



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 175 OF 2015

ASTER HOLDINGS LIMITED.....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI & 4 OTHERS.....DEFENDANTS

RULING

1. The fifth defendant/applicant filed a notice of motion dated 2nd November 2017 in which it seeks stay of execution pending appeal. The applicant contends that it is aggrieved by the judgement of this court delivered on 31st October 2017 and has already preferred an appeal against the said judgement. That if stay is not granted, the applicant will lose its property which is valued at 3 billion shillings in addition to the Kshs.100,000,000/= which the applicant was ordered to pay.

2. The plaintiff /respondent has opposed the applicant's application based on grounds of opposition filed in court on 17th November 2017 and a replying affidavit sworn on 17th November 2017. The respondent contends that the applicant's application is an abuse of the process of the court and that the applicant should have filed its application in the court of Appeal under Rule 5(2) of the Court of Appeal Rules. That this court is *functus officio*. The respondent further contends that the applicant's application has not met the threshold under order 42 Rule 6 of the Civil Procedure Rules.

3. I have considered the applicant's application, the opposition to the same by the respondent as well as the authorities given by both parties. The only issue for determination in this application is whether the applicant has met the threshold set out in Order 42 Rule (6) of the Civil Procedure Rules. For stay pending appeal to be granted, an applicant must file the application without unreasonable delay. The applicant has also to demonstrate that he will suffer substantial loss should stay be refused. Finally there has to be security provided as may ultimately be binding on the applicant.

4. In the instant case, the judgement which is being appealed against was delivered on 31st October 2017. The present application was filed on 2nd November 2017. I therefore find that the same was brought without delay. On the issue of substantial loss, the applicant is contending that if stay is not granted, it will lose the suit property which is valued at 3 billion shillings besides the 100,000,000/= shillings general damages which it is expected to pay . In determining whether there is a likelihood of substantial loss being suffered, the court has to consider the decree which was granted.

5. The court ordered cancellation of title held by the applicant. This title was found to have been illegary issued to a portion of a property which had already been amalgamated and the respondent had a valid title in respect of the amalgamated property. I do not therefore see what substantial loss the

applicant will suffer if the title held by it is cancelled. If the applicant succeeds in its appeal, there will simply be a reversal of the entry in the register to restore the position which was existing. There is no evidence that the respondents are intent on disposing of the property. The applicant has been in occupation of the property. There is no development which is going on.

6. On the issue of the Kshs.100,000,000/= decreed, this is a money decree and in money decrees, an appeal will not be rendered nugatory. If any money is paid out, and the appeal succeeds, the unsuccessful litigant will refund. The applicant did not state anywhere in its supporting affidavit that the respondent would be unable to refund any monies paid should the appeal succeed. In the case of **Kenya Shell Limited Vs Benjamin Karuga & another (1986) eKLR** it was held that if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss is the cornerstone of both jurisdictions for grant of stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondent should be kept out of their money.

7. The applicant has not expressed even the slightest doubt as to the ability of the respondent to pay back the decretal sum. In fact the applicant seems to hold the view that the respondent has a lot of money some of which it can spare to sponsor the media to cover the case. A person of no means cannot be accused of such things if his capability is not known. If the applicant had doubted the ability of the respondent to pay back the decretal sum , that is when the burden should have shifted to it as was held in the case of **National Industrial Bank Ltd Vs Aquivas Francis Wasike & another (20060 eKLR** where the appeal judges states as follows:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”.

8. The right of the respondent as decree holder has already been determined and it will not be fair that it is deprived of the fruits its decree. As has been said now and again that demonstration of substantial loss is the cornerstone for stay and having found that the applicant will not suffer substantial loss, I find that the applicant’s application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **18th** day of **January, 2018**.

E.O.OBAGA

JUDGE

In the presence of :

Mr Cohen for Plaintiff/Respondent

M/s Aisha for 5th Defendant/Applicant

Mr Kamau for 2nd,3rd and 4th Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE