



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 541 OF 2012**

**PATMOSE TECHNICAL SERVICES (K) LIMITED.....PLAINTIFF**

**VERSUS**

**RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT**

**RULING**

1. The application before me is for stay of execution of the decree arising from the judgement which my learned brother, Ogola J. delivered on 18<sup>th</sup> November 2014.
2. It is the prayer of the defendant that there should be a stay of execution until the hearing and determination of its intended appeal to the Court of Appeal.
3. On 27<sup>th</sup> November 2014 the defendant filed a Notice of Appeal, indicating its desire to challenge the whole decision of the court.
4. According to the defendant, the appeal was not only arguable but also had a likelihood of success.
5. The defendant asserted that if execution was not stayed, it would suffer substantial loss. On the other hand, the defendant believes that a stay of execution could not cause the plaintiff to suffer any prejudice or damage for which the plaintiff could not be compensated by way of costs.
6. When the application first came before me, it was under a Certificate of Urgency.
7. Considering that a Court Broker had already commenced the process of execution, by issuing a Proclamation of Attachment, the court certified the application as urgent, and heard it *ex-parte*, in the first instance.
8. On that date, the court granted an interim stay of execution until the application was canvassed *inter-partes*.
9. It was the opinion of the court, even at that *ex-parte* stage, that the defendant needed to put down a security, as a pre-condition for the stay of execution. Therefore, the court directed the defendant to provide a security, in the form of a cash deposit of Kshs. 5,000,000/-.
10. When responding to the application, the plaintiff submitted that the defendant did not have a genuine desire to appeal to the Court of Appeal. As far as the plaintiff was concerned, the defendant would have

been more diligent if it was really keen to appeal. Instead, the defendant was alleged to have failed to provide evidence that it did pay at the Court Registry, the requisite Deposit which would facilitate the typing of the Record of the proceedings.

11. The defendant was also said to have failed to provide evidence to show that they had been writing to the Court, to remind the court that the defendant was still waiting for the typed Record of the proceedings.

12. But Mr. Kipkorir, the learned advocate for the defendant, submitted that Order 42 of the Civil Procedure Rules did not make it mandatory for an applicant, who was seeking stay of execution pending an appeal, to demonstrate that he had actually lodged a Memorandum of Appeal.

13. It is true that the applicant did not have to prove that he had lodged a Memorandum of Appeal. But it could be useful, where an appeal had been filed, to have the applicant demonstrate to the court how keen he was in pursuing the appeal.

14. In this case, I have come to the conclusion that if execution was not stayed, the intended appeal may well be rendered nugatory. I so hold because the respondent has shown that it was eager to reap the fruits of the judgement.

15. However, the order for stay of execution cannot be unconditional, in this case.

16. The applicant cited the authority of **GITAHU & ANOTHER Vs WARUGONGO [1985] KRL 621**, in which the court held that when ordering the applicant to provide security, the court ought to make sure, in an even-handed manner, that the appeal would not be prejudiced and also that the decretal amount would be available if required.

17. In the case of **FIROZE NURALI HIRJI Vs HOUSING FINANCE COMPANY of KENYA LIMITED, Hccc No. 226 of 2003** the judgement was for a sum of Kshs. 20,434,226.54 with interest at the rate of 26% per annum. Odunga J. granted an order staying execution, but he told the applicant to secure an Unconditional Bank Guarantee for Kshs. 30,000,000/-.

18. Meanwhile, the Court of Appeal ordered the applicant to furnish security for Kshs. 25,000,000/- in a case in which the sum which the Industrial Court had awarded was Kshs. 116,792,500/-. That was in the case of **KENYA KAZI SECURITY SERVICES LIMITED Vs KENYA NATIONAL BANK PRIVATE SECURITY WORKERS UNION, CIVIL APPLICATION No. 108 of 2013**.

19. Thus from the authorities cited by the applicant, it can be seen that there is no general policy as concerns the quantum of the security. In some instances, the security was less than the decretal amount, whilst in others, the quantum of the security appeared to take into account the principal sum plus interest.

20. In this case, the applicant had, on 30<sup>th</sup> June 2015, indicated a readiness to deposit the full decretal sum as security.

21. Even in the application itself, the applicant said that it was ready to offer a cash deposit, which would then be held in a joint interest-earning account, or in the alternative, they were ready to provide a Bank Guarantee.

22. In the circumstances, the applicant's advocate cannot be heard to now offer only a small fraction of the decretal amount as security. That would, if permitted, defeat the cause of justice.

23. In the result I now order that until the appeal was heard and determined, there shall be a stay of execution. However, the applicant shall be required to raise Kshs. 50,000,000/- within the next 30 days, so that the said sum is held in a joint interest – earning account in the names of the advocates representing the parties herein.

24. If the applicant will not have raised the said amount, and if the joint account will not have been

opened within the 30 days, execution may proceed.

25. However, each party is granted leave to apply, if necessary.

26. Finally, the costs of the application shall be borne by the applicant.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of February 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Mabera for Gacuna for the Plaintiff

Miss Ngunjiri for Kipkorir for the Defendant

Collins Odhiambo – Court clerk.