



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 240 OF 2011

ANN NYAMBURA MUGWIMA (Suing as personal representative of

ZABLON MUGIMA MUTONGA (Deceased).....PLAINTIFF/RESPONDENT

VERSUS

1. GILBERT MUTUA MUTINDA.....1ST DEFENDANT/APPLICANT

2. DPL FESTIVE LTD.....2ND DEFENDANT/APPLICANT

RULING

1. The defendants have filed a notice of motion dated 23rd July, 2015 seeking stay of execution in this suit pending the hearing and determination of the appeal. The said motion is supported by the grounds listed on the body of the motion and the supporting affidavit of Nzuki Maithya who is the commercial manager of the 2nd defendant.

2. The reasons advanced in support of the motion are that the defendants have filed an appeal. That the said appeal has chances of success and it is necessary to grant the orders because if execution is levied, the said appeal shall be rendered nugatory and or an exercise in futility. It was further alleged that the plaintiff's income is not sufficient to repay the huge decretal sum should she be paid the same.

3. The plaintiff filed a replying affidavit on 21st August, 2016 opposing this motion. She contended that the judgment sought to be appealed against was not unreasonable and/or excessive; that the defendants have not given reasons as to why they wish to appeal against the said judgment; that it is evidently clear that the defendants are just trying to deny the plaintiff the fruits of her judgment. It was further contended that the supporting affidavit contains mere assertions without giving any reasons for the appeal and therefore the entire application lacks merit. That in the event this court is inclined to grant the orders sought, the defendants be ordered to deposit the decretal sum of KShs. 1,881,656.40 in an interest earning account.

4. The application was dispensed with by way of written submissions. In their submissions the defendants stated that they have a good and arguable appeal with high chances of success and it is only fair and in the interest of justice that this application be allowed. It was submitted that the decretal amount is in excess of KShs. 2,000,000/= and the plaintiff being a civil servant did not show how much she earns to prove that if she is paid the decretal sum and the appeal succeeds, she can pay back the money. On this aspect they cited, **Nairobi Civil Application No. 238 of 2005. National Industries Credit Bank Limited v. Aquinas Francis Wacike & another.**

5. The plaintiff on the other hand argues that the defendants have not met the threshold to satisfy this

court to grant the orders of stay of execution. It was stated that since this application was brought to court, the defendants have been promising to settle the matter out of court in which case the matter was adjourned severally and nothing came out of it. That the defendants have only so far attached a notice of appeal and no appeal has been filed. That it is clear the application is mischievous, frivolous and an abuse of the court process. Secondly, it was submitted that the defendants have not offered any security for the due performance of the decree as required by order 42 rule 6. To support that argument the plaintiff cited **Jane WatiriThuo v. NasirMohammed [2014] eKLR** and **Esther Wanjiru v. JacklineArege [2014] eKLR**.

6. The substantive law on stay of execution pending appeal is provided for under Order 42 rule 6(2) of the Civil Procedure Rules. An applicant ought to establish that substantial loss may result to him/her unless the order is made; that the application has been made without unreasonable delay; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her has been given by the applicant.

7. In circumstances where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent has to be weighed. The court must balance the interest of the applicant who is seeking to preserve the stay pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.

8. It is not sufficient for an applicant to merely state that the decretal sum is substantial and the applicant would suffer loss if the money is paid. The applicant must show the damages it would suffer if the order for stay is not granted since by granting stay the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin KarugaKibiru and Another [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.**

9. Where there is an allegation that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

10. However, the law appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul GachangaNdarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

11. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is contended that the respondent in his evidence before the trial court stated that he is a person of meagre means. That if true, would in my considered view amount to a reasonable ground for believing that the respondent is unlikely to refund the decretal sum if the appeal succeeds. It is, however, upon the applicant to lay a basis for this belief. In this case, it was contended that the plaintiff testified that she is a civil servant but did not show how much she earns to prove that if she is paid the decretal sum and the appeal succeeds she can pay back. It is worth noting that the respondent did not rebut this aspect of the applicant's argument. This court further takes note of the principle that where it is alleged that the respondent is unable to repay the decretal sum, the burden shifts on that respondent to prove otherwise. That can be done by filing an

affidavit of means which the respondent therein failed to do. See the case of **National Industrial Credit Bank Limited v. Aquinus Francis Wasike Civil Appeal No. 238 of 2005** where the appellate court stated as follows:

“this court has said before and it would bear repeating that while legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back, the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is the matter which is peculiarly within his knowledge.”

12. The applicant has due to the foregoing, coupled with the applicant’s willingness to deposit the decretal sum and the fact that the application was filed within reasonable time satisfied the conditions for granting stay of execution.

I will therefore allow the application dated 23rd July, 2015 on condition that half of the decretal sum is deposited in a joint account to be opened in the names of both lawyers for the parties therein. The money to be so deposited within 45 days from the date of this ruling failing which the stay of execution granted herein shall automatically lapse.

Costs of the application to abide the out of the appeal.

Dated, Signed and Delivered at Nairobi this 9th Day of February, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff/Respondent

..... for the 1st Defendant/ Applicant

..... for the 2nd Defendant/Applicant