



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 36 OF 2017

MARTIN MAINA T/A MAINA & MAINA ADVOCATES.....APPELLANT

V E R S U S

PATRICK NGUNJIRI MAINA T/A MURIKI NGUNJIRI ADVOCATES.....RESPONDENT

RULING

1. Martin Maina T/A Maina and Maina advocates, the appellant herein, took out the motion dated 22nd February 2017 in which he sought for *inter alia* an order for stay of execution of the order arising from the ruling of Hon. D. W. Mburu, delivered on 27th January 2017 pending appeal. The motion is supported by the affidavit of Maureen Maitai sworn on 22nd February 2017.
2. When served with the motion Patrick Ngunjiri Maina T/a Muriuki Ngunjiri Advocates filed a replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels made oral submissions.
3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival oral submissions. The appellant argued that the ruling delivered on 27.1.2017 had the draconian effect of striking out the appellant's defence and consequently entering judgment in favour of the respondent.
4. The appellant also argued that his appeal against the decision has high chances of success and may be rendered useless if the respondent is allowed to execute the decree. The appellant stated that he is willing to abide by any terms given by this court. In his oral submissions the appellant submitted through his advocates that he is not averse if he is allowed to deposit a 1/3 of the decretal sum.
5. The respondent opposed the appellant's application arguing that the appellant has not shown the substantial loss he would suffer if the order for stay is denied. The respondent further argued that if this court is inclined to grant the order for stay of execution then the appellant should be ordered to deposit the entire decretal sum in an interest earning account in the joint names of learned advocates or firms of advocates.
6. What provoked the filing of this appeal and the motion herein, is the ruling delivered by Hon. D. W. Mburu on 27.1.2017, where the Hon. Principal Magistrate struck out the appellant's defence and subsequently entered judgment against the appellant in the sum of ksh.3,900,000/= plus interest and costs. Being aggrieved by the decision, the appellant preferred this appeal. The appellant is now seeking for an order for stay of execution of the decree pending appeal.
7. The principles to be considered in an application for stay of execution pending appeal are largely

settled. First, an applicant must show the substantial loss he would suffer if the order for stay of execution is denied.

8. Secondly, an applicant must show that he filed the motion for stay without unreasonable delay. Thirdly, that the court should consider the provision of security for the due performance of the decree.

9. On the question as to whether the applicant has shown the substantial loss he would suffer if the order for stay is denied, the appellant/applicant has argued that the substantial loss will be evidenced by the fact that if the principal sum is subjected to interest, the outstanding amount will shoot upto more than ksh.5,000,000/= which is a huge amount for the appellant to pay. I find the argument put forward by the appellant/applicant does not establish substantial loss the appellant would suffer. In money decrees like in this case substantial loss arises where it is alleged that the respondent may not be in a position to refund the decretal sum should the appeal succeed. In this case there is no averment that the respondent is unable to repay if paid the judgment sum. With respect, I agree with the respondent that the mere financial burden occasioned by the judgment does not constitute substantial loss for purposes of grant of an order for stay of execution.

10. The second principle to be considered is the question as to whether the application was filed without unreasonable delay.

There is no doubt that the motion was timeously filed.

11. The third principle is the provision for security for the due performance of the decree. In my humble view this principle is dependent on whether or not the applicant has shown the substantial loss which, in this case, the appellant has miserably failed to establish. I will therefore not consider the principle because I have formed the opinion that an order for stay should not be given.

12. In the end, I find no merit in the motion dated 22nd February 2017. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent