



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E323 OF 2020**

**ANTHONY KIRIINYA MWONGERA.....APPLICANT**

**VERSUS**

**COMMERCIAL BANK OF AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. The motion dated 31<sup>st</sup> August, 2020 by **Anthony Kiriinya Mwangera** (hereafter the Applicant) seeks an order to stay execution of the judgment and decree entered in favour of **Commercial Bank of Africa Ltd** (hereafter the Respondent) in **Nairobi Milimani CMCC No. 3603 of 2019**, pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 6 of the Civil Procedure Rules, *inter alia*. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant. To the effect that being dissatisfied with the ruling of the lower court delivered on 20<sup>th</sup> December, 2019, the Applicant has preferred an appeal which is arguable and has a high chance of success and; that the Applicant is apprehensive that unless stay is granted, the Respondent shall proceed with execution thereby rendering his appeal nugatory. He offers to deposit 10% of the decretal sum, asserting that he might lose his right to defend the lower Court suit if required to deposit the entire decretal sum.

2. The motion is opposed through the replying affidavit of **Jackson Nyaga** who describes himself as the Legal Counsel at the Respondent Bank, thus conversant with pertinent facts, competent and with due authority to swear on behalf of the Respondent. He takes issue with the motion on the grounds that the same is incompetent, bad in law, without merit and an abuse of the court process. He cites the multiplicity of applications by the Applicant, delay, and his failure to comply with the lower court orders and swears that the motion is a mere *façade* brought with the sole aim of delaying the execution process. In his view the Applicant is not entitled to the orders sought in the motion and the same should be dismissed with costs.

3. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant's counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Counsel asserted that the purpose of an application for stay of execution pending appeal is to preserve the subject matter so that the rights of the appellant exercising his undoubted right of appeal are safeguarded. It was submitted that the appeal and present motion were lodged expeditiously upon delivery of the impugned ruling. On substantial loss, counsel argued that if the Respondent is allowed to proceed with execution of the decree the appeal, if successful will be rendered nugatory. In conclusion it was submitted that the Applicant is ready and willing to provide security as a condition for stay of execution and the motion ought to be allowed.

4. For his part, counsel for the Respondent similarly based his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Citing the decision in **Antoine Ndiaye v African Virtual University [2015] eKLR** he submitted that the Applicant has not shown sufficient cause why stay of execution ought to be granted in his favour. Counsel further contended that there was delay in filing the motion as the impugned ruling was delivered on 26<sup>th</sup> June, 2020 whereas the instant motion was filed on 31<sup>st</sup> August, 2020 thus the motion is an afterthought, the Applicant having been awakened from slumber by the execution process. Concerning substantial loss, the Respondent relied on several decisions including **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR** and asserted that the Applicant did not establish substantial loss and that it was not enough for the Applicant to merely state that execution would render the appeal nugatory.

5. Counsel concluded by contending that provision of security is not dependent on the Applicant's discretion but is a matter of law, based on the terms that may be imposed by the court in exercise of its discretion. That the Applicant's proposal on security is a backdoor attempt to appeal the impugned ruling of the lower court and ought not to be sustained. In the foregoing regard counsel called to aid the decision in **Gianfranco Manenthi & Another v Africa Mercant Assurance Company Limited [2019] eKLR**.

6. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. Secondly, it is not clear to this Court why the Applicant having filed his appeal before this court, namely **HCCA No. E 020 of 2020** in July 2020 subsequently filed the instant miscellaneous cause for stay orders. This created some confusion and delays as certain filings were made in the former cause instead of the instant matter. Be that as it may, it is trite that the power

of the court to stay the execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417**.

7. The prayer for stay of execution pending appeal is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 Applicants 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 Applicants”.**

8. The first question to be determined is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] e KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the **Shell** case are especially pertinent. These are that:

**“1. ....**

**2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**

**3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**

**4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”**

9. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The **Ag JA** (as he then was) stated inter alia that:

**“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)”**

10. The learned Judge continued to observe that: -

**“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicants, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.” (Emphasis added)**

11. Earlier on, **Hancox JA** in his ruling observed that:

**“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”**

**As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if**

successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997.**

12. The Applicant in his supporting affidavit asserts apprehension that the Respondent shall proceed with execution rendering the appeal nugatory unless stay orders are granted. In his submissions, the Applicant correctly cited the applicable principles on stay of execution pending appeal, but his affidavit material falls short of demonstrating how substantial loss will come about; is it through hardship in satisfying the decree or the Respondent’s inability to refund the decretal sum to the Applicant in the event of the appeal succeeding? Not a single averment is put forward by the Applicant in respect to the foregoing.

13. Thus, the court agrees with the Respondent’s assertion that the Applicant has failed to demonstrate the likelihood of suffering substantial loss as the mere fact of execution of itself is not evidence of substantial loss. Contrary to his submissions, the Applicant has not discharged this burden. The Respondent would only be called upon to rebut the Applicant’s claims where the Applicant has discharged his evidential burden. In any event, the Respondent is a well-known commercial bank, and the amount it claimed in the lower Court arose from alleged loan sums advanced to the Applicant. Presumably, the Respondent is possessed of means to repay monies recovered in execution should the appeal succeed. In these circumstances, it is not enough for the Applicant to make bare assertions as to substantial loss.

14. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** the Court of Appeal stated that:

**“This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

15. Further, the Applicant appeared to make a half-hearted offer to provide security in the form of a deposit of 10% of the decretal sum for the due performance of a decree that is in the sum of over Shs.3.5 million odd. The moment the Applicant failed to comply with the lower Court’s order to deposit the decretal sum, the judgment of the lower Court was reinstated, a matter which the Applicant appears unaware of, going by his offer which was apparently pegged to the ruling of the lower Court. An application under Order 42 Rule 6 of the Civil Procedure Rules stands or falls on the key considerations of substantial loss and security as there must be demonstrated just cause to deny the decree-holder the fruits of his judgment.

16. The Court also notes that the Applicant is guilty of laches. Although the ruling of the lower Court was delivered on 26<sup>th</sup> June 2020, the Applicant did not file his appeal until after 20<sup>th</sup> July, 2020 and thereafter waited until 31<sup>st</sup> August 2020 to file the instant application, inexplicably, in a miscellaneous proceeding.

17. In the present matter, no cause has been shown by the Applicant to justify keeping the Respondent from its money. As stated in the **Shell** case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what must be prevented. Without this evidence, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money. A lawful process of execution, without more, cannot be cited as evidence of substantial loss. The Applicant’s motion is without merit and is hereby dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF APRIL 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Mr Masinde h/b for Mr Mungai**

**For the Respondent: Ms. Odhiambo h/b for Mr. Kabaiku**

**C/A: Carol**