



REPUBLIC OF KENYA



**Post Bank Credit Limited (In Liquidation) v Victoria Distributors Limited
(Civil Appeal E091 of 2021) [2022] KEHC 12678 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E091 OF 2021**

JN KAMAU, J

JULY 27, 2022

BETWEEN

POST BANK CREDIT LIMITED (IN LIQUIDATION) APPELLANT

AND

VICTORIA DISTRIBUTORS LIMITED RESPONDENT

((Being an Appeal arising from the Ruling and Order of Hon P. N. Gesora (CM) in respect of application dated 14th April 2021 in Chief Magistrate's Court Case ELC No E040 of 2021 delivered on 7th July, 2021))

RULING

Introduction

1. In its notice of motion dated July 27, 2021 and filed on July 28, 2021, the appellant herein sought an order for stay of execution of the ruling in respect of the application dated April 14, 2021 that was delivered on July 7, 2021 by hon P N Gesora (CM) in Kisumu CMC ELC No E040 of 2021 pending the hearing and determination of the appeal herein.
2. The said application was supported by the affidavit of Thomas E Osama, a senior officer-resolutions at the Kenya Deposit Insurance Corporation that was sworn on July 27, 2021.
3. It contended that the case Kisumu HCCOM No 56 of 2018 *Kenya Industrial Estates Limited vs Post Bank Credit Limited* (formerly filed in the Environment and Land Court as Kisumu ELC No 308 of 2016) relating to this suit was pending hearing and determination before this court and had been scheduled for pretrial conference on October 6, 2021 (sic).
4. It added that the respondent had filed an application therein seeking injunction orders, which application was denied in the High Court but on application to the Court of Appeal *vide* Kisumu Civil Application No 73 of 2018 (UR 48/2018), the injunction orders were granted by a ruling dated



- February 21, 2019 restraining any dealings in the suit property (sic) pending hearing and determination of the intended appeal.
5. It further averred that the appeal against the ruling of the Environment and Land Court had since been filed as Kisumu Civil Appeal No 37 of 2019 Kenya Industrial Estates Limited vs Post Bank Credit Limited & 4 Others and that the same was awaiting fixing of a suitable hearing date by the Court of Appeal.
 6. It therefore argued that it would be improper and contemptuous for it to engage in any dealings in relation to the suit property, including handing over of vacant possession as claimed by the respondent in the main suit while the aforesaid suits were pending determination by the respective courts.
 7. It added that the respondent filed Kisumu CM ELC No E040 of 2021 *Victoria Distributors Limited vs Post Bank Credit Limited (In Liquidation)* and an application dated April 6, 2021 in which it had sought a mareva injunction freezing the sum of Kshs 18,239,140/= in its account No 10000xxxxx held at Central Bank of Kenya, Head Office Branch pending the hearing and determination of the suit.
 8. It asserted that a ruling was delivered on July 7, 2021 in which it was directed to deposit the sum of Kshs 18, 239, 140/= in court as security for the principal debt within twenty one (21) days of the date of the said ruling. It filed the present appeal as it was aggrieved by the said ruling.
 9. It averred that Account Number 10000xxxxx held at Central Bank of Kenya, head office branch from which account the sum of Kshs 18, 239,140 was to be released was an account maintained as a pool of funds meant for the day to day running of its affairs and therefore its release without addressing the issues raised in its intended appeal would highly prejudice it as it would have been condemned unheard.
 10. It stated that it had an arguable appeal which had a high chance of success and that its application had been filed without delay. It was apprehensive that if the respondent executed against it, it would render the appeal nugatory.
 11. It further averred that it was willing to abide by any conditions and terms as the court may deem fit to impose and urged this court to allow its present application.
 12. In opposition to the said application, on September 28, 2021, Yogesh Dawda, a director at Victoria Distributors Limited, swore a replying affidavit on behalf of the respondent herein. The same was filed on October 6, 2021.
 13. The respondent averred that the appellant's application was frivolous, scandalous and vexatious and that the appellant had approached the court with unclean hands by omitting material facts and misrepresentation to suit its cause. It pointed out that the appellant had failed to disclose to this court that it was currently in liquidation and that it was apparent that its liabilities exceeded its assets and there was imminent danger that the money, the subject of the suit, may be utilised to offset its debts and/or its day to day running of its business, without any possibility of recovery if it was not compelled to deposit the sum of Kshs 18, 239, 140/= in court as security for the principal debt as directed.
 14. It explained that the said sum of Kshs 18, 239, 140/= was the aggregate sum for the purchase price of parcel known as LR No Kisumu/Municipality Block 2/102 (hereinafter referred to as "the subject property") and its claim for reimbursement was the primary cause of action in the lower court.
 15. It further pointed out that the appellant was well aware of the dispute relating to the subject property but failed to disclose the same to it when it purchased the property by way of auction on September 5, 2018. It averred that this was manifest demonstration of unconscionable conduct on the part of the appellant herein.



16. It argued that the appellant had not demonstrated the conditions necessary for granting of orders as was set out in order 42 rule 6(2) of the [Civil Procedure Rules 2010](#) and urged this court to dismiss the present application with costs.
17. The appellant's written submissions were dated November 1, 2021 and filed on November 2, 2021 while those of the respondent were dated November 24, 2021 and filed on November 26, 2021.
18. The ruling herein is based on the said written submissions which parties relied upon in their entirety.

Legal Analysis

19. The appellant placed reliance on several cases among them the case of [Butt vs Rent Restriction Tribunal](#) [1979] eKLR, [Sarah Sakwa vs Elizabeth Wamwanyi t/a Namukhosi Ltd & Another](#) [2017] eKLR, [Preston Mbonzo Nzioka vs Titus Patrick Muthiani](#) [2021] eKLR and [Imperial Bank Limited vs Peter Kironjo Mwaura & Another](#) [2019] eKLR to argue that it had met the conditions for being granted an order for stay of execution pending appeal.
20. On its part, the respondent relied on several cases, among them the case of [Antoine Ndiaye vs African Virtual University](#) [2015] eKLR, [Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others](#) [2015] eKLR and [Magnolia PVT Limited vs Synermed Pharmaceuticals \(K\) Ltd](#) [2018] eKLR to buttress its arguments that the appellant had not met the aforesaid conditions.
21. The present application was filed pursuant to order 42 rule 6 of the [Civil Procedure Rules](#), 2010 which empowers the court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
22. Under the said order 42 rule 6 of the [Civil Procedure Rules](#), an applicant has to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - a. That the application has been made without unreasonable delay.
 - b. Such security as the court orders for the due performance of the decree has been given by the applicant.
23. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive. Both parties were in agreement as to the aforesaid conditions. The court therefore considered the same with a view to establishing if the appellant had met the said conditions for the granting of an order for stay of execution.
24. The ruling the appellant sought to appeal against was delivered on July 7, 2021. The present application was filed on July 28, 2021. It was therefore filed without any unreasonable delay. The appellant had therefore satisfied the first condition for being granted an order for stay of execution pending appeal.
25. As the appellant was the one that was required to pay the decretal sum, the issue of it suffering substantial loss did not arise. It was in fact the respondent which would suffer substantial loss if its claim against the appellant in the lower court succeeded and the appellant had no assets from which it could recover the decretal sum.
26. Notably, the decretal sum herein was Kshs 18,239,140/=. The appellant had stated that the aforesaid sum was kept in a pool meant for the day to day running of its affairs. This was a colossal amount. Ordinarily, there would have been need for the respondent's interests to be safeguarded particularly because the appellant was in liquidation. Be that as it may, this court noted that the appellant's monies



were held at Central Bank of Kenya as the appellant was in liquidation. The respondent would thus be able to recover its monies in the event the appellant lost the appeal herein. It was unlikely that the Central Bank of Kenya would ever go into liquidation.

27. Notably, the grant of orders for stay of execution is discretionary. The purpose of a stay of execution is to maintain the *status quo* to afford an applicant a right to appeal before the decree is executed.
28. It was thus in the interest of justice that the appellant's application be allowed as the respondent would not suffer any prejudice as the appeal was being heard. if it suffered any prejudice, it did not demonstrate the same to this court.

Disposition

29. For the foregoing reasons, the upshot of this court's ruling was that the appellant's notice of motion that was dated July 27, 2021 and filed on July 28, 2021 was merited and the same be and is hereby allowed in terms of prayer No (3) therein as follows:-
 1. That there shall be a stay of execution of the Ruling that was delivered by hon PN Gesora (CM) on July 7, 2021 in Kisumu CMC ELC No E040 of 2021 Victoria Distributors Limited vs Post Bank Credit Limited (in Liquidation) pending the hearing and determination of the appeal.
 2. The appellant be and is hereby directed to file and serve his record of appeal within ninety (90) days from the date of this ruling.
 3. This matter will be mentioned on November 16, 2022 to confirm compliance and/or for further orders and/or directions.
 4. Costs of the application herein shall be in the cause.
 5. Either party is at liberty to apply.
30. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2022

J. KAMAU

JUDGE

