



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

**AT MOMBASA**

**CIVIL SUIT NO 54 OF 2013**

**(1) ZAHIR HABIB JIWAN.....PLAINTIFF**

**(2) SANGEETA JIWAN ALIAS SANGEETA KARWAL SABHARWAL.....PLAINTIFF**

**VERSUS**

**JUBILEE INSURANCE COMPANY OF KENYA LTD.....DEFENDANT**

**RULING**

1. There is before court an application by way of Notice of Motion dated 17/9/2015 seeking orders for stay of the Judgment of Hon.Kasango J, dated and delivered on the 21/8/2015 pending the hearing and determination of the appeal to the court of appeal.
2. That appeal to the court of appeal is evidence by a notice of appeal dated 26/8/2015 and filed in court the same day.
3. In considering whether or not to grant stay under Order 42 Rule 6, the court addresses the questions whether the applicant stands to suffer substantial loss, whether the application has been brought without unreasonable delay and if the applicant has provided security for the due performance of the decree, that may be ultimately be binding upon him
4. The judgment sought to be stayed granted to the Respondent the sum of Kshs.7,639,000 being the pecuniary claim and Kshs.500,000 general damages on account of losses incurred by the Respondent as a result of their safe boxes rented from the Applicant were broken into and valuables stolen.

**Parties arguments.**

5. The Applicant/judgment debtor in his affidavit in support of the application and oral submissions stressed the fact that the sum being in excess of kshs.8,000,000 is substantial and that they do not have certainty that the plaintiffs if paid and the appeal subsequently succeeds they will be able to effect a refund. In the affidavit however there was not attempt to allude to any substantial or indeed any loss being occasioned to the Applicant if the decretasum was paid out to the decree holders. Two decisions were cited in support of the applicants submissions.
6. In opposition to the application the Respondent/judgment creditor filed grounds of opposition in which it is contended that there is not prejudice or substantial loss disclosed as capable of being suffered by the applicant if stay is declined, that the financial muscle of the Decree holders was demonstrated at trial and not contested and that the application had failed to meet the conditions precedent for grant of stay of execution pending appeal.
7. By his oral submissions Mr.Nyongesa for the Respondent decree holder submitted from the bar, and without protest from Mr.Gichara for the applicant, that the Respondent are persons of

- enormous means by virtue of ownership three landmark buildings in Mombasa; that part of the jewelry that was kept with the judgment debtor and not stolen is worth over 16 million and are insured by the Judgment debtor.
8. He stressed the point that it was the onus of the applicant to demonstrate substantial loss and that it had failed to do so. He cited decided two cases to support his position.

**Determination.**

**Is substantial loss demonstrated.**

9. I have taken time to weight the rival submissions and the decisions cited in support of the rival positions. I am in no doubt that the burden rests on him who desires the court to believe the existent or non existent of a particular fact. It was incumbent upon the applicant to prove that the Respondent would be unable to refund the decretal sum if payment is effected to them and the appeal subsequently, succeeds. As was held, in the case of **ABN AMRO BANK N.V. -VS- IT MUNDE FOODS LTD.** It is not sufficient for an applicant to allege that it does not know the financial ability of the decree holder to that the evidential burden shifts to the Respondent. In this case no allegation has been made hence the both legal and evidential burden remain upon the Applicant with no obligation at all on the Respondent to show their ability to effect a refund in the event of the appeal succeeding.
10. In the case before me the duty to prove substantial loss has not been discharged and since the requirements are cumulative and not disjunctive, this finding alone is enough for me to disallow the application.
11. I say so noting that it was always the onus of the applicant to place some material and information to convince the court into concluding that it surely stood the risk of suffering substantial loss be it in monetary or other terms. The material and information expected of an Applicant must be in the nature and be able to show that the execution or payment of the decretal sum would create a state of affairs that will irreparably negate the very substratum of the applicant case as a successful party in the appeal.
12. The upshot of my decision foregoing is that the applicant having failed to discharge its legal burden is not entitled to the order sought and the application dated 17/9/2015 thus lacks merit and is accordingly dismissed with costs to the Respondent/decreet holder.

**Dated, signed and delivered at Mombasa this 4th day of December 2015.**

In the presence of

Mutubia for Nyongesa for Decree holder/Respondent.

No appearance for the Judgment Debtor/Applicant.

**P.J.O. OTIENO**

**JUDGE**