



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL SUIT NO.246 OF 2009**

**GEORGE ONSONGO MAGETO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA COMMERCIAL BANK.....DEFENDANT/APPLICANT**

**RULING**

**Introduction:**

1. In a judgment delivered on 16<sup>th</sup> January 2015, this court (*differently constituted*) entered Judgment in favour of the Plaintiff/Respondent for the sum of Kshs.5,000,000/= as damages for defamation and loss of business together with costs and interests.

2. The Defendant/Applicant, being dissatisfied and aggrieved by the said judgment has now moved this Court through a Notice of Motion application dated 22<sup>nd</sup> May 2015 brought under **Section 1A, 1B & 3B, 99 & 80** of the **Civil Procedure Act, Orders 42 and 51 Rule 1** of the **Civil Procedure Rules** and **Article 159** of the **Constitution of Kenya**, in which it seeks orders as follows:

**1) Spent.**

**2) Spent.**

**3) THAT the Honourable Court be pleased to grant orders of stay of execution of the Judgment and orders issued by Honourable Ruth N. Sitati issued/dated 16<sup>th</sup> day of January 2015 and all consequential orders, pending the hearing and determination of the appeal filed by the applicants.**

**4) THAT costs of and occasioned by this application be provided for.**

**5) THAT such further and/or other orders be made as may be expedient.**

3. The application is supported by the grounds on the body of the application which were stated as follows:

**a) THAT judgment was delivered on 16<sup>th</sup> day of January 2015**

**b) THAT the Applicant herein was aggrieved and the same lodged Notice of Appeal on the 28<sup>th</sup> day of January 2015 against the entire of the said decision dated 16<sup>th</sup> day of January 2015.**

**c) THAT the appellant has already preferred an Appeal which raises serious arguable grounds and the same ought to be afforded an opportunity to ventilated the Appeal.**

**d) THAT besides, the Appeal herein shall be rendered nugatory if the stay herein sought is rejected and the impugned orders executed.**

**e) THAT there is peculiar and special circumstances obtaining which warrants certifying the instant application as urgent and hearing the same on priority basis.**

**f) THAT the respondent has already instructed Omwoyo & Auctioneers to take out warrants of attachment.**

**g) THAT the respondent is ready and willing to comply with any order as security as this Honourable Court may order.**

**h) THAT it is in the interests of justice that the application herein be certified as urgent and be entertained on priority basis.**

**i) THAT this is a fit and proper application to be allowed.**

4. The said application is further supported by the affidavit of sworn by **BILLY MOMANYI** on 22<sup>nd</sup> May 2015 in which he has repeated and expounded on the grounds stated on the body of the application to the effect that the applicant was aggrieved by the judgment delivered on 16<sup>th</sup> January 2015 and had lodged a Notice of Appeal against the said judgment.

5. The deponent reiterated that he had already preferred an appeal against the judgment which appeal raises serious arguable grounds and may be rendered nugatory if the stay sought is not granted and the impugned orders executed.

6. The deponent lamented that the respondent had already engaged auctioneers to commence execution process and thus it is necessary to stay the execution pending the outcome of the appeal.

7. The applicant reiterated that it would suffer irreparable loss if the application is not allowed while the respondent would not suffer any loss since he never pleaded for the award that court made to him. The applicant added that the application had been filed timeously and that it was ready and willing to comply with any conditions that the court may set as a condition for the stay.

#### **Respondent's Case:**

8. The respondent filed a replying affidavit dated 1<sup>st</sup> July 2015 in opposition to the applicant's application in which he stated that the applicant had not placed any material before the court to warrant the issuance of the orders of stay of execution sought.

9. The respondent stated that the applicant had not demonstrated that it stood to suffer substantial loss or at all if the orders sought are not granted and neither had it shown that it would not be able to recover the decretal sum from the respondent in the event that the appeal succeeds. The respondent further deponed that he was not a man of straw, but had sufficient resources from which he could refund the decretal sum in the event that the applicant's appeal succeeds.

10. The respondent went further to disclose his financial standing through his bank account and real properties whose value he stated, far outweighs the awarded decretal sum and from which the applicant could recover the decretal sum should its appeal be successful.

