



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 783 OF 2007

FLORENCE MBAI T/A FOUNTAIN OF LIFE CHILDREN'S HOME

FOUNTAIN OF LIFE DELIVERANCE FELLOWSHIP.....1ST PLAINTIFF

CENTRE SUING THROUGH FLORENCE MBAI

AS THE CHAIRLADY.....2ND PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

Judgment in this matter was entered on **24th March 2015**, wherein the Court ordered the Defendant to pay the Plaintiff **Kshs. 8,000,000/-** being Special damages and **Kshs.500,000/-** being exemplary and punitive damages with interest at court rates until payment in full together with the costs of the suit. This order forms the basis of the Defendant/ Applicant's application dated **23rd April 2015** wherein it seeks an order of stay of execution of the said Judgment pending the hearing and determination of the intended appeal to the Court of Appeal.

The application is premised on stated grounds supported by an affidavit sworn by **Karisa Iha**, the Director of Legal Affairs. He deposes that the Applicant is aggrieved with the Judgment and intends to appeal against the orders made therein. Secondly, that the Applicant is likely to suffer substantial loss if execution proceeds, as the Respondents may not be capable of refunding the decretal sum in the event that it succeeds on appeal. Further, that it has an arguable appeal with an overwhelming chance of success and therefore that the intended appeal will be rendered nugatory appeal if the orders sought are not granted. The deponent also stated that the Judgment having been delivered on **24th March 2015**, there has been no inordinate delay in making this application. Additionally, that the Applicant is prepared to furnish security as the Court directs. Finally, that should there be any prejudice suffered by the Respondents in the event that stay is granted, the same can be remedied by an order for damages, interests or costs.

In response to the application, the Respondents filed grounds of opposition dated **18th May 2015** stating that the application is frivolous, vexatious and an abuse of the court process, misconceived and bad in law, devoid of merit and ought be disallowed. Further, that orders sought are untenable and incapable of being granted.

This application was canvassed by way of written submissions which I have carefully read. I have also read and considered the insightful authorities referred to by counsel in support of their urgings.

The power of this Court to grant an order for stay of execution is given under **Order 42 Rule 6 of the Civil Procedure Rules**. In determining applications for stay, the Court is required to observe the following conditions;

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

On the foregoing, Judgment having been entered by a Court of concurrent jurisdiction, the ground that the Applicant has an arguable appeal with overwhelming chances of success, or that the appeal shall be rendered nugatory, do not fall within the realm of this Court. In the case of **Antoine Ndiaye v African Virtual University, HCCC Nairobi No. 422 of 2006 (2015) eKLR** referred to by the Plaintiff, Gikonyo J. explains that:

The inquiry for purposes of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules is not about the merits of the appeal but the loss that would be occasioned by the satisfaction of the decree in the event of a successful appeal.

The first question is whether the application was filed timely. This application was filed on **23rd April 2015**, one month after the delivery of the Judgment. The same was brought before the decree was extracted as well as before the costs had been taxed. This Court (Onguto J.) declined to certify the application urgent on the aforementioned reasons noting that execution could not possibly be undertaken. I am of the view that there was no delay in bringing this application.

The second condition is that the Court must be satisfied that the Applicant may suffer substantial loss. The Applicant submitted it fears that the Respondent may not be in a position to refund the decretal sum in the event of a successful appeal, as the Respondent had not demonstrated its ability to refund. In support of this submission, the Applicant relied on the case of **Ann Wanjiru Waigwa and David Kinyua Muriuki v Joseph Kiragu Kibarua Civil Appeal (Nyeri) No. 92 of 2009 (2009) eKLR** where the Court held:

Given the fact that the Respondent has not come out boldly to proclaim his ability to refund the amount in the event of the appeal succeeding, there can be no doubt that the Applicants are likely to suffer loss if execution of the decree is not stayed pending disposal of the appeal.

In response, the Respondent submitted that the Applicant had merely stated but not shown how it would suffer substantial loss. Further, that the Applicant has not furnished any evidence to show that the Respondent is not able to refund the decretal sum should the appeal succeed. Counsel referred to the case of **Antoine Ndiaye (Supra)** where the Court observed that:

This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Appellant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created in the Respondent. And it is only where financial limitation or something of the sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means.

It was further submitted that mere financial burden occasioned by a Judgment does not constitute substantial loss for purposes of grant of stay of execution. In support of the submission, counsel on the case of **Radio Africa Ltd vs Lingam Enterprises & 4 Others HCCC Nairobi No. 579 of 2008 (2011)**

eKLR where Okwengu J. (now JA.) held that:

The Applicants have maintained that they will suffer substantial loss if the order of stay is not issued because they are unlikely to recover the decretal sum of their appeal is successful. The Applicants have however not laid any basis to justify this apprehension. Nor have the applicants provided anything to demonstrate that the Respondent will not be able to refund the decretal sum if required to do so. The applicants' main fear appears to be the fact that in their view the amount of the decree is substantial. However, the amount on the decree on its own is not a sufficient excuse to justify an order for stay of execution or proceedings. Therefore, the applicants have not provided any plausible reason as to why the Court should order a stay of execution or proceedings.

On the issue of substantial loss, it is my finding that the Applicant has not shown how it shall suffer substantial loss only hinging its submission on the claim that the Respondent may not be in a position to refund the same in the event of a successful appeal. The Applicant has not prima facie established financial limitation on the part of the Respondent to create the evidential burden upon the Respondent to furnish an affidavit of means.

The third condition is that of security for due performance. Here, the Applicant deposed that it was willing to furnish security as the Court directs. However, in its submissions, the Defendant stated “*that it is a Constitutional body with perpetual succession and that Justice will be better served if it is not needlessly burdened with an order for furnishing security*”. This submission, in my view, is unfounded, for reasons that upon entry of Judgment in favour of the Plaintiff, the Applicant became a Judgment-debtor liable to pay the decretal sum. It matters not, that it is constitutional body with perpetuity.

The aforementioned findings notwithstanding, I am alive to the fact that the discretionary relief of stay of execution pending appeal is founded on the basis that both parties have equal rights; the Applicant's right to appeal against the Respondent's right to enjoy the fruits of the judgment delivered in his favour, and the Court must balance the competing rights of either party.

Having now considered the instant Notice of Motion and the written submissions, the court makes the following orders:-

- 1. An order of stay of execution of the decree is hereby granted on condition that the Applicant shall deposit the decretal sum of Kshs. 8.5 Million in Court within 45 days of the date hereof, which deposit shall be held as security for performance of the decree. In default, the stay shall automatically lapse.***
- 2. Each party to bear their own costs.**

It is so ordered.

Dated, Signed and Delivered this 29th day of April, 2016

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Respondent though notified.

M/s Butoyi holding brief Mr Omoti for the Defendant/Applicant

Hilda : Court Clerk

L. GACHERU

JUDGE

29/4/2016