



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 133 OF 2007

JOACHIM VON STACKELBERG 1ST PLAINTIFF

YOLANDA FIRTH 2ND PLAINTIFF

- V E R S U S -

SYLKE OBSTDEFENDANT

RULING

1. Judgment was delivered in this case on 6th November 2014 in favour of the Defendant. The Court by that judgment ordered the Plaintiff to transfer within 14 days to the Defendant **KWALE/GALU KINONDO/1174, 1175, 1176 and 1177**; to pay interest on the amount of Kshs. 23 million from 1st February 2008 until the date the transfers were effected; and to pay Defendant's costs of the suit.
2. Plaintiff filed a Notice of Appeal and have by their Notice of Motion dated 17th November 2014 sought stay of execution pending appeal.
3. During the hearing of that Notice of Motion Learned Counsel for the Plaintiffs conceded that the stay of execution that Plaintiffs seek relates to the payment of interest and of costs of the suit. He did indeed indicate that the Plaintiff's appeal will also only be restricted to the grounds that touch on the award of interest to the Defendants.
4. The only ground upon which the Plaintiffs seek stay is captured by paragraphs 6 and 11 of the supporting affidavit which is to the effect that the amount of interest they will be required to pay is large and that they do not have that amount and will suffer substantial loss if stay is not granted. Further that if stay is not granted their appeal will be rendered nugatory because Defendant ordinarily resides in Germany.
5. In response Defendant respondent by deposing that Plaintiffs will not suffer any loss if the judgment is executed because Defendant, having bought the suit properties demonstrated that she is a person of means and if the Plaintiffs' appeal was successful Plaintiffs will recover their money from that immovable property.

DETERMINATION

6. Plaintiffs' application is premised on the provision of Order 42 Rule 6(2) of the Civil

Procedure Rules. Plaintiffs under that Rule are required to meet three requirements.

7. The first is that the Plaintiff should satisfy the Court that unless stay of execution is granted they will suffer substantial loss. It has often been recognized that the alleged substantial loss of the Applicant ought to be balanced against the right of the successful Respondent enjoying the fruits of his/her judgment. This is well captured in the decision of **SOCFINAC COMPANY LIMITED –Vs- NELPHAT KIMOTHO MUTURI [2013]eKLR** where the Learned Judge referred to another case as follows-

“In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held 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 judgement or of any decision of the court giving him success at any stage. 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. 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”.

In that vein I refer to the often quoted case of **KENYA SHELL LIMITED –Vs- KIBIRU (1986) KLR** where it was stated-

In Kenya Shell Limited vs. Kibiru [1986] KLR 410, Platt, Ag.JA (as he then was) at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI 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 corner stone 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 respondents should be kept out of their money”.

On the part of Gachuhi, Ag.JA (as he then was) at 417 stated-

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

8. The Plaintiffs other than saying that the money they ought to pay is a lot of money they needed to inform the Court, as the above quoted case shows, what loss they would suffer if stay was not granted.

9. The second condition Plaintiffs needed to meet under Rule 6(2) of Order 42 was to have filed the application for stay of execution without unreasonable delay. The Judgment Plaintiffs are intending to appeal against was delivered on 6th November 2014. The application for stay of execution was filed on 17th November, 2014. It is clear from the above that Plaintiffs adequately

met the second condition.

10. The final condition is that the Court may order a party seeking stay of execution to provide security for the due performance of the decree. This third condition is in my view within the realm of the Court. It is the Court that may order for security to be provided.

11. Having considered parties affidavits and also bearing in mind that even where one party is appealing, both opposing parties rights should be considered when the court grants orders for stay of execution and doing the best I can do in this matter I grant the following orders-

(a) There shall be a stay of execution of only paragraphs 18(d) and (e) of the judgment of 6th November 2014 on condition that-

(i) The Plaintiffs do within four (4) working days provide documents as ordered in paragraph 18(a) of the judgment of 6th November 2014 to the Defendant's Counsel. For the avoidance of doubt if those documents are not delivered within four (4) working days there shall NOT be stay of execution of the judgment of 6th November 2014.

(b) The costs of the Notice of Motion of 17th November 2014 shall abide with the outcome of the intended appeal.

DATED and DELIVERED at MOMBASA this 4TH day of DECEMBER, 2014.

MARY KASANGO

JUDGE