



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 420 OF 2011

SAMUEL NDUNGU MUKUNYA. PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LIMITED. 1ST DEFENDANT/APPLICANT

ALPHONSE SHIUNDU. 2ND DEFENDANT/APPLICANT

RULING

The Defendants/Applicants have moved this court by way of a Notice of Motion dated the 15th June, 2016 under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2016, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The Applicants have sought the following orders.

1. That this application be certified as urgent and service at first instance be dispensed with.
2. That there be a stay of execution of the judgment delivered by this honourable court on the 29th June, 2015 pending the hearing and determination of this application inter partes.
3. That there be a stay of execution of the Plaintiff's Bill of Costs dated 22nd February, 2016 taxed at Ksh.583,147/- on the 19th May, 2016 pending the hearing and determination of this application inter parties.
4. That there be a stay of execution of 2 & 3 above pending the hearing and determination of the appeal herein.
5. That the costs of this application be provided for.

It is supported by the annexed affidavit of Sekou Owino and on the grounds set out on the body of the application.

The deponent avers that judgment in this matter was delivered on the 29th June, 2016 for a total of Ksh.20,000,000/- (Twenty Million) plus costs and interest.

The Defendants being dissatisfied with the said judgment have filed a notice of appeal. That the Respondent filed his Bill of Costs, the same was taxed on the 19th May 2016 and a stay of execution was granted by the Deputy Registrar. That on the 2nd day of June, 2016, the Applicants were served with a warrant of attachment of moveable property which warrants were issued on the 27th day of May, 2016 before the stay that had been granted by the Deputy Registrar had expired.

It is further deponed that the Applicants have a justifiable apprehension that the Respondent will proceed and commence execution in which case the Applicants will suffer substantial loss. According to the applicants, the award of general damages made by the court was inordinately high and that the ramifications of such huge pay out would be felt in the running of the company's day to day business.

That the 1st Defendant/Applicant is ready and willing to deposit such security and to abide by any such conditions as the court may deem fit to impose upon the applicants.

The Respondent has opposed the application by way of a replying affidavit sworn by Samuel Ndung'u Mukunya sworn on 23rd June, 2016. In the said affidavit, it is deponed that, the Applicants have not been able to meet the threshold set out by Order 42 rule (6) of the Civil Procedure Rules in that they are guilty of inordinate delay and the present application was prompted by his steps to realize the fruits of his judgment.

It has also been deponed that the Applicants have not demonstrated what substantial loss they are likely to suffer if the stay of execution is granted. That besides stating that its appeal has a good chance of success, it has not been stated what grounds of appeal the Applicants are relying on and that no draft of Memorandum of appeal has been annexed. The Respondent has also averred that no specific security has been offered for the due performance of the decree herein and that the Applicants have not demonstrated any sufficient cause to warrant granting of the orders sought. It has further been deponed that the Respondent is the Presiding Judge of the High Court Bungoma and he is able to refund the decretal sum should he appeal succeed. He has urged the court to dismiss the application.

Both Parties filed written submissions in support of their respective positions, which this court has duly considered.

The application has mainly been brought under Order 42 Rule 6 (2) of the Civil Procedure Rules. The rule provides as hereunder: -

“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.”

On the first condition, the Applicant has argued that the decretal sum of Kshs.20,000,000/- (20 Million) is indeed an inordinately large sum and any such payment would affect the day to day running of the company as well as have serious ramifications on the company. On his part the Respondent has submitted that the Applicant has not demonstrated what substantial loss it shall suffer if stay is not granted.

Where execution of a money decree is sought to be stayed and in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The court has to balance the interest of the Applicants who are seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the court should not only consider the interest of the Applicants but has also to consider in all fairness the interest of the Respondent who has been denied the fruits of the Judgment. See the case of **AG Vs Halal Meat Products Limited**, Civil Application Number 270 of 2008 (Nairobi).

It is not sufficient to merely state that the decretal sum is a lot of money and the Applicants would suffer if the money is paid. See the case of **Machira t/a Machira & Co. Advocates Vs East African Standard (2002) KLR 63**.

