



Case Number	Civil Suit 45 of 2011
Parties	Anthony Kiai ta High Flyer Services and Publisher & another v Peter Mwangi Gichuki ta High Flyer Services and Publisher & another
Case Class	Civil
Judges	A Mabeya
Advocates	1.Ms Ndungu h/b for Mrs. Makworo 2.Mr. Asimwe h/b for Ombachi
Case Action	
Case Outcome	Notice of Motion dismissed with costs to the Interested Party
Date Delivered	02 Sep 2021
Court County	Nairobi
Case Court	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Court Division	Commercial and Tax

Anthony Kiai t/a High Flyer Services and Publisher & another v Peter Mwangi Gichuki t/a High Flyer Services and Publisher & another (Civil Suit 45 of 2011) [2021] KEHC 6 (KLR) (Commercial and Tax) (2 September 2021) (Ruling)

Neutral citation number: [2021] KEHC 6 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

September 2, 2021

A Mabeya, J

Civil Suit No. 45 of 2011

Between

Anthony Kiai t/a High Flyer Services and Publisher

1st Plaintiff

High Flyer Services & Publisher Ltd

2nd Plaintiff

and

Peter Mwangi Gichuki t/a High Flyer Services and Publisher

1st Defendant

Fortune Printers Limited

2nd Defendant

Ruling

1.The application the court is tasked with determining is a Motion dated 17/1/2020. It is brought inter alia under Order 42 Rule 6 and Order 52 Rule 1 of the Civil Procedure Rules. The Motion seeks a stay of execution of the judgment of Chemitei J. delivered on 20/12/2019 pending the hearing and determination of an appeal in the Court of Appeal.

2.The applicant swore a supporting affidavit on 17/1/2020 whereby the grounds of the application are set out. The grounds are that; the applicants intend to appeal against the said decision and have filed a Notice of Appeal; that the intended appeal is meritorious and raises several issues for determination; that the applicants will suffer substantial loss and irreparable damage if the decree is executed and that the applicants are willing to abide by any conditions that may be imposed by the Court pending the hearing and determination of the intended appeal.

3.In opposition, the 1st respondent filed a replying affidavit sworn on 5/2/2020. He asserted that in the year 2004, he brought the 1st plaintiff into his business of publishing. They incorporated a company known as 'High Flyer Services Ltd' whereby the book 'High Flyer Series' was launched. In 2007, they separated but the respondents continued to trade in the name 'High Flyer Series' the plaintiff harassed them to stop publishing using that name.

4.He averred that the plaintiff used their popular name "High Flyer Series" to penetrate the Kenyan and East African market and even win a seat in the Kenyan Parliament. On his part, he has been left to wallow in poverty after suffering debts and sickness.

5.The respondents therefore pray that the stay orders should not be granted but if granted sufficient security be ordered. The Court has carefully considered the record.

6.A grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Under that provision, the principles applicable are that the application must be made timeously, an applicant should demonstrate that he will suffer substantial loss if the stay is not granted and he must offer sufficient security for the decree that might ultimately be binding on him.

7.Judgment in this suit was delivered on 20/12/2019 and the subject application was lodged on 17/1/2020. As such there was a period of 27 days which is reasonable. The Court therefore finds that there was no delay in lodging the application.

8.The second limb for consideration is whether the applicants have shown satisfactorily to the Court that they would suffer substantial loss.

9.The applicants submitted that they stand to suffer substantial harm as the defendants are not in a position to refund the decretal sum in the event the appeal is successful. This is based on the fact

that the 1st defendant sought to file a pauper case in Misc 259 of 2018 and his averment in his replying affidavit stating that he is suffering in oblivion and seclusion under numerous debts.

10. In *Antoine Ndiaye v African Virtual University* [2015] eKLR, it was held: -“So the Applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.”

11. The Court applies the foregoing pronouncement and holds that, if an applicant demonstrates that he might not recover the decretal sum, if the appeal succeeds, then that would be substantial loss.

12. In the present case, the respondent confirmed that he is wallowing in abject need. That he is not financially sound. It is therefore clear that from the respondents’ own admissions, they are not in a position to refund the decretal amount to the applicant if paid over and the appeal is successful. This will render the appeal nugatory.

13. On the issue of security for due performance, the applicants averred that they are willing to provide security for the decretal sum and to abide by any conditions set by the Court.

14. The Court is of the opinion that the sufficient security should be the entire decretal sum.

15. Accordingly, the application is allowed on condition that the applicant deposits the entire decretal sum in an interest bearing account in the joint names of the Advocates for the parties herein. The deposit should be made within 30 days from the date of this ruling. The costs will be in the cause.

It is so ordered. **DATED** and **DELIVERED** at Nairobi this 2nd day of September, 2021. **A. MABEYA,**
FCI ArbJUDGE