REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 422 OF 2006

ANTOINE NDIAYE……………………….…………..............………………PLAINTIFF

V E R S U S

AFRICAN VIRTUAL UNIVERSITY ………………………………………….DEFENDANT

RULING

Stay of execution pending appeal

[1] The Motion dated 30th April, 2012 is seeking for stay of execution of the judgement of the Honourable Mabeya J pending appeal. The judgement was for a sum of US$ 144,800.57 plus interest with costs which were assessed by the Registrar in the sum of Kshs. 364,835. The application is supported by Affidavits of Bakary Diallo dated 30 April 2012 and 31 May, 2012.

The Applicant's gravamen

[2] The Applicant is challenging the decision of the court on the basis of the immunity accorded by virtue of the employment contract herein-on its interpretation thereof. It believes that it has good chances of success on appeal and is concerned that if its appeal is successful after it has paid the decretal sum to the Respondent, it will not be able to recover the money from the Respondent particularly because the Respondent resides outside of Kenya and his current means are unknown. The Applicant further states that the decretal amount is substantial and if paid out will lead to the stalling of many projects that the Applicant is involved in. The Applicant is a donor funded/project impacted by the diversion of funds from key projects. The Applicant holds funds it receives in a fiduciary capacity. Consequently, these funds cannot be used in any manner other than that which it is authorized by the donors as they are tied to specific projects which may be prejudiced if the Applicant is required to pay the entire decretal sum. The Applicant's Board has nonetheless consented to the allocation of the sum of US$ 20,000 towards security for stay of execution pending the hearing and determination of the appeal.

[3] The Applicant cited the relevant law, i.e. Order 42 Rule 6 of the Civil Procedure Rules which they submitted sets out three requirements for the grant of stay of execution. The first requirement is that substantial loss would occur unless stay is granted. The likelihood of the Applicant's projects being frustrated on account of diversion of funding is real and if the projects

stall, the reputation of the Applicant with potential donors will be greatly prejudiced. They relied on the case of ***Butt vs. Rent Restriction Tribunal civil Application No. NAI 6 of 1979*** ; ***New Stanley Hotel Limited vs. Arcade Tobacconists Limited Civil Case No.2260 of 1982*** ; ***Linotype – Hell Limited Vs. Baker (1992)4 ALL ER 887; Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005.***

The High Court of Uganda at Kampala in the latter case restated that

> ***"…substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".***

[5] The court has discretion to set the security that it considers reasonable and just in the circumstances. The Applicant has offered the sum of US$ 20,000 considering the peculiarities of the case. There has been no undue delay in applying for stay. Judgement was delivered on 2 March 201 on which date a 30 day stay was granted and the Applicant lodged a Notice of Appeal on 20 March 2012 with this Application being filed on 2 May 2012. The Applicant has acted expeditiously to safeguard its position. Therefore, the Applicant submitted that the facts of this case render it necessary and just that a stay be granted pending the appeal on the terms proposed.

The Respondent opposed grant of stay

[6] The Respondent filed Grounds of Opposition dated 15th May 2012 in opposition to the application for stay of execution. The Respondent submitted that the Principles guiding the court when deciding applications for stay of execution pending appeal are well established. In the case of ***Machira t/a Machira & co. Advocates East Africa Standard (No.2) (2002) KLR 63*** that;

> ***"...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. 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. <u>That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.</u> In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".***

[7] Against the test above, the Respondent submitted that the Application date 30th April 2012 lacks merit and the same is merely intended to deny the Plaintiff immediate access to the fruits of his judgment. The cause of action in this case arose on or about year 2003 and it is not until year 2012 when the plaintiff finally got reprieve. Justice demands that litigation must come to an end. The Respondent further submitted that the Applicant has in any event not met the requirements envisaged under order 42 Rule 6(2) of the Civil Procedure Rules 2010. In order for the court to allow the application for stay of execution pending appeal, the court must satisfy itself that:

a. Substantial loss may result to the Applicant unless the order is made;
b. The application has been made without unreasonable delay and;
c. The applicant has furnished security for the due performance of the decree being appealed from.

[8] The Respondent contended the allegation that since the decretal amount is substantial and

if paid out will lead to the stalling of many projects is made without proof of the nature and the specific projects it is talking about. Therefore, the Honourable Court has no basis upon which to assess the risk and loss, if any, that the Applicant may suffer if stay is not granted. The Respondent cited the case of ***Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001***, (unreported) as follows;

> ***"Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay".***

The Applicant has not discharged that onus. In any event, mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay of execution. In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, 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 a stay..."***

The Respondent submitted that the Applicant has failed to provide any evidence on donor funds or projects it is engaged in that would stall as a result of paying the decretal sum. On the basis of the foregoing, the Applicant has failed to satisfy the mandatory provision under order 42 Rule 6(a).