11. The respondent deponed that he was therefore entitled to the fruits of his judgment the applicant's appeal notwithstanding and that execution of the decree was his legal right and indeed a legal requirement for which he could not be faulted for pursuing.

12. The respondent reiterated that the mere existence of an appeal before the court of appeal does not guarantee the applicant an automatic stay of execution, but the applicant needed to satisfy the mandatory conditions for the grant of orders of stay of execution.

13. The respondent sought the dismissal of the application with costs. When the application came up for hearing on 3<sup>rd</sup> July 2015, parties agreed to canvass the said application by way of written submissions.

#### **Applicant's Submissions:**

14. In its written submissions dated 21<sup>st</sup> September 2015 and filed on 22<sup>nd</sup> September 2015, the applicant sought to rely on the grounds stated on the body of the application and the supporting affidavit of BILLY MOMANYI. The applicant submitted that the basis of the application is that it had preferred an appeal against the decision of the court which appeal would be rendered nugatory if stay of execution is not allowed. The applicant cited the principle guidelines for granting of orders of stay of execution as spelt out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

15. The applicant argued that the appeal would be rendered nugatory as the respondent cannot repay back the decretal sum in case the same is released to him. The applicant discounted the respondent's claim that he owns several properties worth millions as a fallacy since it had been held by the courts time and time again that in as much as the respondent has properties, the same may depreciate in value or it may be difficult to sell after the appeal is heard and determined. Furthermore the respondent had not given evidence to prove the value of the properties. The applicant relied on the cases of **Gladwell Wangechi Kibiru t/a Santa Libera –vs- Lady Kathleen Black burn [2013] eKLR.**

16. The applicant further argued that the right to appeal is a constitutional right and anything that renders appeal nugatory impinges on the very right of appeal and therefore the court needs to intervene to safeguard this right.

17. On the aspect of security, as may be ordered by the court, the applicant submitted that it is a banking institution and was able to deposit the entire decretal sum together with costs as security for costs. The applicant added that it was willing to abide by the court's orders as may be directed in regard to security for the due performance of the decree.

#### **Respondent's Submissions:**

18. The respondent began his written submissions filed on 20<sup>th</sup> July 2015 by attacking the numerous sections, quoted by the applicant, under which the application had been brought and stated that some at those sections were not applicable in the instant application.

19. **Secondly**, the respondent submitted that the applicant had not satisfied all the conditions for the grant of orders of stay of execution namely:-

**1) The applicant must satisfy the court that substantial loss may result to the applicant unless the order is granted.**

**2) The application has been brought without unreasonable delay; and finally**

**3) The applicant is ready to provide such security as the court orders for the performance of the decree.**

20. The respondent's case was that the first and the most important condition of proving that substantial loss may result of the orders of stay sought has not been granted had not been discharged by the applicant. Without proof of the substantial loss the respondent contended that he should not be kept out of his money decree.

21. The respondent relied on the case of **ABN AMRO BANK –VS- LE MONDE FOODS LTD**

NAI.CIVIL APPL. NO.15 OF 2002 in which it was held that:

**“the burden is on the applicant to show that the appeal shall be rendered nugatory say by swearing upon reasonable grounds that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. The legal burden is still on the applicant, but the evidential burden would then shift to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. This is by showing what assets he has such as land, cash in bank and so on.”**

22. The respondent concluded his submissions by stating that he had discharged the evidential burden by showing the 4 parcels of land that he owned, one being plot on which a construction billed to be worth over 17 million was on-going as proof that he would be capable of meeting his financial obligations in the event the appeal succeeds. The respondent sought the dismissal of the appeal with costs.

**Analysis and Determination:**

23. The relevant law relating to applications for stay of execution pending appeal can be found in the **Civil Procedure Rules Order 42 Rule 6(1) and (2)** which provides as follows:

***“6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

**(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.”***

24. In the instant case, it is not disputed that the application was filed within reasonable time and the applicant is ready able and willing to furnish such security as the court may orders for the due performance of the decree or the order as may ultimately be binding on him.

25. The main bone of contention in this instant application is the issue of the substantial loss that may result to the applicant if the stay of execution order is not granted. The applicant merely stated, in his application, that the appeal may be rendered nugatory if the stay sought is not granted without specifying the reasons for such a stand.

