”.

17. The appellant in his supporting affidavit has not given any kind of evidence to enable the court exercise its discretion to grant the stay. The court agrees with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent’s argument that a litigant is entitled to fruits of his judgment and the court has to uphold its overriding objective which is to do justice in accordance with the law and to prevent abuse of the process of the court as in **Machira t/a Machira & Co. Advocates (supra)**.

18. The policy of the court is to exercise its discretion to ensure that justice is served. The Court of Appeal in **Butt v. Rent Restriction Tribunal Civil Appeal No. Nairobi 6 of 1979 (Madan, Miller and Porter JJA)** stated as follows:

- 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 principal 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.

19. The appellant has already filed an appeal and the onus is on them to prove that they shall suffer substantial loss unless the order is made or the application has been made without undue delay and such security for due performance of decree has been given by the applicant.

20. The appellant filed this application on **18/6/2016** after judgment had been delivered on 3/11/2015. In their submissions they indicated the application was filed in 12/1/16 which is not the case. This was 7 months after the delivery of judgment and was considerable delay.

21. In addition to this the appellant after delivery of judgment on 3/11/2015 moved the court by a Notice of Motion 12/1/2016 at the Senior Principal Magistrate Eldama Ravine. The appellant sought for stay of execution which order was granted on condition that they pay 50% of the decretal amount to the respondents within 45 days and to deposit a further 50% in an interest earning account in the joint names of the advocates within 60 days as security of performance. The appellant herein in his supporting affidavit for this instant application has not demonstrated any evidence to prove to this court compliance of the said order.

22. I would agree with the decision in *Standard Chartered Bank Ltd (supra)* where the court held that: “that it was not within the rights of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the court, such actions must be stopped to avoid unnecessary costs and waste of judicial time”.

23. In addition to the above, the court has to consider the kind of terms it may deem fit to ask the appellant to provide as security. In their submissions, Counsel urged that they are ready and willing to furnish security for the grant of stay by this court. This security is stated by them can be in form of an insurance bond, depositing the whole or part of the decretal award in a joint interest earning account in the names of both advocates and either depositing a bankers guarantee. The respondents opposed this argument. Indeed in the lower court as stated above the appellant was asked to deposit but never complied yet they ask this court to grant the same condition. Court orders are not given in vain they have to be complied with. See *Wildlife Lodges Ltd v. County Council of Narok and Another* [2005] 2 344 (HCK). The appellant is quite aware of the orders issued on 12/5/2016 but decided not to obey. See also *B v. A.G* [2004] KLR 431.

24. This court is also guided by section 1 A (3) of the Civil Procedure Act. Which the provides as follows:

“A party to civil proceedings or an advocate for such party is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the direction and orders of the court”.

In this instant case the appellant has not revealed to the court of any previous orders that had been issued.

25. In *Caltex Oil Limited v. Evanson Wanjihia Civil Application No. 190 of 2009* (unreported) the court stated as below:

**“Before we set out the terms of the conditional stay it is important to state that in our view, the powers of this Court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No.6 of 2009). The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”**

26. In *Nairobi Civil Appeal No. 6 of 2010 Hunker Trading Company Ltd v. Elf Oil Kenya Ltd* [2010] eKLR under section 1 A (3) the applicant has a duty to obey all court processes and orders. The court had this to say;

**“As the applicant has admitted having failed to comply with the order of stay by (Koome, J.) We find that it is in breach of section 1A(3) of the Civil Procedure Act and also section 3A(3) of the Appellate Jurisdiction Act. We do not think that the fact that the order has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant’s application to this Court under section 3A is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under section 1A (3) the applicant has a duty to obey all court processes and orders. In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the (double “O” principle) and in this case, we have chosen to call it (“the O<sub>2</sub> or the oxygen principle”) because it is intended to re-energise the processes of the court’s and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this Court’s resources (time) and also an abuse of its process”.**

The appellant failed to obey the orders in the lower court and therefore, this court cannot grant stay order.

27. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents urged that the applicant had introduced a new issue by the prayer to deposit a bank guarantee or Insurance bond of Ksh. 7,468,988/=. In view of this finding of the court that the application is an abuse of the process, the court does not have to determine this issue.

## **Conclusion**

28. In conclusion, the court finds that there are orders which have not been complied with by the appellant in the lower court and the matter is governed by the authority of *Hunker Trading Company Ltd v. Elf Oil Kenya Ltd*, supra, and the court determines that the present application is an abuse of the process of the court and a violation of the overriding objective of the civil process under the Civil Procedure Act.

**Order**

29. Accordingly, for the reasons set out above, the appellant's application dated 13/6/2016 is dismissed with costs to the Respondents.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JULY 2018.**

**EDWARD MURIITHI**

**JUDGE**

**Appearances**

1. M/S Kinyanjui Njuguna & Co. Advocates for the Appellant/applicant
2. M/S Keboga & Co. Advocates for the 1<sup>st</sup> Respondent
3. M/S Arusei & Co. Advocates the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents