



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.435 OF 2018**

**ECOTACT LIMITED T/A**

**IKO TOILETS.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**NAIROBI CITY COUNTY.....DEFENDANT/APPLICANT**

**RULING**

1. This is the Notice of Motion dated 6<sup>th</sup> December 2018 brought under Section 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Act, Caps 21 Laws of Kenya and Order 42 rule 6 (2) of the Civil Procedure Rules 2010.

2. It seeks orders:-

***(1) Spent***

***(2) Spent***

***(3) That the execution of the ruling and order made on the 4<sup>th</sup> December 2018 be and is hereby stayed pending the filing of the said application in the Court of Appeal.***

***(4) That costs of this application be in the cause.***

3. The grounds are on the face of the application and are set out in paragraphs 1 to 21.

4. The application is supported by the affidavit of David Oseko, the acting County Attorney of the defendant/applicant sworn on the 6<sup>th</sup> December 2018.

5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 18<sup>th</sup> December 2018.

6. It is the defendant's/applicant's case that they have filed a notice of appeal and hence they seek stay of the orders granted on 4<sup>th</sup> December 2018. That this application has been brought without undue delay. That the defendant/applicant has an arguable appeal which will be rendered nugatory if these orders are not granted. No prejudice will be occasioned to the plaintiff/respondent as it can be compensated by an award of damages. It prays that the application be allowed.

7. It is the plaintiff's/respondent's case that the issues being raised in this application were already canvassed and a ruling delivered. Further that the ingredients for grant of stay pending appeal have not been met. It prays that the application be dismissed with costs.

8. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition, the oral submissions of counsel and the relevant provisions of law.

9. Order 42 rule 6(2) of the Civil Procedure Rules provides that:-

***“No order for stay of execution shall be made under sub rule (1) unless:-***

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

It is clear from the above provision that it requires specific conditions to be met by the applicant.

10. The principles that guide a court in exercising discretion in an application for stay pending appeal are now well settled.

(1) That the application has been brought without undue delay.

(2) That unless stay is granted the applicant shall suffer substantial loss.

(3) That the applicant has offered security for the due performance of the decree that may ultimately be found to be binding upon him.

11. I have considered the notice of motion herein. I find that it has been brought without undue delay. It is the defendant’s/applicant’s case that the appeal will be rendered nugatory if these orders are not granted. However, I find that they have failed to demonstrate that the plaintiff/respondent will not be in a position to compensate the defendant/applicant should the appeal succeed.

12. In the case of **Feissal Amin Janmohammed t/a Dunvia Forwarders vs Shami Trading Co Ltd Mombasa HC Civil Appeal No 65 of 2013 [2014] Eklr Kasango J** stated as follows:-

**“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.**

I have considered the defendant’s/applicant’s application in its entirety. In my view the applicant has not demonstrated that it will suffer substantial loss if these orders are not granted.

13. In the case of **Machira t/a Machira & Co. vs East African Standard [2002] 2 KLR 63** where it was held that;

**“It is not enough merely to state that substantial loss will result or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground substantial loss, the kind of loss likely to be sustained must be specific, details or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue, and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant’s business (e.g appeal or intended appeal)”.**

14. The other condition to be satisfied by the applicant is that it must provide such security as may ultimately be binding on them. The same is set in mandatory terms. Order 42 rule 6(2) of the Civil Procedure rules requires specific conditions to be met by an applicant of which the applicant herein has not satisfied. I find that the applicant herein has not stated whether they intend to furnish or have already furnished as security for the due performance of the decree.

15. All in all I find that the defendant’s/applicant has failed to satisfy the requirements set out under order 42 rule 6(2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed. The costs of this application be in the cause.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 23<sup>RD</sup> day of JANUARY 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for Plaintiff

.....Advocate for Defendant

.....Court Assistant