



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Case 184 of 2011**

**VYAS BROTHERS LIMITED:.....:APPELLANT**

**VERSUS**

**SHADRACK CHERUIYOT LAGAT:.....:DEFENDANT**

**RULING**

This is an application primarily under Order 42 Rule 6(1) of the Civil Procedure Rules. It seeks one substantive order that there be a stay of execution of the decree and judgment dated 27th October, 2011 in Eldoret CMCC NO. 838 of 2009, pending the hearing and determination of this appeal. The applicant was the defendant in the lower court whilst the respondent was the plaintiff. The main ground for the application is that the respondent will not be able to refund the decretal amount if paid out to him and the appeal eventually succeeds. In that event, the applicant contends that its appeal will be rendered nugatory. There is an affidavit in support of the application sworn by one **Rajesh Vyas**, a director of the applicant. The averments reiterate the above ground of the application.

The respondent opposes the application and has filed a replying affidavit. It is deponed in the affidavit, *inter alia*, that the applicant has not demonstrated that the respondent will not be able to refund the decretal amount if paid to him and the appeal eventually succeeds. The respondent has also deponed, on advise of his advocate, that the application is premature substantially because the applicant, according to the respondent, should have moved the lower court first for stay.

At the hearing of the application, counsel rehashed the stand-points taken by their clients in their respective affidavits.

I have carefully considered the application, the affidavits filed by both parties and the submission of counsel. Having done so, I take the following view of this matter. I think I should first consider whether this application is incompetent for having been filed prematurely. Order 42 Rule 6(1) of the Civil Procedure Rules reads as follows:-

**“6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appeal 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 order thereon as may to it seem just,..... (underlining supplied).”**

The plain language of the above sub-rule shows that the court to which an appeal has been preferred has original jurisdiction to entertain an application for stay of execution. That being the

position, it is clear that this application is not bad in law for having been filed prematurely.

I turn now to the merits or demerits of the application. For the applicant to succeed in this application it had to satisfy the conditions set in order 42 Rule 6 of the Civil Procedure Rules. Under the rule, I am required to consider first whether there is sufficient cause to warrant a stay of execution. The court cannot also issue the order unless:-

**(a) The applicant demonstrates that substantial loss may result to it unless the order of stay is made;**

**(b) The application has been made without inordinate delay.**

**(c) Sufficient security is ordered.**

To show substantial loss, the applicant has contended that its appeal may be rendered nugatory unless a stay is ordered since, in its view, the respondent may not refund the decretal amount if paid to him and the appeal eventually succeeds. The respondent has not in my view, demonstrated that he will be able to repay the decretal amount if paid to him and the appeal subsequently succeeds. He appears to be of the view that it was the appellant to demonstrate that he does not own any assets to resort to in the event he has to refund the decretal amount if paid to him. In my judgment, he has not demonstrated, even on a balance of probability, that he will be able to refund the decretal amount should the appeal eventually succeed. I am therefore satisfied that the applicant has demonstrated that it may suffer substantial loss unless a stay of execution is granted.

With regard to delay, I note that the judgment appealed from was delivered on 27th October, 2011. This application was lodged on 18th December, 2011. The delay involved is therefore of only just under two (2) months. I do not consider the delay inordinate.

With regard to security, the applicant has offered to deposit the entire decretal amount in a joint interest earning account of the parties' advocates. That offer, in my view, constitutes sufficient security for the due performance of the decree herein in the event the appeal is lost.

Having demonstrated that substantial loss may result to it unless stay is granted and having offered sufficient security, the applicant has thereby shown sufficient cause to warrant the issuance of the order of stay.

In the end, I make the following orders.

- 1) The applicant shall, within fourteen (14) days of the date hereof, deposit into an interest bearing joint account to be opened in a reputable financial institution in the name of the parties' advocates the entire decretal amount.**
- 2) There shall be stay of execution pending compliance with (1) above.**
- 3) In default the applicant's Notice of Motion dated 15th December, 2011 shall stand dismissed with costs.**
- 4) If (1) above is complied with, within the period appointed, there will be stay of execution of the decree of the lower court until the determination of the appeal.**
- 5) If (1) is complied with, costs of the Notice of Motion shall abide the results of the appeal.**
- 6) Each party has liberty to apply.**

Orders accordingly.

**DATED AND DELIVERED AT ELDORET**

**THIS 6TH DAY OF NOVEMBER, 2012.**

**F. AZANGALALA  
JUDGE**

**Read in the presence of:-**

**Mr. Otieno for the Applicant and**

**Mr. Mamba for the Respondent.**

**F. AZANGALALA  
JUDGE  
6TH NOVEMBER, 2012**