

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 406 OF 2015

NAILS & STEEL PRODUCTS LIMITED.....APPLICANT

VERSUS

JAMES MACHARIA TUAMU.....RESPONDENT

RULING

[1] Before this court is a notice of motion dated 23rd June, 2006. The motion is brought under Order 42 rule 6(6), Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B, and 3A of the Civil Procedure Act. The Applicant seeks stay of execution of judgment delivered in Nairobi CMCC No. 4976 of 2012 on 6th August, 2015 pending hearing and determination of this appeal.

[2] It is the Applicant's case that subsequent to the delivery of the said judgment, an oral application seeking stay was made and 30 days stay was also granted. A formal application for stay of execution was later made but the application was dismissed on 13th June, 2016. That since the orders of stay lapsed, the Applicant is likely to suffer substantial loss as the Respondent will not have the financial ability to refund the decretal amount. The Applicant also expressed willingness to deposit the decretal sum.

[3] The Respondent filed a replying affidavit in opposition to the motion. He contended that stay of execution would further delay execution of judgment yet the matter was fully heard and determined. That the Applicant had not raised any triable and justiciable issues and that this motion is merely a time wasting technique. The Respondent further contended that the decretal sum will have lost value due to inflation. He further stated that the decretal sum of Kshs.256,000/= is inordinately low and urged the court to order for the payment for the undisputed amount. That in the event that the application is allowed, the decretal sum be deposited in a joint interest earning account of the Advocates of both parties herein or in court pending the hearing and determination of the appeal herein.

[4] Submissions in this application were made orally in court. I have considered the rival submissions.

[5] In an application for a stay of execution orders, the Applicant must satisfy the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 thus; the applicant is likely to suffer substantial loss; the application is made without unreasonable delay; and the Applicant provides such security for due performance of the decree as the Court orders.

[6] The Lower Court ruling that dismissed the application for stay of execution was delivered on 13th June, 2016 and this motion was filed on 23rd June, 2016. The application was made timeously. The hearing of the application for stay in the Lower Court is not a bar to the application at hand. Order 42 rule 6 (1) Civil Procedure Rules provides as follows:

“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, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

[7] On the issue of substantial loss, the Applicant is apprehensive that the Respondent will not be able to refund the decretal sum in the event that the appeal succeeds. When such an allegation is made the burden shifts to the Respondent to prove otherwise. The Respondent has said nothing about his financial status. There is nothing in the Respondent’s affidavit evidence to reassure the court that the Respondent is capable of refunding the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UIR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 a 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 a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

[8] As to security for the due performance of the decree, it is noteworthy that the Applicant has expressed willingness to deposit the decretal sum.

[9] To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in an interest earning account of the counsels of the parties herein or in court within 30 days from the date hereof. Costs in cause.

Dated, signed and delivered at Nairobi this 15th day of Sept, 2016

B THURANIRA JADEN

JUDGE