[9] The Respondent went on to state that the Applicant has offered security of US$ 20,000 which is a mere 13% of the decretal sum of US$ 144,800. The Respondent humbly submits that this proposal by the Applicant amounts to mockery of the rights availed to the Respondent under the judgement intended to be appealed against by the Applicant. In any event, and without prejudice to the foregoing submissions, the Applicant has submitted that it relies on donor funding which in effect means that there is a chance that Applicant may never have, now or in the future, the means of settling the decretal sum. The Respondent further submitted that there is absolutely no basis to order that the Applicant tenders security of anything less than the full decretal sum. The Respondent urged this Honourable Court to follow the decisions of the court in the cases of ***Abdi Ali Noor Vs. Transami (Kenya) Ltd Nairobi Milimani Civil Case No.267 of 2005*** (unreported) as well as the case of ***Motres Limited Vs. Akamba Road Services Ltd & Another (Nairobi High Court Civil Case No. 1824 of 2000*** (unreported). In both cases, the Applicants were ordered to deposit the entire decretal sum in court as a condition to stay of execution decree. In the unlikely event that the honourable court is inclined to allow the application, the Respondent urged this Honourable Court to order that at least half the decretal sum be released to the Respondent in the interest of justice. In this regard, the Respondent urges this Honourable Court to be guided by the decision of the Court in the case of ***Gitahi & Another Vs. Waruongongo [1981] KLR 621*** where half the decretal sum was paid to the Respondent and the balance secured by bank guarantee pending the hearing and determination of the appeal.

THE DETERMINATION

[10] The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules.The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) Such security as the court orders for he due performance of such decree or order as may ultimately be binding on him has been given by the Applicant. at

Application was timely

[11] The first one is simple and straight forward. I will start with it. This application was made timeously especially given the fact that there was an initial stay of execution for 30 days which had been granted on delivery of judgment. I rest the issue there and move on to the other two.

Substantial loss occurring

[12] All the prerequisites in Order 42 Rule 6 of the Civil Procedure Rules are as important and must be considered in an inextricable manner. But I should state that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. There is an ample judicial authority on this issue but I need not multiply them except to cite the case of ***Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)l KAR 1018*** where the Court of Appeal stated that:

> ***"It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay"***

And substantial loss in the sense of Order 42 rule 6 has been described; see the following rendition in a work of Ogola J in ***Tropical Commodity Suppliers Ltd*** (Supra) that:-

> *"…**Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"***

And also in the **c**ase of ***Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto*** that***:***

> ***''The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...''***

[13] So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. in other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown. See what the Court said in the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, that;

> ***"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 a stay..."

This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See ***Harlsbury's Law of England*** on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. I also think the submission by the Applicant that the sum involved is substantial and if paid out will lead to the stalling of many projects by the Applicant, is not relevant as long as it has not shown that the Respondent cannot refund the money. Again, as long as the decree has not been reversed, the fear that projects will stall if the Respondent pays out of the decretal sum is also misplaced, for, the judgment-debtor remains liable to pay the decretal sum. The argument is fit in an application to pay by instalments or in some other acceptable mode. One other thing; I agree with the Respondent that the submission by the Applicant that it is donor funded and possesses only funds for specified projects may allow the argument that it has no provision for liability arising out of legal action. There is also doubt, following that submission whether at some time the Applicant may as well not be in funds for the settlement of this decree which may ultimately become binding on them. Whereas the Applicant holds projects funds in a fiduciary capacity, it is untenable that it has set out to carry out activities which may attract liability apart from the actual cost of the project without provision for such liability. I say all these things because both parties have rights; the Applicant to his appeal which includes prospects of success; and the Respondent to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so.

[14] On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds. I have extensively discussed this matter above and I cite the case of ***Jason Ngumba [2014] eKLR*** that:

> **''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.**

But what was stated in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** is relevant**,** that:

> **''The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination''.**

How, therefore, will the court balance the rights of parties in the circumstances of this case?

[15] Despite my findings above, I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the Applicant. And the Applicant has offered USD 20,000 as security. That may be a good gesture. But importantly I reckon that the Respondent made a proposal that, in the event stay of execution is granted, one half of the decretal sum be paid to the Respondent and the other half to be deposited in an interest earning account in the joint names of parties. Accordingly, there is room for a stay of execution given these sentiments by the parties as long as the parties' rights are held in almost symmetrical bound. In light thereof, I order that there be a stay of execution of the decree herein on condition that the Applicant pays one half of the decretal sum to the Respondent within 45 days and deposits the other half in a joint interest earning account at Kenya Commercial Bank, Milimani High Court Branch. Within 60 days of today. The deposit shall be held as security for performance of the decree which may be ultimately binding on the Applicant. It is so ordered. I will not condemn the Applicant to pay costs of the application.

Dated, signed and delivered in court at Nairobi this 9th day of February 2015

F. GIKONYO

JUDGE