I have perused the affidavit in support of the application, the Applicant has averred that it will suffer substantial loss, in that the decretal sum is inordinately high and being guided by the case of **Machira Vs East Africa Standard (supra)**, that does not amount to substantial loss.

The Applicant has further submitted that if the decretal sum is paid out to the Respondent, he may not be able to refund, should the appeal succeed. This was not, however, deponed to in the affidavit in support and as courts have said time and again, submissions are not evidence and especially on factual issues unless the same have been made under oath. For the applicant to succeed on this front, it was expected to swear upon reasonable grounds that the Respondent will not be in a position to refund the decretal sum in which case, the evidential burden would have shifted to the Respondent to prove otherwise. See the case of **Kenya Posts & Telecommunication Corporation Vs Paul Gachanga Ndurua**, Civil Application No. NAI 347 of 2001. With regard to what amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum, is a matter of fact which depends on each individual case. In my view, this burden did not shift to the Respondent and in the premises, the Applicant was unable to prove that it shall suffer substantial loss.

On the issue of inordinate delay, the court has noted that the judgment in this matter was delivered on the 15th June, 2016 while the application herein was filed on the 15th June, 2016. The Applicant has attempted to explain the delay by attributing the same to the process of filing and taxing the Bill of Costs. It is my considered view that whatever the case, a period of one year is by any standards, inordinate delay and the explanation given by the Applicant is not satisfactory. The Applicant did not require a decree in order to apply for a stay of execution pending appeal. I, therefore, hold that the delay was inordinate.

On the issue of security, the applicant has submitted that it has offered to deposit such security and abide by any conditions that this Honourable Court shall deem fit. The said offer as rightly submitted by the Respondent has been made in general terms and it's not specific on what security the Applicant has offered. The law requires the Applicant to offer security.

On the issue of whether the applicant has a good appeal with a high chance of success, the Applicant herein did not submit on it, but from what this court is able to gather from the submissions and the affidavit in support of the application, the only quarrel the Applicants have, with the judgment is on quantum of damages which it submits is inordinately high. It has not been submitted the Applicants have a problem with liability and in any event, it has not annexed a draft memorandum of appeal to guide the court on whether the appeal is arguable or not. The court is therefore, unable to make a finding on whether the appeal shall be rendered nugatory or not if the stay of execution is not granted.

This court is alive to the fact that, a stay pending appeal is a discretionary remedy and in dealing with an application like the one before the court, its discretion is wide but at the same time such discretion should be exercised judiciously. With the overriding objective in civil litigation, the court is now enjoined to take into account substantive and proportionate justice, act fairly and balance the relative interests of all the parties.

The Court of Appeal emphasized this principle in the case of **E Muriu Kamau & Another Vs National Bank of Kenya Ltd (2009) eKLR** where the court observed: -

“The court including this court in interpreting the Civil Procedure Act or the Appellant jurisdiction Act or exercising any power must take into consideration the overriding objective as defined by the two Acts. Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.”

The court applied the balancing principle in the case of **Jason Ngumba Kagu & Others Vs Intra Africa HCCC 288 of 2011** where it was held:-

“I have stated time and again that the basis for the approach taken by the Court is the recognition that both parties have rights; and, neither the right of the respondent to his judgment not the Applicant’s to its appeal is the lesser. However, the appeal relates to reversal of the judgment of the court and the court should strike a balance that will hold the parties at almost a symmetrical bound. In balancing these rights, the court is minded of the role of security required under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly, in the light of my finding above, I will grant a stay of execution pending appeal on condition that; the Applicant pays one half of the decretal sum to the respondents and deposit the other half in an interest earning account in the names of counsels for the parties and the Deputy Registrar.”

This court is persuaded by the above judgment and I am inclined to make similar orders as in the following terms: -

(a) There shall be a stay of execution pending the hearing and determination of the appeal but on condition that half of the decretal sum is paid to the Respondent and deposits the other half in an interest earning account to be opened in the joint names of the advocates on record.

Dated, signed and delivered at Nairobi this 13th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff/Respondent***

..... ***for the 1st and 2nd Defendant/Applicant***