



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 118 OF 2013**

**DIRECTLINE ASSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**NAKAUTO HOUSE (K) LTD.....RESPONDENT**

**RULING**

Before me is the notice of motion dated 29/4/2014 in which the appellant seeks an order of stay of execution of the decree issued in NKU CMC 626/2012, **Nakauto House (K) Ltd vs Directline Assurance Co. Ltd.** The application is premised on grounds that the appeal filed herein raises serious legal issues; that the lower court dismissed the appellant's application for stay and ordered the appellant to pay the respondent pending hearing of the appeal but the appellant is willing to deposit the decretal sum in an interest earning account in the parties' advocates' names; that the appellant is apprehensive that if the appeal succeeds, it will not be able to recover the decretal sum from the respondents and the appellant will therefore suffer prejudice; that if the decretal sum is deposited in an interest earning account, the respondent will not suffer any prejudice.

The application was opposed and Jayen Motichand Dodhia filed a replying affidavit in reply. Jayen deposed that if paid the decretal sum the respondent is able to refund the said sums at any time. At paragraph 5 & 8 of the affidavit, he listed the properties owned by the respondent. He said the respondent owns plot Nakuru Municipality Block 4/19 next to Nakumatt next to KFA Roundabout which operates a petrol station leased out and shops for rental. He exhibited the title (JMD1); that the respondent sells and distributes lubricants and owns properties in which a renowned motor vehicle dealership pays it a monthly rent in excess of Kshs.230,000/- (JMD2). He also annexed a Bank Statement (JMD3) showing a credit of over 30 million.

For the court to grant an order of stay of execution pending appeal, the applicant has to demonstrate that:-

1. The application is brought without unreasonable delay;
2. That the applicant will suffer substantial loss if the order is not granted;
3. That the applicant is willing to provide security for the due performance of the decree.

In the instant case, judgment was entered in favour of the respondent on 5/7/2013. The appellant moved the same court vide notice of motion dated 21/7/2013 seeking an order of stay. By the court's ruling dated 21/3/2014, the said court declined to grant an order of stay pending appeal. The applicant then moved to this court vide his application dated 29/4/2014 seeking the same orders. The applicant took a month to move this court after dismissal of their application. I will find that the application is brought within reasonable time because the delay was due to the pendency of the application in the lower court.

Will the appellant suffer substantial loss if the order of stay is not granted? The appellant argued that if the decretal sum is released to the respondent, it will not be recoverable. That is why the appellant urged the court to allow the decretal sum to be deposited in a joint account for both advocates. However, the respondent has demonstrated that they are credit-worthy, they have property which they lease out and receive rent, they exhibited a bank statement which shows that the respondent have a lot of money in that bank that cannot compare to the decretal sum which is a mere Kshs.270,000/- or there about. The statement of account indicates that as at 31/4/2014 the respondent had over Kshs.30 million in its Bank account. I am satisfied that if the decretal sum is paid to the respondent, it will be easily be recoverable if the appeal succeeds and no loss will be suffered by the appellant.

For the above reason, I find no merit in the application. The respondent has judgment and should be allowed to enjoy the fruits of that judgment pending hearing of the appeal and if the appellant succeeds, the respondent will refund. The upshot is that this notice of motion must be dismissed with costs abiding the appeal.

**DATED and DELIVERED this 3<sup>rd</sup> day of October, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

N/A for the appellant

Mr. Tombe holding brief for Mr. Matiri for the respondent

Kennedy – Court Clerk