



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 187 OF 2015 (OS)**

**NZIOKI AND CO. ADVOCATES. .... APPLICANTS**

**VERSUS**

**HARIT SHETH ADVOCATES. .... RESPONDENTS**

**R U L I N G**

1. Before the court is a Notice of Motion Application dated the 23<sup>rd</sup> November, 2015 brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

2. The Application seeks various reliefs among them: -

i) Spent

ii) Execution of and all proceedings to enforce the Judgment and Decree given in this matter on 3<sup>rd</sup> November, 2015 by the Honourable Mr. Justice Mbogholi Msagha be stayed pending the hearing and final determination of this Application.

iii) Execution of and all proceedings to enforce the Judgment and Decree given in this matter on 3<sup>rd</sup> November, 2015 by the Honourable Mr. Justice Mbogholi Msagha be stayed pending the hearing and determination of the Defendant's Appeal to the court of Appeal against the said Judgment and Decree.

iv) The costs of this Application be made to abide the result of the said Appeal.

3. The Application is based on the grounds set out therein and on the Affidavit of Harit Amritlal Sheith sworn on the 23<sup>rd</sup> day of November, 2015 and a supplementary affidavit by Harit Sheith sworn on 7<sup>th</sup> December, 2015.

4. The Application is opposed by the Plaintiff/Respondent through a replying affidavit sworn by Joseph Muisyo Nzioka on the 4<sup>th</sup> day of December, 2015.

5. The brief history of the Application is that on the 3<sup>rd</sup> day of November, 2015 Hon. Justice Mbogholi delivered a judgment in this matter ordering the defendant to pay a sum of Ksh.50,000,000/- to the Plaintiff within 30 days from the date thereof and in default enforcement shall follow. The Defendant being dissatisfied with the said judgment and decree given on the 3<sup>rd</sup> day of November, 2015 intend to Appeal against the judgment.

6. In the Affidavit in support of the Application Mr. Sheth Advocate depones that the intended Appeal is arguable and it has very good chances of succeeding in that the Judgment delivered on the 3<sup>rd</sup> November, 2015 is erroneous in so far as it directs the Defendant to pay the Plaintiff a sum of Ksh.50,000,000/- and this contradicts the Plaintiff's own clear instructions to the Defendant to pay a sum of Ksh.25,000,000/- to one Samuel Bryan Yongo Otumba and the balance of Ksh.25,000,000/= to the Plaintiff.

7. It is further deponed that the sum of Kshs.600,000,000/- received by the Defendant from the government and from which the said Judgment amount of Ksh.50,000,000/- was to be paid to the Plaintiff had already been released and paid out in full (or to the order of) his client's Director one Francis Mbuno and therefore the money is no longer in his possession, custody or control.

8. He further depones that being an Advocate's firm, they do not have enough of their own funds to pay the Ksh.50,000,000/- to the Plaintiff as ordered by the court in its judgment dated 3<sup>rd</sup> November, 2015, and that any execution proceedings against their firm to enforce the said judgment will cause serious and irreparable loss and damage and will have the effect of crippling their operations and shutting them down completely thereby destroying their family members, employees and will also cause serious loss and damage to their clients.

9. It is further deponed that if the said amount is paid to the Plaintiff, he will not be in a position to refund the money in the likely event that the Appeal succeeds.

10. He further contends that the intended Appeal will be rendered nugatory if execution is not stayed and that they will suffer substantial and irreparable loss and harm. He avers that the Plaintiff will not suffer any prejudice not capable of being compensated by an Award of Costs if the execution is stayed.

11. On his part, the Defendant in his replying Affidavit depones that by the time the Defendant received the Kshs.600,000,000/= he was aware of the Plaintiff's claim of Ksh.50,000,000/- and having given the professional undertaking the subject matter of this suit the Defendants in releasing the sum of Kshs.600,000,000/- to his client did so at his own risk.

12. According to the Plaintiff, the Defendant has failed to show that they will suffer substantial loss unless the orders sought in the application dated 23<sup>rd</sup> November, 2015 are granted and that there has been a delay in bringing this Application.

13. The Defendant filed a Supplementary Affidavit on 8<sup>th</sup> day of December, 2015. At the hearing of the Application, parties recorded a consent in respect of the same to the effect that; the same was deemed as duly filed and that paragraphs 6-10 of the said Affidavit both inclusive were struck out.

14. In the said Supplementary Affidavit Paragraph 4, Mr. Sheth Advocate has offered to give a bank guarantee for the sum of Ksh.20,000,000/- on behalf of the Defendant to act as security.

15. The submissions by the counsels reiterates the contents of their respective Affidavits which the court shall not reproduce as I have already summarized the facts as captured in the Affidavits. It is important to note that in his submissions, counsel for the Defendant has offered to pay a sum of Ksh.5,000,000/- to the Plaintiff in addition to the bank guarantee of Ksh.20,000,000/- because according to the Defendant the total amount owing to the Plaintiff is Ksh.25,000,000/- and not Ksh.50,000,000/- as claimed. This, however, is a matter for the Court of Appeal to decide.

16. I have carefully considered the Notice of Motion, the Affidavits in support of and against the same,

the submissions by the learned counsels and the authorities relied on by the Defendant/Applicant. The Application has been brought under Order 42 Rule 6 among other provisions. The said order provides as follows: -

***“No order for stay of execution shall be made under sub-rule 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.”***

17. The grounds of granting a stay of execution are now settled in law as was held in the Court of Appeal in the case of **Equity Bank Limited Vs West Link MBO Ltd (2013) eKLR** that an Appeal does not operate as a bar to execution of the judgment hence a party seeking stay pending Appeal must therefore, demonstrate that they are not using the appeal to delay justice.

18. On whether the Application was filed without undue delay, I note that the same was filed after 21 days from the date of the Judgment. On the issue of whether there was a delay in filing the Application or not, though the Respondent has deponed it in his replying affidavit, the same was not canvassed by the parties and in the circumstances I will excuse the delay.

19. Regarding the issue of substantial loss, I am satisfied that if execution proceeds, it will have the effect of crippling the operations of the Defendant's firm which will cause serious loss and damage to the Defendants, the clients and the employees.

20. On the issue of security, the Defendant is willing to give a bank guarantee of Ksh.20,000,000/- and in addition pay a further sum of Ksh.5,000,000/- to the Plaintiff.

21. The court is alive to the fact that the remedy sought by the Applicant is a discretionary one. In the case of **Absalom Dura Vs Tarbo Transporters (2013) eKLR** the court observed: -

***“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves”***

This is in recognition that both parties have rights, the Appellant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory, and to decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.

22. This court has many options of balancing out the parties rights. In this case, where it decides to grant a stay, it can do so on terms.

23. In the upshot, I make the following orders: -

***a) The Notice of Motion dated 23<sup>rd</sup> November, 2015 is allowed in terms of prayer 3 on the following condition.***

***(i) A sum of Ksh.10,000,000/- be paid to the Plaintiff within 30 days from today.***

***(ii) The Defendant to give a bank guarantee for a sum of Ksh.25,000,000/- on behalf of the Defendant within 30 days from today.***

***(iii) The balance of Ksh.15,000,000/- be deposited in an interest earning account in joint names of both lawyers within 45 days.***

***(iv) Failure to comply with any of the conditions above, execution to issue.***

***(v) Costs of the Application shall be for the Respondent***

Dated, signed and delivered in Nairobi this 10<sup>th</sup> day of March, 2016.

.....

**L NJUGUNA**

**JUDGE**

***In the presence***

..... ***for the Plaintiff.***

..... ***for the Defendant.***



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