



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 448 OF 2016

ADDED PERFORMANCE KENYA LIMITED.....APPELLANT

- V E R S U S -

JOEL MUTHENGI MUTHUIRESPONDENT

RULING

1) The appellant /applicant, Added Performance Kenya Ltd, filed a motion application dated 12th July 2016 where it sought orders to wit:

1. THAT this application be certified as urgent and service thereof be dispensed with at the first instance.

2. THAT this honourable court be pleased to grant a stay of execution of the decree in Milimani CMCC No. 2100 of 2013 (Joel Muthengi Muthui –vs- Added Performance Kenya Limited) pending the hearing and determination of this application inter-partes.

2. THAT this honourable court be pleased to grant a stay of execution the decree in Milimani CMCC No. 2100 of 2013 (Joel Muthengi Muthui –vs- Added Performance Kenya limited) pending the hearing and determination of the appeal herein.

3. THAT costs of this application be provided for.

4. THAT this honourable court be pleased to grant any other and further orders it deems fit to grant.

2) The application was premised on the grounds that the respondent was awarded a sum of ksh.700,000/= together with costs of the suit. That if orders for stay of execution is not granted, it will suffer substantial loss and that the appeal will be rendered nugatory. That the 30 days' period granted by the trial court has now lapsed and the application has been brought timeously. It is willing to abide by any conditions and terms as to security as the court deems fit to impose.

3) In response to the application the respondent filed his replying affidavit where he deponed that the appellant has appealed against quantum and apportionment of liability yet it did not challenge the decision on liability in the lower court. He averred that he has suffered lead poisoning as a result of being exposed to lead chemicals by the appellant hence his need for the decretal sum for purposes of acquiring his medication. The respondent further deponed that he is a man of means as he has assets in his rural home and that his wife operates a family business in Kitui. He further stated that he has been paying for his own medication without any assistance.

4) When the matter came up for interpartes hearing on 26th September 2016, the applicant claimed that the replying affidavit fell short of responding to the motion. The respondent on the other hand stated that the applicant is not in a position to refund the decretal sum if the appeal is successful since he is a person of means. He averred that he should not be kept from the fruits of his judgment. He urged this court to have the applicant pay half the decretal sum and the other half to be deposited in a joint interest earning account.

5) I have considered the grounds set out on the face of the motion plus the facts deposed in the affidavits filed for and against the application.

6) The application has been brought under Order 42 Rule 6 of the Civil Procedure Rules. The provision provides for the principles to be considered in an application for stay. Firstly, there must be a threat of substantial loss on the part of the applicant if the orders for stay fail to issue. Secondly, the application must have been brought without delay and finally, the security for the due performance of the decree should be considered. On the first principle, the applicant is required to show that it will suffer substantial loss. The cornerstone of the jurisdiction of the court in determining whether or not to grant stay of execution pending appeal is the fact that substantial loss will occur upon the applicant unless stay is granted. The legal burden of proof in this motion lies with the applicant to show that the respondent will not be able to refund the decretal sum if it is paid over to him. In the present case the applicant merely claims that it will suffer substantial loss since it is not likely to recover the aforesaid amount if the appeal herein succeeds. The applicant has not demonstrated to this court how he will suffer substantial loss. It is not enough to claim that one will suffer substantial loss, one ought to demonstrate or explain the nature of the substantial loss he is likely to suffer. This was stressed in the case of Machira t/a Machira & Co. Advocate vs East African Standard (No. 2) (2002) KLR 63, where it was held as follows:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay...”

7) The applicant has failed to show how the payment of the decretal sum will cripple him or his business. Orders for stay of execution are not granted in the High Court on the merits of the appeal but rather on the substantial loss that will be occasioned by the satisfaction of the appeal. No such loss has been shown. Furthermore, the respondent has stated that he is a person of means hence in a position to refund the decretal sum should the appellant's appeal be successful.

8) On the second principle, it is apparent that the application was filed within a reasonable time.

9i) On the third principle, the applicant is required to offer security for the due performance of the decree. The applicant offered to deposit any security that the court deems fit. The respondent on his part proposed that half of the decretal sum be paid to him while the other half be deposited in a joint interest earning account. The cardinal point is that whether or not the applicant makes an offer for security, the court is enjoined by law to consider the issue before determining the application. The main consideration in this motion is whether or not the applicant has shown the substantial loss he would suffer if the order for stay is denied. He has failed to satisfy that requirement. Since the other principles are dependent on the first principle, the motion fails.

10) In the end, the motion is ordered dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent