



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC SUIT NO. 92 OF 2011**

**JOSEPH MAWEU MATHEKA.....PLAINTIFF**

**VERSUS**

**MUSIKIE LIMITED.....1<sup>ST</sup> DEFENDANT**

**BEDAN M. CHEGE**

**t/a BEDANS AUCTIONEERING SERVICES.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant filed a Notice of Motion dated 13<sup>th</sup> February 2017, in which it sought stay of execution of a judgment which was delivered on 10<sup>th</sup> February, 2017. The Applicant contends if stay of execution of the judgment is not granted, the Plaintiff Respondent may sell the suit property which will render the appeal nugatory. The Applicant further argues that the Court awarded huge amounts of general damages which if paid out will cripple the Applicant which is a small company with limited resources.
2. The Applicant further argues that the original Plaintiff has since died and has been replaced by his legal representative whose assets if any are not known and if execution was to issue, it might be difficult to recover the amount which would have been paid in execution of the decree. The Applicants undertakes not to sell the suit property as a form of security for the due performance of the decree which may ultimately be binding upon it.
3. The Applicant's application is opposed by the Plaintiff/Respondent based on a replying affidavit sworn on 26<sup>th</sup> February, 2018. The Respondent contends that the Applicant's application is fatally defective, misconceived, bad in law and is otherwise an abuse of the process of the Court. The Respondent argues that whereas leave to serve notices of appeal out of time was given on 7<sup>th</sup> May 2017, the Applicant application was filed on 14<sup>th</sup> February 2017, long before the said leave was granted. The Respondent therefore argues that there is nothing capable of being stayed.
4. The Respondent further argues that the Applicant has not met the threshold set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. The Respondent contends that the suit property is not registered in the name of the Applicant and that the Respondent has been kept out of the fruits of the judgment for over two years and that any grant of stay orders will greatly prejudice the Respondent.
5. I have considered the Applicant's application together with the opposition to the same by the Respondent. I have also considered the submissions filed by the parties. There are only two issues which emerge for determination. The first issue is whether the Applicant's application is bad in law and secondly whether the Applicant has met the threshold under Order 42 of Rule 6 (2) of the Civil Procedure Rules.
6. On the first issue, the Respondent contends that the present application was filed on 14<sup>th</sup> February 2017, whereas leave to file notice of appeal was granted on 7<sup>th</sup> May, 2018. It is important to note that the original Plaintiff died on 18<sup>th</sup> February 2017, after notice of appeal had been filed. There had to be substitution which took some time. The leave obtained to serve notice of appeal on 7<sup>th</sup> May 2018, was directed at the legal representative who had taken over from the original Plaintiff. It cannot therefore be argued that the application was filed long before leave was obtained.
7. On whether the Applicant has met the threshold for grant of stay pending appeal, there are only three conditions which fetter the discretion of the Court to grant stay pending appeal. The first is that the application has to be brought without unreasonable delay. The second is that there has to be demonstration of substantial loss. The third is that there has to be security for the due performance of the decree as may ultimately be binding upon the Applicant.
8. In the instant case, the judgment was delivered on 10<sup>th</sup> February, 2017. The present application was filed on 14<sup>th</sup> February, 2017. There

was therefore no delay in filing the application. As regards demonstration of substantial loss, one has to look at the judgment which was delivered and what it may entail if it were executed.

9. The Applicant's director contended that she purchased the suit property at a public auction. Prayer 2 of the plaint which was allowed nullified the said sale. Though the said prayer is wrongly attributed to the 2<sup>nd</sup> Defendant, the undisputed fact is that the sale was to the director of the Applicant company. Besides this prayer the Applicant was enjoined from in any way dealing with the property. In addition to this, this Applicant was condemned to pay general damages of Kshs.2,000,000/=.

10. The Applicant is therefore apprehensive that if execution was to be carried out, it will suffer substantial loss in that it will not be able to recover the Kshs.2,000,000/= if paid out and its director will have lost the suit property yet she was not party to the suit which is subject of the decree herein. Once the Applicant doubted the capability of the Respondent to refund the decretal sum, it was incumbent for the Respondent to show that she is capable of refunding the amount from the estate of the deceased.

11. In as much as a successful litigant is entitled to fruits of the judgment, the aggrieved litigant has also a right to appeal and that right has to be taken into consideration especially where execution will result in the intended appeal being rendered nugatory. If the suit property were to be sold and the Kshs.2,000,000/= paid out, it will render the appeal nugatory. I therefore find that this is a clear case where stay of execution ought to be granted.

12. The Applicant is offering the suit property as security. The Respondent on the other hand contends that this is not suitable security as the suit property is not in the name of the Applicant. The Respondent is in the alternative not averse to stay being granted if the Applicant is ordered to deposit the Kshs.2,000,000/= given as security to be deposited in a joint interest earning account. As the Court observed, it was not dealing with the issue of ownership. The Court was only dealing with the manner in which the Respondent had been evicted from the suit premises. The Court later ordered that he be put back in possession. It is the estate of the deceased which is in occupation of the suit property pending resolution of the ownership dispute. I therefore do not find that ordering deposit of Kshs.2,000,000/= will be an appropriate security. Security has to be ordered in such a way that it does not stand in the way of those pursuing their rights. I will in the circumstances order stay of execution on the condition that the Applicant deposits in Court Kshs.500,000/= within 30 days failing which the stay shall lapse.

The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 27<sup>th</sup> day of August, 2019.**

**E.O OBAGA**

**JUDGE**

In the absence of parties who had been notified of date and time of delivery of ruling.

Court Clerk: Hilda

**E.O OBAGA**

**JUDGE**