



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL APPEAL 86 OF 2011**

**NZOIA SUGAR COMPANY LTD.....APPELLANT**

~VRS~

**TABITHA ACHANDO KHAMALA.....RESPONDENT**

(Being appeal from the Ruling of the Chief Magistrate Hon. U. P. Kidula in Bungoma in civil case no.546 of 2009)

**RULING**

On 19/7/2011 the Chief Magistrate's Court declined to set aside the *ex-parte* judgment entered against the Appellant. The Appellant was aggrieved by the ruling and filed the present appeal. It is in the appeal that an application has been made to stay the execution of the decree in the lower court until the appeal is heard and determined. I called for the file in the subordinate court and found that the decree was for Ksh.8,681,555/= and that the *ex-parte* judgment followed a hearing which the Appellant did not attend. The Appellant had filed a defence denying the claim of Ksh.2,617,764/= plus interest and costs.

It should be noted that after the Appellant filed the appeal it went before the trial court for stay. The trial court granted stay on condition that within 30 days the entire decretal sum be deposited into court or into an interest earning account in the names of both counsel, or, in the alternative, the Appellant pays half of the decretal sum to the Respondent within 30 days.

Under Order 42 rule 6 of the Civil Procedure Rules, once the appeal has been filed the party appealing can seek stay either in the court appealed from or in the court where the appeal has been filed, and

*“whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders thereon as it may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

The present application was made on the basis that the order of stay made by the trial court was punitive in the circumstances of the case, and that the Respondent is a person of straw and that if the decretal sum is paid to her she will be unable to refund it in the event that the appeal ultimately succeeds.

The Appellant sought stay in the subordinate court. The court understood that it had to be shown that the application had been brought timeously; the Appellant would suffer substantial loss in case the application was not allowed; and that security was being offered. The application had been brought without delay. It had been deposed that the Respondent was a person of straw who could not refund the

decretal sum if the application was refused and the appeal ultimately succeeds. The court found that the Appellant had not shown that the Respondent had no means to make good the decretal sum. The Appellant had sworn that it was willing to offer security without disclosing its nature. That is what left the court with the option of making the orders that are now being said to be punitive.

It should be noted that it is not normal for a court to grant stay of execution in monetary decrees unless it can be shown that the amount payable under the decree is substantial and that the respondent has no known assets from which the appellant can recoup in the event that the appeal is successful (**Singh v. Runda Sisal Estates Ltd [1960] E.A 263**).

It was alleged, without proof, that the Respondent was a person of straw. The onus was upon the Appellant to show that the Respondent was a person of straw and therefore that the money paid would not be recoverable (**ICDC v. Daber Enterprises Ltd, Civil Application no. Nai 223 of 1999**). The burden was not discharged in the trial court and neither was it discharged before this court.

The purpose of the application for stay of execution pending appeal is to preserve the subject matter dispute so that the right of the Appellant who is exercising his undoubted right to appeal is safeguarded and the appeal, if successful, is not rendered nugatory. Otherwise, the Respondent, as the successful litigant, is entitled to the fruits of her judgment. It was not alleged that the amount in the judgment was so substantial that if ordered to be paid or deposited would have the effect of grounding the operations of the Appellant to a halt (**Niazons Kenya Ltd & Others v. National Industrial Credit Ltd, Civil Application no. Nai 102 of 2001**).

Lastly, an applicant in an application for stay of execution should state the condition upon which he is seeking stay. He knows his means and he knows what form of security he can afford and place at the disposal of the court. (**ASG Scan Cargo v. Nairobi Conveyors Ltd H.C (Milimani) CC no.423 of 1999**). It should not be left to the court to imagine what form of security can be afforded by the applicant.

My conclusion is that, given the facts of the case, the conditional stay granted by the trial court made a lot of sense as it sought to protect the rights of both sides. The order was also quite flexible to the Appellant as it gave three options. This court adopts the orders which shall run for 30 days from today, failing which execution shall issue. The Appellant has been indulged and shall pay costs of the application.

Dated, signed and delivered at Bungoma this 5<sup>th</sup> day of July 2012.

**A. O. MUCHELULE**

**JUDGE**