



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MILIMANI

ELC CASE NO. 331 OF 2010

ASSETS PROCUREMENT &

DEVELOPMENT COMPANY LIMITED.....PLAINTIFF

=VERSUS=

KENYA BREWERIES LIMITED & 2 OTHERS.....DEFENDANTS

RULING

1. The 1st Judgment debtor/Applicant (Applicant) filed a Notice of Motion dated 4th May, 2018 in which it sought stay of execution pending appeal. This Court delivered a judgment in favour of the Decree holder/Respondent (1st Respondent) on 19th April, 2018. The Applicant contends that if stay of execution is not granted, it will suffer substantial loss and that it may be difficult to recover the amount as the assets of the 1st Respondent if any are not known.
2. The 1st Respondent has opposed the Applicant's application based on a replying affidavit sworn on 3rd September, 2018. The 1st Respondent argues that the Applicant has not met the threshold for grant of stay of execution pending appeal; that the judgment is a money decree which will not be rendered nugatory and that the appeal is not arguable and has no chances of success. The 1st Respondent further argues that it is capable of refunding the decretal sum should the Applicant's appeal succeed.
3. The 1st Respondent in the alternative to the opposition to the application states that it is willing to concede to stay of execution on condition that a sum of Kshs.40,000,000/= is deposited in an interest earning account in the joint names of the Advocates for the Applicant and the 1st Respondent.
4. The Applicant's application was opposed by the 3rd Defendant/Respondent (3rd Respondent) through a replying affidavit sworn on 20th July, 2018. The 3rd Respondent contends that the Applicant's application has been overtaken by events in that the 2nd Defendant/Respondent (2nd Respondent) has already taken possession of the property which was the subject of the suit; that the Applicant's application is defective and that the Applicant has no arguable appeal to warrant issuance of orders of stay of execution. The 3rd Respondent further argues that the Applicant has not demonstrated that it will suffer substantial loss should stay of execution be denied.
5. I have considered the Applicant's application as well as the opposition of the same by the 1st Respondent and the 3rd Respondent. I have also considered the submissions filed by the Applicant as well as those filed by the 1st Respondent. The conditions which fetter the Court's discretion to grant stay are set out in Order 42 of the Civil Procedure Rules. These conditions are that the application for stay must be brought without unreasonable delay; the Applicant has to demonstrate that he/she will suffer substantial loss and there has to be security for the due performance of the decree.
6. In the instant case, there is no dispute as to the timing of the application. The judgment was delivered on 19th April, 2018. This application was filed on 4th May, 2018. There was therefore no delay in filing the same. The only issue for determination is whether there is demonstration of substantial loss after which the Court will decide whether to order for security and if so the nature of the security.
7. In cases of a money decree, it is rare that an appeal will be rendered nugatory. In granting stay of execution in such cases, the Court has to balance the interest of the decree holder and judgment debtor. The Court has to consider that in as much as it should guard a judgment debtor's right of appeal, that right has to be balanced with the right of a decree holder to enjoy the fruits of its judgment. In the instant case, the decretal sum plus interest at the time of writing this ruling should be in the region of Kshs.40,000,000/=
8. The Applicant has preferred an Appeal against the judgment. From a perusal of the Court record the 1st Respondent is intent on raising a cross-appeal. The Applicant has argued that there is no evidence of assets of the 1st Respondents and that if the decretal sum was paid to the 1st Respondent, it may be difficult to recover the same. The 1st respondent has tried to argue that if it was able to pay Kshs.6,300,000/= to the

Applicant in 2003, that is evidence that it may not be a problem in paying back the decretal sum should the appeal succeed.

9. The 1st Respondent had been challenged on its ability to refund the decretal sum. The Respondent should have at least demonstrated that it has the means to refund the money by say attaching its audited accounts because it is not the duty of the Applicant to demonstrate this as it is not in a position to do so. It therefore follows that it will be in the interest of both the Applicant and the 1st Respondent that stay of execution be granted on certain conditions. The Applicant and the 1st Respondent do not mind stay being granted. The point of divergence is as to what form the security is to be given.

10. The form in which security is to be given is at the sole discretion of the Court. This discretion should however be exercised based on the circumstances of the case. The 1st Respondent had paid Kshs.6,300,000/= to the Applicant in 2003. The money is still with the Applicant who were unable to deliver a title to the 1st Respondent. The property which the 1st Respondent was purchasing has already been taken by the County Government of Nairobi which is the 2nd Respondent. It is fair that a security which will take care of the interest of both parties is given. The Applicant does not say that it will not raise the decretal sum being proposed by the 1st Respondent. Their only concern is the possible inability of the 1st Respondent to repay the same should the appeal succeed. I therefore allow the Applicant's application in terms of prayer (3) and (4) of the Notice of Motion dated 4th May, 2018 on condition that the sum of Kshs.40,000,000/= is deposited in a reputable bank in an interest earning account in the joint names of the Advocates for the Applicant and the 1st Respondent within 45 days failing which the stay order shall stand vacated.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 21st day of May, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr Lubullellah for decree holder/respondent and

Ms Okutta for Mr Amoko for applicant

Court Assistant – Hilda