



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. E048 OF 2021

METROPOL CREDIT REFERENCE BUREAU LIMITED....APPELLANT/APPLICANT

VERSUS

EVANS MESSOP MONGARE.....1ST RESPONDENT

NATIONAL BANK OF KENYA LTD.....2ND RESPONDENT

RULING

This ruling is in respect to the application dated 6/7/2021. The applicant seeks a stay of execution of the judgement and decree in **Migori CMCC No. 525 of 2018, Evans Mongare vs National Bank of Ltd & Metropol Credit Reference Bureau Limited** delivered and issued on 10/6/2021 pending the hearing and determination of the applicant's appeal.

The grounds upon which the application is premised are found in the body of the application and the supporting affidavit of **Pharis Kiama**, the Dispute Resolution Manager of the applicant. It is the applicant's contention that it is aggrieved by the entire judgement issued by the trial court and it instructed its advocates on record to file the instant appeal; that the 1st respondent is in the process of execution; that there is no order for stay of execution in force; that the decretal sum is a substantial, amounting to **Kshs. 2,500,000/=** which if paid to the 1st respondent and the appeal is successful, the applicant will not be able to recover the same since it does not know the financial status of the 1st respondent; that the applicant is ready and willing to deposit security for costs, by proving a bank guarantee or abide by any further directions of this court; that no prejudice will be suffered by the 1st respondent if the application be allowed; that the appeal has high chances of success and the application has been brought without undue delay, in good faith and in the interest of justice.

The application was opposed. The 1st respondent swore and filed a replying affidavit dated 23/7/2021. The respondent primarily deponed that the application is intended to deprive him of enjoying the proceeds of the judgement he is entitled to and the appeal as filed does not give a prima facie impression of success.

The application was prosecuted by way of written submissions and both parties submitted on whether the applicant is deserving of stay pending appeal. I have duly considered the written arguments of both parties.

The application is one of stay pending appeal. **Order 42 Rule (6) (1) and (2)** makes provision for stay pending appeal as follows:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 ultimate be binding on him has been given by the applicant."**

In order for stay of execution orders to issue, the applicant should demonstrate the following:-

- a. He shall suffer substantial loss if stay is not granted;
- b. That the application has been filed without unreasonable delay;
- c. The applicant is willing to furnish security for the due performance of the decree;
- d. The applicant has an arguable appeal.

On the issue of substantial loss, it is the applicant's submission that the decretal sum of Kshs. 2,500,000/= is a substantial amount and the 1st respondent's source of income is unknown. The applicant is apprehensive of the 1st respondent's capability to refund the money if the appeal succeeds; that the appeal will be rendered nugatory and the applicant will suffer irreparable loss in the event the 1st respondent will not be able to refund the money and the appeal succeeds.

In response the 1st respondent submitted that the applicant has not demonstrated to this court what kind of loss it would suffer should the execution proceed. In the case of **Silverstein v Chesoni (2002) 1 KLR 867** cited in **Superior Homes (Kenya) Limited vs Musango Kithome (2018) eKLR** the Court of Appeal held as follows:

"...issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

The assurance that the applicant has that it will not suffer substantial loss, is the ability of the 1st respondent to refund the decretal sum if the appeal succeeds. In **Superior (Homes) Kenya Limited (supra)**, the court held:-

"...The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum."

A similar finding was made in **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua (2001) eKLR** as follows:-

"...Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient."

The evidential burden therefore lies on the 1st Respondent to prove his means.

In his replying affidavit, the 1st respondent deposed that he is a Civil Servant capable of repaying the decretal sum in the event the appeal succeeds. However, the 1st respondent did not attach any evidence of either an employment letter or payslip to support his averment. The 1st respondent has not sufficiently discharged the evidential burden of his ability to repay the decretal sum. In the event the decretal sum is paid to him, the applicant might suffer substantial loss and the appeal rendered nugatory.

On whether there was unreasonable delay in bringing this application, **Section 79G of the Civil Procedure Act** provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on 10/6/2021. The instant application and memorandum of appeal were filed on 6/7/2021. This is a period of twenty-five (25) days from the date when judgement was delivered. The application and the memorandum of appeal were filed well within time. I therefore find there has not been inordinate delay in filing this application.

On security for the due performance of the decree, the 1st respondent submitted that if this court is inclined to grant stay of execution, the applicant be ordered to deposit Kshs. 500,000/= as security. On 19/7/2021, this court directed that the applicant deposit a sum of Kshs. 1,500,000/= in an interest earning account of both Counsel. The applicant in its submissions confirmed compliance with the order, a fact that has not been disputed. I find that the applicant has fulfilled this condition and provided security for the due performance of the decree.

Whether the applicant has an arguable appeal: the applicant is disputing among others that the trial court erred in law and in fact when interpreting the law guiding the applicant in executing its statutory mandate; that the award in general damages was exorbitant and without any basis and that the court arrived at an erroneous finding. In addition to that, the applicant faults the trial court for disregarding its defence and submissions. This is arguable. Since the applicant has already provided security for the due performance of the decree, then the respondent will not suffer any prejudice.

In the end, I make the following orders: -

a. There be a stay of execution of the judgement and decree delivered on 10/6/2021 in Migori CMCC No. 525 of 2018 Evans Messop Mongare pending the hearing and determination of the appeal;

b. The Applicant/appellant do file and serve the record of appeal within sixty (60) days from the date of this ruling;

c. Costs of this application do abide the outcome of the appeal.

Dated, Delivered and signed at Migori this 28th day of April, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Ondigi for the Applicant

Ms. Okota for the 1st Respondent

Mr. Odhiambo for the 2nd Respondent

Nyauke Court Assistant