



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 244 OF 2002

JOSEPH NG'ANG'A NDUNGU.....PLAINTIFF/RESPONDENT

VERSUS

EVEREADY BATTERIES K)LIMITEDDEFENDANT/APPLICANT

RULING

1. This is an application for stay of execution brought under **Order 42 Rule 6** of the **Civil Procedure Rules and Section 3A of the Act** by the appellant, Joseph N. Ndungu.

Judgment was delivered on the 22nd September 2016 and decree drawn in an all inclusive sum of Kshs.5,132,947. On the 25th October 2016, the Decree holder took out warrants of attachment of the movable property of the judgment debtor in execution of the money decree.

2. Upon delivery of the judgment the appellant was dissatisfied with the same and filed a Notice of Appeal on the 7th October 2016. In the meantime, the Respondent was gearing to execute the decree and as stated above, had taken out warrants for execution.

On the 26th October 2016 this court granted a temporary relief to the appellant of stay of execution order pending hearing of the application interpartes.

3. The application by Notice of Motion is dated the 19th October 2016.

The applicant seeks an order to stay execution of the decree pending hearing and determination of the Appeal filed as **Nakuru Court of Appeal No. 38 of 2016**.

The applicant pleads that if a stay order is not granted the appeal will be rendered negatory and substantial loss will be suffered as the respondent will not be able to refund the sums paid should the appeal, said to have appreciable chances of success, succeed.

The Respondent opposes the application and has filed a Replying Affidavit in opposition.

4. **Order 42 Rule 6(2) of the Civil Procedure Rules** sets out the conditions to be satisfied by an applicant upon which an order of stay of execution may be granted. The conditions are guidelines which the court may use as beacons in exercise of its discretion in deciding whether or not to grant stay pending appeal. The court ought to weigh the pros and cons of granting the orders as well as the necessity of expeditious disposal of cases and the *prima facie* merits of the intended appeal whether it is arguable and its chances of success and whether there has been delay in bringing the application.

Order 42 rule 6 (2) states:

“No order of stay of execution shall be made under subrule (1) unless -

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay

(b) and 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.

5. There is no doubt that the application has been brought without undue delay, specifically within 28 days after delivery of the judgment.

6. On substantial loss, the applicant submits that the Respondent, if paid the decretal sum standing at Kshs. 5.13 Million will be unable to repay should the appeal be successful. The onus of proof as to whether or not the respondent would be unable to repay lays with the applicant. This allegation has not been established or demonstrated by the applicant. The respondent in his submissions states otherwise, that he has financial capacity to repay the decretal sum. The court has to consider the financial positions of the parties. I have seen the Respondents replying affidavit to the application. He avers that he has invested heavily in family business in horticultural farming in Ol'Kalou Sub County and in rental houses and refund of the said money would not be a challenge to him. There is no evidence of such income or investments demonstrated. As stated above, and in the cases of **Equity Bank Ltd -vs- Taiga Adams Company Ltd (2006) e KLR** and **KPLC -vs- Esther Wanjiku Wokabi (2014) e KLR**, the thread that runs through is that unless the applicant shows what substantial loss would be suffered, an order of stay of execution will be denied. **Justice Odunga in Misc. Civil Appl.No. 51 of 2013 R -vs- The Commissioner of Investigations & enforcement “Exparte” Wananchi Group Kenya Ltd (2014) e KLR** was of the opinion that the matter of substantial loss is so crucial and ought to come out clearly in the supporting affidavit rather than to be dealt within submissions. No averment by the applicant in its supporting affidavit mentions in what manner it would suffer should the orders be denied. A general averment that the appellants would suffer substantial loss is therefore not sufficient.

7. The applicant is also enjoined to provide security for the due performance of the decree. It has offered to provide and deposit bank guarantee in court as security.

In **Machira t/a Machira & Co. Advocates -vs- East Africa Standard (No 2) (2002) e KLR 63** the court held that:

“---the ordinary principle is that a successful party is entitled to the fruits of his judgment --- in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

The same sentiments were expressed by Justice Emukule in **Nairobi HCC 1259 of 2001** that:

“ it is the duty of the applicant to demonstrate in the affidavit in support that the respondent is a man of straw and it would be impossible to recover the decretal sum should the appeal succeed.”

8. It is not just and fair to deny a successful party the benefit of enjoyment of his judgment fruits because he is said to be poor. Financial ability of the judgment debtor can also not be solely the only reason for allowing a stay of execution especially when there is evidence that the decree holder may not be able to refund the same as is the case in this matter.

9. This is a matter of conflicting interests. The court must endeavour to balance both interests in the best possible way by not depriving the decree holder enjoyment of his judgment while at the same time protecting the judgment debtors interests should the appeal be successful.

10. Following therefore, I have taken into account and considered both interests as evidenced on record. I have also considered whether or not the appeal as filed has exhibited *prima facie* chances of success or it is purely frivolous.

In **Kenya Power & lighting Co. Ltd – Esther Wanjiku Wokabi(2014) e KLR** the issue was discussed and the court made observations that an arguable appeal is not necessarily one that may succeed but one that has triable issues. Being a discretionary power whether to grant or not an order of stay of execution, the discretion must be exercised in such a way that it will not prevent an appeal or render it negatory should it be successful.

See **Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) e KLR.**

11. In deciding whether or not to grant the order of stay, I have considered all the matters I have discussed above and the need for expeditious disposal of the case, the *prima facie* merits of the appeal not whether it will succeed, but whether it is an arguable one and whether it was brought on time together with the prejudice the respondent may suffer if the order is granted. I am also minded that the decree is a money decree that whichever way the appeal goes, it would be reimbursed by the respondent or paid by the applicant.

12. The sole and most important question to me, and not trivializing the others, is whether in the interest of justice the order of stay should be granted, and if so, on what terms.

Having rendered myself as above, and taking into account all circumstances of the case, I find it in the interest of justice to allow the application on the following terms and conditions:

- 1. That a sum of Kshs.3,000,000/= out of the decretal sum be paid to the Respondent within 30 days of the ruling.***
- 2. That the balance of Kshs.2,132,947 be deposited in an interest earning joint account of both counsels for the plaintiff and defendant in a reputable bank to be agreed upon by both counsel within 45 days of this ruling.***
- 3. That failure to comply with the above conditions 1 and 2 above, the order of stay of the execution shall lapse unless otherwise by a further order of the court.***
- 4. There shall be no orders as to costs on this application.***

Dated, signed and delivered this 19th day of January 2017

J.N. MULWA

JUDGE