



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.232 OF 2013

SPIN KNIT LTD.....APPELLANT/APPLICANT

VERSUS

ISAIAH K. AMBAN.....RESPONDENT

RULING

This application is made by way of Notice of Motion dated the 24th May, 2014 and is brought under the provisions of **Order 46 Rule 6(1)** of the **Civil Procedure Rules** and **Section 3A Civil Procedure Act**.

The Applicant seeks the following orders;

1. That pending hearing and determination of this application inter partes the Honourable Court be pleased to grant an order of stay of execution of the judgment /decree delivered on the 6th day of December, 2013 and the ruling /order of the subordinate court delivered on the 21st day of May, 2014 and or any consequential orders thereof.
2. That pending the hearing and determination of the appeal, the Honourable Court be pleased to grant an order of stay of execution of the judgment /decree delivered on the 6th day of March, 2014 and the ruling of the subordinate court delivered on the 21st day of May, 2014 and or any consequential orders thereof.
3. The Respondent be condemned to pay the costs of the application.

APPELLANTS SUBMISSIONS

4. The application is premised on the grounds on the face of the application and on the Supporting Affidavit sworn by **Winfred W. Gicharu**.
5. After hearing an application for stay of execution made by the Appellant an order for stay was granted by the lower court on condition that the Appellant deposits half of the decretal sum in an interest earning account within 21 days thereof and the other half of the decretal sum was to be paid directly to the Respondent. In default execution was to issue.
6. Counsel contended that partial deposit and partial satisfaction as ordered by the lower court are not provided for in the rules and the purport of stay of execution was to suspend satisfaction of the decree to enable a higher court to investigate the decree further and the order negated this essence of the rules.
7. That the appeal filed by the Applicant is on both liability and quantum and the appeal has high chances of success particularly on the issue of quantum.

8. The Respondent having confessed to being unemployed from the date of the accident and due to his social status, in the event the Appellant succeeds in its appeal it may have no recourse as against the Respondent for the recovery of the monies paid out directly to him.

9. The court was urged to reconsider the order granted and to give one that was fair and just and to give an order that did not amount to satisfaction as the Applicant would suffer prejudice. Reference was made to the annexed authorities on timeliness, fettered discretion and security for costs and the court was urged to allow the application.

RESPONDENT'S SUBMISSIONS

10. The Applicant alleges that the Respondent is a person of no means. That it was upon the party making the allegation to prove this and the Applicant ought to have called the Respondent for cross examination. This allegation was discriminatory as all persons must be treated fairly before the law. Reference was made to Article 27 of the Constitution.

ISSUES FOR DETERMINATION

11. Whether to interfere with the order and conditions for stay of execution granted by the lower court?

ANALYSIS

12. The Applicant being aggrieved with the judgment delivered on obtained an order for stay of execution but is aggrieved with the conditions of partial satisfaction and contends that if the appeal succeeds the Applicant will not be able to recover the amount paid out directly to the Respondent. Therefore the Applicant seeks this courts intervention to grant orders that are:

13. The provisions of Order 42 Rule 6 are the applicable provisions of the law and the discretion of the court is fettered as the Applicant must demonstrate that substantial loss may result if the order sought is not granted, must provide security for costs and also demonstrate that the application was made in a timely manner.

14. I will address the issue of timeliness first. The record shows that Judgment was delivered on the 6th December, 2013. The first application for stay of execution was filed in court on the 10th January 2014 and the ruling was delivered on the 21st day of May, 2014. The current application was filed on the 27th May, 2014 which translates to six (6) days from the date of the Ruling. This court is satisfied on the timeliness of filing the current application and finds that it was brought without undue delay.

15. Next is the Applicant must demonstrate that it will suffer substantial loss if the order sought is not granted and the appeal would be rendered nugatory. It is incumbent upon the Applicant to satisfy the court on the substantial loss that it will suffer. It has not been demonstrated to this court that the amount of Kshs.400,000/- is colossal.

16. The law of evidence places the onus of proof on the party making the allegation and a mere averment that due to the Repondent's social and economic status he is unlikely to able to refund the monies is not tenable in law.

17. In the case of **Stephen Wanjohi vs Central Glass Industries Ltd. HCCCNo. 6726 of 1991 (Nrb)** the court held as follows:

“... Financial inability of a decree holder solely is not a reason for allowing stay...”

18. The Applicant has a right to appeal and this being a money decree it is trite law that a successful litigant also has a right to the fruits of his judgment and ought not to be deprived without just cause. Refer to the case **Kenya Shell Ltd vs Kibiru and anor (1986) KLR.**

19. It is therefore desirable that a balance be struck. The Applicant may have an arguable appeal but it has not satisfied the court on the efforts being made to pursue the appeal. Judgment was entered on the 6th December, 2013 and all efforts are being expended expeditiously on the issue of stay of execution but there is no sign of progress on the appeal and it is now eight (8) months from the date of judgment. The Applicant is enjoying orders for stay but has not demonstrated that it has applied for typed and certified proceedings by annexing any letter to court requesting for the above documents so as to enable it to lodge the substantial appeal and or prepare the Record of Appeal.

20. The Respondent has rebutted the Applicant's allegation of being impecunious and states that he owns property valued at Kshs.6.5Million. Again this court reiterates that the onus of demonstrating that Respondent is a person of no means is upon the Applicant.

21. The Applicant has failed to satisfy the court the substantial loss to be suffered if the order is not granted.

22. The last issue relates to security for the due performance of the decree. The words used in Order 42 Rule 6(2) (b) are:

‘such security as the court orders for the due performance....’

23. This court is of the view that the above rule gives the court unfettered discretion and therefore it can exercise this discretion by granting an order for the partial payment or partial deposits of the decretal sum. This discretion nevertheless has to be exercised judicially and upon the material presented and this court opines that the appeal cannot be rendered nugatory by a money decree being satisfied by payment particularly where substantial loss has not been demonstrated. Refer to the case of **Kenya Shell (supra) Platt J.A** made the following observations:

“If there is no evidence of substantial loss by the applicant, it would be a rare case when an appeal would be rendered nugatory by some other events. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondent should be kept out of their money”

24. This court stands guided by this case.

FINDINGS

25. For the reasons stated above this court finds no reason to interfere with the conditions for stay granted by the lower court.

26. The Applicant's application is found to be lacking in merit.

CONCLUSION

27. The Applicant's application is hereby dismissed.

28. An order for stay of execution pending the hearing and determination of the appeal is hereby granted upon the following terms and conditions;

- i. The sum of Kshs.400,000/= to be paid directly to the Respondent;
- ii. The balance to be deposited in a joint interest earning account in the joint names of both Counsels for the Applicant and Respondent;
- iii. The monies payable and deposits to be made within 21 days from the date hereof in default of any one condition the Respondent be at liberty to proceed to execution of the decree.

Costs shall be paid by the Applicant.

It is so Ordered.

Dated, Signed and Delivered at Nakuru this 3rd day of September, 2014.

A. MSHILA

JUDGE