



Malde (Suing as Executor of Will of Lalitaben Kantil Shah - Deceased) v Spire Bank Limited (Successor in Title to the Southern Credit Banking Corporation Limited) (Civil Case 278 of 2001) [2024] KEHC 9201 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 278 OF 2001
JWW MONG'ARE, J
JULY 31, 2024**

BETWEEN

DINIT VIRCHAND MALDE (SUING AS EXECUTOR OF WILL OF LALITABEN KANTILAL SHAH - DECEASED) PLAINTIFF

AND

SPIRE BANK LIMITED (SUCCESSOR IN TITLE TO THE SOUTHERN CREDIT BANKING CORPORATION LIMITED) DEFENDANT

RULING

Introduction And Background

1. By this court's judgment dated 13th October 2023, the Plaintiff's suit was allowed and judgment was entered in his favour and against the Defendant in the sum of Kshs.16,829,886.70 being the balance from the sale proceeds of the property known as Land Reference 209/75/5 plus interest at court rates from 26th September, 2007 till payment in full. The Plaintiff was also awarded costs of the suit. The Defendant has evinced its intention to appeal against the said judgment at the Court of Appeal and has now approached the court by way of a Notice of Motion dated 7th December 2023 made, inter-alia, under Section 1A, 1B and 3A and 63(e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 42 Rule 6 of the *Civil Procedure Rules* ("the Rules") principally seeking to stay the execution of the judgment pending hearing and determination of the intended appeal.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Vincent Nyambati, the Defendant's Manager, Finance Department sworn on 7th December 2023. It is opposed by the Plaintiff through the further replying affidavit sworn on 5th January 2024. The parties have also filed written submissions in support of their respective positions which I have considered.



The Application

3. The Defendant contends that the Plaintiff has purported to obtain warrants of attachment dated 5th December 2023 and proceeded to proclaim the Defendant's goods on the 6th December 2023 without formally setting aside the orders of 30th November 2023 and thus terms these actions as illegal, unprocedural and a travesty of justice. That the execution of the decree and attachment of the Defendant's tools of trade by the Plaintiff for an amount of Kshs 55,003,069.74 would result in crippling of the Defendant's operations thus occasioning it substantial loss owing to the uncertainty of the Plaintiff's ability to refund the decretal amount should the intended appeal succeed. It further states that the application has been filed without undue delay, that the Defendant is ready, able and willing to provide such security for the due performance of such decree or order as may ultimately be binding on them as the Court may order including but not limited to an appropriate bank guarantee for the due performance of the decree.

The Plaintiff's Reply

4. The Plaintiff opposes the application on the technical ground that the Defendant's deponent has not attached any authority of the Defendant to swear an affidavit on its behalf and thus urges the court find that the deposition sworn in support of the application is a nullity. On the substance of the application, the Plaintiff proffers that no appeal has been filed as yet and that the prayer seeking stay pending appeal is speculative, that any intended appeal would simply be an exercise seeking to delay to settle the long standing dispute running from the year 2007. Further, that any intended appeal would stand no chance of success as all issues raised in the draft memorandum of appeal were answered by the court in its judgment.
5. The Plaintiff further depones that the Defendant should be ordered to deposit the decretal sum in court and not the promised bank guarantee and that there is little or nothing to attach against the Defendant as the Defendant had closed all its branches and is no longer operating as a Bank. That if the stay orders are granted then it would give the Defendant an opportunity to escape any possible enforcement.

Analysis and Determination

6. I have carefully considered the rival pleadings and depositions of the parties together with the written submissions on record. In as much as the Plaintiff has raised the technical issue that the Defendant's deponent had no authority to swear an affidavit on its behalf, I propose to deal with the substance of the application in the interest of justice and for completeness. In any event, the deponent has stated that he is well versant with the facts relevant to the application and therefore competent and duly authorized to swear this affidavit. He is therefore presumed to be duly authorized by the Defendant unless the Defendant states otherwise, which is not the case and the Plaintiff has not produced any contrary evidence that the said deponent is not authorized.
7. It is common ground that the principles that guide the court in an application for stay of execution and proceedings pending an appeal are grounded in Order 42 Rule 6 (2) of the *Civil Procedure Rules*. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be.



8. In *Kenya Women Microfinance Ltd v Martha Wangari Kamau KJD* HC Civil Appeal No. 14 of 2020 [2020] eKLR, the court cited the position of Warsame J., (as he then was) in *Samvir Trustee Limited v. Guardian Bank Limited* NRB ML HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

9. Based on the above, it is clear that for the Court to grant stay of execution, the Defendant needs to satisfy the Court that it will suffer substantial loss. The Court in *Muri Mwaniki & Wamiti Advocates v Wings Engineering Services Limited* Thika ELC Misc. Application No. 18 of 2017 [2020] eKLR cited the decision of *Century Oil Trading Company Ltd v. Kenya Shell Limited* NRB ML HCMCA No. 1561 of 2007 where the court stated

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, 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 is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is 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.”

10. From the Defendant’s deposition, I note that it gives contradictory statements on its financial position. On one hand it states that execution will cripple its banking operations, on the other hand it states that it is able to furnish security, implying that it is not in financial dire straits as it claims. In any case, it has not demonstrated, by way of evidence, its financial position for the court to find in its favour. If anything, the Defendant has not responded to the Plaintiff’s contention that it is closing operations and that unless execution is done at the earliest, the Plaintiff will not be able to enforce the judgment and obtain any fruits from it. The Defendant has also not put forth any evidence to demonstrate the kind of loss it will suffer if it satisfies the decree or that the Plaintiff is not in a position to refund the paid sums. As stated by the Plaintiff, I take cognizance that this dispute has been around since 2007 and owing to the Defendant’s volatile and unpredictable financial position, it would not be in the interest of justice to delay the Plaintiff from enjoying the fruits of his judgment any longer.
11. The conditions that satisfy the court that an order of stay of execution under Order 42 Rule 6 of the Rules ought to be granted must be fulfilled conjunctively, meaning all three conditions must be met simultaneously and that failure to satisfy any one of the tenets stipulated in that Rule is fatal to the application (see *Equity Bank Limited V Taiga Adams Company Limited* ML HCCA No. 772 of 2005 [2006] eKLR and *Morris Guchura Njage t/a Morris Njage & Company v Liza Catherine Wangari Mwangi* EMBU HC Misc. Civil Application No. 111 of 2017 [2021] eKLR)
12. Thus, whereas the Defendant might have brought the application without undue delay and that it is willing to provide such security as determined by court, I find that it has failed to demonstrate the substantial loss it will suffer if the stay is not granted. In the foregoing, I find that the Defendant has not made out a case for the grant of an order of stay of execution of the court’s judgment.

Conclusion and Disposition

13. For the reasons stated above, I find that the Defendant’s application dated 7th December 2023 lacks merit and dismiss the same in its entirety and the interim orders issued by the court on 30th November 2023 are discharged. Costs of this Application are awarded to the Plaintiff.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF JULY 2024

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J W W MONGARE

JUDGE

In The Presence Of

Mr. Kimani for the Defendant/Applicant

Mr. Mbithi for the Plaintiff/ Respondent

Amos- Court Assistant

