



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 665 OF 2012**

**KAMU VENTURES LIMITED.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**PAUL MUNGAI MWANGI.....DEFENDANT/APPLICANT**

**RULING**

1. This is the notice of motion dated 13<sup>th</sup> June 2018 brought under order 42 rule 6 and order 51 rules 1 to 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act.

2. It seeks orders:-

***1. That this honourable court be pleased to stay the execution of a judgment and order made herein on 18<sup>th</sup> May 2018 until further orders of this honourable court.***

***2. That this honourable court be pleased to stay the execution of the judgment and order made herein on 18<sup>th</sup> day of May 2018 pending the lodging, hearing and determination of the intended appeal.***

***3. That the costs of this application be provided for.***

4. The grounds are on the face of the application and are:-

**(a) The defendant/applicant is aggrieved by the judgment which was delivered herein on 18<sup>th</sup> May 2018 and has filed a notice of appeal and have applied for proceedings to enable him lodge an appeal in the Court of Appeal.**

**(b) In an application for a stay of execution, this honourable court has discretion to make such orders as will serve the ends of justice after delivery of its judgment herein on 18<sup>th</sup> May 2018**

**(c) The defendant/applicant fears that unless the stay sought is granted, the plaintiff/respondent execute the said judgment and the defendant/applicant will be rendered homeless.**

**(d) The defendant/applicant's right of appeal will be rendered nugatory if the plaintiff/respondent executes the judgment during the pendency of this application and intended appeal.**

**(e) The object of the stay, like of an injunction, is to keep things in status quo so that if at the hearing of the appeal, the defendant/applicant obtains a judgment in its favour, the plaintiff/respondent will have been prevented from dealing with the subject matter in such a way as to make that judgment ineffectual.**

**(f) It is the interest of justice for this honourable court to grant the orders sought.**

5. The application is supported by the affidavit of Paul Mungai Mwangi the defendant/applicant herein sworn on the 13<sup>th</sup> June 2018 and further affidavit of Jennifer Waitherero Maina sworn on the 6<sup>th</sup> August 2018.

6. The application is opposed. There is a replying affidavit sworn by Migui Mungai, a director of the plaintiff's company sworn on the 10<sup>th</sup> July 2018.

7. It is the defendant's/applicant's case that he has filed a notice of appeal and hence seeks stay of execution of the judgment delivered on 18<sup>th</sup> May 2018. That this application has been brought without undue delay. The defendant also states that he 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. He prays that the application be allowed.

8. It is the plaintiff's/respondent's case that the ingredients for grant of stay pending appeal have not been met. It prays that the application be dismissed.

9. I have considered the notice of motion and the affidavits in support. I have also considered the replying affidavit, the written submissions of counsel, the relevant provisions of the law and the authorities cited. The issue for determination is whether this application is merited.

10. The plaintiff/respondent has also raised the issue as to whether counsel representing the defendant/applicant is properly on record. **Order 9 rule 9** of the Civil Procedure Rules provides that:-

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.**

The Notice of Appeal by the firm of Irungu Mwangi Ng'ang'a T. T. & Co. Advocates was filed on 25<sup>th</sup> May 2018 while the consent to come on record was filed on 29<sup>th</sup> August 2018.

11. I have seen the filed copies of consent to come on record. They were filed on 29<sup>th</sup> May 2018, one of the copies has two dates 29<sup>th</sup> May 2018 on the front and 25<sup>th</sup> May 2018 at the back. Jennifer Waitherero Maina a clerk in the firm of Irungu Mwangi Ng'ang'a T. T. & Co. Advocates in her affidavits attempts to explain the discrepancy. I find that her explanation does not add up. It is curious to note that she swore the affidavit after the plaintiff/respondent raised the issue in their replying affidavit. The date to be considered is the one at the front. Therefore I find that the Notice of Appeal filed on 25<sup>th</sup> May 2018 is invalid, having been filed by an advocate who was not properly on record.

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

**“No order for stay of execution shall be made under subrule (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 for stay to be granted specific conditions must be met by the applicant.

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

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

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

**(iii) That the application has offered security for the due performance of the decree that may ultimately be found to be binding on him.**

14. 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 he has failed to demonstrate that the plaintiff/respondent will not be in a position to compensate him should the appeal succeed. It should be noted that the defendant/applicant has failed to attach a draft memorandum of appeal. This would have been a basis upon which this court can be persuaded that there exists an intended appeal which is arguable or has merit.

15. In the case of **Feissal Amin Farmohammed 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 he has not demonstrated that it will suffer substantial loss if these orders are not granted.

16. 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)”.**

17. The other condition to be satisfied by the applicant is that he must provide such security as may ultimately be binding on him. The same is set in a 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 he has not stated whether he intends to furnish or has already furnished security for the due performance of the decree.

18. In conclusion, I find that the defendant/applicant has failed to satisfy the requirements set out in order 42 rule 6(2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed. Each party do bear its own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 25<sup>th</sup> day of September 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant