



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CIVIL MISC. APPLICATION NO.12 OF 2016
PEMBE FLOUR MILLS LTD.....APPLICANT
-VERSUS-
ALI OMAR SWALEH.....RESPONDENT
(Being an appeal from the judgement of the Chief Magistrate's Court
at Kajiado in Civil Case No. 13 of 2015 in a judgement
delivered on 5/8/2016)

RULING

This is an application for stay of execution of judgement and decree issued on 5/8/2016 pending the hearing and determination of an appeal to this court. The application is brought pursuant to Order 42 rule 6 of the Civil Procedure Rules, section 1A, 1B, 3A and 63E of the Civil Procedure Act.

The applicant contends that he is dissatisfied with the entire judgement of the trial court delivered on 5/8/2016. The applicant further deposes that the appeal has high chances of success and if the order of stay is not granted he stands to suffer substantial loss. The application is supported by the affidavit of one Lucy Muriithi the Deputy Legal Manager with ICEA LION General Insurance Co. Limited. She deposes that the applicants are not satisfied with the award made in CMCC No. 13 of 2015. That the intended appeal has high chances of success as averred in the affidavit. According Ms Lucy Muriithi there is fear that if the decretal amount is paid out to the respondent he could fail to make good in the event the appeal succeeds. The applicant annexed the memorandum of appeal claiming various grounds upon which the appeal would be presented at the hearing.

The respondent filed a replying affidavit filed in court on 13/9/2016 opposing the application. The respondent further deposed that he has not executed the judgement nor the decree. The respondent further deposed that he should not be denied to access the fruits of judgement awarded on merits at the hearing. It is the respondent's contention that in the event the appeal succeeds he will be in a position to repay the decretal amount though no supporting documents of proof were annexed as to the financial status. In a nutshell the respondent deposed that if the applicant is granted stay of execution, the court should consider release of a half of the decretal amount and the balance to be deposited in the interest earning account of both advocates.

Mr. Njuguna counsel for the applicant submitted and made several observations:

a. That the applicant stands to suffer substantial loss if stay is not granted.

In this regard counsel relied on the case of *S.S. Mehta & Sons Ltd v Stephen Ndung'u Mwaura & Ano.* [2007] eKLR

b. That the applicant has made an undertaking to furnish the court with adequate security for the performance of the decree.

c. That the applicant has made the application without undue delay.

Mr. Momanyi counsel for the respondent in reply submitted that the applicant has not satisfied the criteria under Order 42 rule 6 of the Civil Procedure Rules. Learned counsel relied on the following authorities; ***City Hopper Limited v Thomas Jeremiah Kivuva Machakos HCCA No. 216 of 2008, Kiwanjani Hardware Ltd v Daniel Ndaka Sebastian S.N. Ndaka Machakos HCCA No. 187 and 188 of 2006.***

I have considered the submissions by both counsels and the application itself together with the grounds and affidavit in support. In deciding this application I am alive to the legal principle that granting or refusing stay of execution is in the reaction of unfettered discretion of the court. In exercising the discretion it is imperative for the court to take into account the applicable law, relevant factors as outlined under Order 42 rule 6 on timelines, substantial loss and condition on security. The court should not lose sight that the judgement being appealed from came as a result of a full trial and an award of quantum made in favour of the respondent.

The onus therefore lies on the applicant to show that the conditions under Order 42 rule 6 do exist to justify grant of stay. What is the applicant looking for before this court as earlier elucidated in this application in my view understanding Order 42 of the Civil Procedure Rules deals with appeals and stay of execution to the High Court.

The term 'stay of execution' has been widely considered under case law and legal texts. In ***Hullsbury 4th Edition Vol. 17*** the phrase execution is defined as:

“The word execution or its widest sense signifies the enforcement of or giving effect to the judgement or orders of courts of justice. In a normal sense, it means that the enforcement of those judgement or orders by a public officer under the writ of fierifacias, possession, delivery, sequestration.”

Lord Denning Mr. in ***Re-Overseas Aviations Engineering G.B. Ltd [1963] ICU 24 at pg 39*** held:

“Execution means quite simply the process for enforcing or giving effect to the judgement of the court and it is completed when the judgement creditor gets the money or other thing awarded to him by the judgement.”

From the record it is manifest that the respondent has a judgement with an order for a liquidated amount as demonstrated in the extracted money decree. The respondent is therefore entitled to the fruits of his judgement in terms of payment of money by the applicant. The applicant therefore boils to me key ground whether the application if successful would be able to recover the decretal amount from the respondents if the court refuses to grant stay of execution.

From the facts and circumstances of this matter I am of the view that the applicant has satisfied the prayer under Order 42 rule 6 on substantial loss. The fear entertained by the applicant does not appear to be imaginary.

I come to the conclusion that this application has merit and hereby allowed under the following terms:

1. That there be stay of execution pending the interpartes hearing of the appeal or further orders from this court.

2. That in the interim, the applicant do deposit the decretal amount in the interest earning account of both counsels to this appeal in a bank of their choice within 30 days from today's date.
3. That the record of appeal and memorandum be served upon the respondent within 30 days from today's date.
4. That the deposit slip of the decretal amount – a copy thereof be filed in the court file.
5. That the appeal be set down for hearing on priority basis.
6. That costs of this application to abide the outcome of the appeal

Dated, delivered and signed in open court at Kajiado this 2^{3rd} day of March, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Momanyi for applicant present

Mr. Mwaura for the respondent present

Mr. Mateli Court Assistant