26. I find that the applicant did not set the stage by coming out clearly to swear on the reasonable grounds that would convince the court that the respondent will not be in a financial position to refund the decretal sum if it was paid to him and the pending appeal succeeds. Despite the fact that the applicant did not discharge his legal burden of proving the substantial loss it stood to suffer, the respondent went ahead to provide evidence of his financial standing, by not only disclosing a bank account he held with the applicant, but also the various pieces of land that he owned as proof that he would be in a position to refund the decretal sum in the event the applicant’s appeal succeeds.

27. The applicant merely attempted to counter and belatedly pour cold water on the respondent’s disclosure of assets in the written submissions and I find that turn of events to be coming a little too late

as the ideal place/time that the applicant ought to have raised the issues of the respondent's financial worth or lack thereof was in its sworn affidavit in support of the application.

28. Similarly, I find that it was not enough for the applicant to merely allege that its appeal would be rendered nugatory if the stay sought was not granted without even bothering to attach a copy of the said appeal to the application in order to give this court the opportunity to peruse the grounds thereof, not with a view to determining or pre-empting the outcome of the same, but with a view to establishing if the same raises triable issues with high chances of success.

29. Furthermore, the applicant did not expound in its affidavit in support of the application, how the enforcement of the court's decree would occasion it substantial loss. In this regard, I refer to the Court of Appeal's findings in Civil Appeal No.186 of 2007 in the case of Standard Assurance Co. Ltd -vs- Alfred Mumea Komu when it stated as follows:

**“Substantial loss, in its various forms is the cornerstone of best jurisdiction for granting a stay. That is what has to be presented. Therefore without this evidence, it is difficult to see why the respondent's should be kept out of their money.”**

30. In the case of Machira t/a Machira & Co. Advocates -vs- East African Standard (No.2) [2002 KLR 63 it was held inter alia that:

**“The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage.”**

31. In this instant case, even though the applicant has failed to show what substantial loss it stands to suffer should the decree be executed among other failures, I find that the applicant's saving grace is its admission that it will be ready, able and willing to comply with any conditions that the court may set as a condition for the stay including the depositing of the entire decretal sum together with costs as security for costs.

32. This court finds that gesture by the applicant to be quite commendable and is a demonstration of good faith on the part of the applicant and a guarantee to the respondent that in the fullness of time, if the applicant's intended appeal failed, he would be able to recover his entire decretal sum together with costs.

33. On another score, this court does not know the value of the property exhibited by the respondent as a demonstration that he would be able to refund the decretal sum if the applicant's appeal succeeded. Faced with a similar situation in the case of Standard Bank Ltd -vs- G. N. Kagia t/a Kagia & Co. Advocates, Civil Application No.193 of 2003 (unreported) the Court of Appeal stated:

**“So the amount that the Respondent is ultimately entitled to is not settled and will only be ascertained after the determination of the appeal. Although the Respondent has several pieces of land, they may depreciate in value or may be disposed of or it may be difficult to sell them by the time the appeal is determined. If the applicant's appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”**

34. Under the above circumstances, this court is faced with the delicate and daunting task of balancing the interests of both the applicant and the respondent pending the outcome of the appeal. As was observed in the case of M/S Portreitz Maternity -vs- James Karanga Kabia Civil Appeal No.63 of 1007:

**“The right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”**

35. In the end, the order that commends itself to me is as follows:-

**1) That there shall be a stay of execution of the judgment and orders issued by the Honourable Ruth N. Sitati on 16<sup>th</sup> January 2015 and all consequential orders pending the hearing and determination of the appeal filed by the applicant, but on condition that;**

**(a) The applicant deposits the full decretal sum together with costs in a joint interest earning account to be held by the advocate for the applicant and respondent within 30 days from the date of this order.**

**(b) That in the event of failure to comply with the order contained in 1(a) hereinabove, the stay order shall stand vacated and the respondent shall be at liberty to proceed with the execution of the decree.**

**2. The costs of the Notice of Motion dated 22<sup>nd</sup> May 2015 shall abide the outcome of the appeal.**

**Dated, signed and delivered in open court this 3<sup>rd</sup> day of February, 2016**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Miss. Sagwa holding brief for Ochoki for the Applicant
- Mr. Bigogo holding brief for Gisemba for the Respondent
- Omwoyo: court clerk