



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 313 OF 2016

MWANIKI WA NDEGWAPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The Application before Court is not an everyday stay of execution application. The Court is asked, through a Notice of Motion dated 14th August 2020, for the following substantive orders:-

[2] THAT pending the hearing and determination of this Application inter-partes there be a stay of execution of the Decree issued herein on by way of liquidation of a Bank Guarantee issued by Co-operative Bank Kenya Limited to Mwaniki wa Ndegwa pursuant to an order issued herein on 13th June 2018 or by any other mode of execution.

[3] THAT pending the hearing and determination of the Application seeking certification of an Appeal sought to be preferred to the Supreme Court and the hearing and determination of such an Appeal to the Supreme Court there be a stay of execution of the Decree issued herein on by way of liquidation of a Bank Guarantee issued by Co-operative Bank Kenya Limited to Mwaniki wa Ndegwa pursuant to an order issued herein on 13th June 2018 or by any other mode of execution.

2. Its uniqueness is that the true effect of the Applicant's request is for this Court to stay execution of an order of the Court of Appeal.

3. A brief background. By a Judgment dated 3rd May 2018, this Court allowed the suit of the Respondent and made the following orders:-

“[35] These are my final Orders.

35.1. Prayer (b) of the Plaint dated 2nd August 2016 is granted as prayed.

35.2. Prayer (c) thereof fails.

35.3. Prayer (a) is allowed to the extent that the difference between the Auction price of Kshs.47 million and Kshs.21,561,563 together with interest thereon (not being suspended interest) from 17th April 2008 to 28th May 2009 and costs of the Sale shall be paid to the Plaintiff with interest thereon at Court rates from the date of filing of this suit.

35.4. Parties to agree on the interest and costs referred to in 35.3 above failing which the same to be worked out by an accountant to be agreed upon by parties or appointed by Court.

35.5. Costs of the suit to the Plaintiff.”

4. In exercise of its right of Appeal, the Applicant Bank moved the Court of Appeal against the Judgment of this Court. In the meantime the Applicant Bank obtained stay of execution of this Court's Judgment pending hearing and determination of the Appeal. The stay order was granted on condition that the Applicant Bank provides a bank guarantee from an independent and reputable financial institution securing settlement of the decretal sum of Kshs.24,906,802.20 plus interest thereon at 12% p.a from 3rd August 2018 until determination of the Appeal.

5. On 7th August 2020, the Court of Appeal dismissed the Appeal with the consequence that the bank guarantee is liable to be called up. The application before Court seeks stay of liquidation of the bank guarantee as the Bank has commenced a second tier of appellate proceedings before the Supreme Court.

6. This Court is told that its jurisdiction to grant the orders sought stems from Section 34 of the Civil Procedure Act which reads:-

“Questions to be determined by court executing decree;

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.— For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

7. It is asserted that in the constitutional scheme, a Judgment of the High Court in a commercial dispute can be subjected to two tiers of Appeal, first to the Court of Appeal and then to the Supreme Court and this Court as the executing Court has jurisdiction to stay execution of such Judgment pending the exhaustion of the Appellate process.

8. This argument, even if attractive, faces insurmountable hurdles. The power of this Court to stay execution of its Judgment pending hearing of an Appeal is spelt out in Order 42 Rule 6 which provides:-

“Stay in case of appeal;

6. (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 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 ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

9. From Sub-rule (4) it is obvious that the provisions are in respect to an appeal to the Court of Appeal and no further. Second, the Court of Appeal has rendered itself on the matter and if this Court were to stay execution of its Judgment then it would in effect be staying the decision of the Court of Appeal. In any event, the Court of Appeal has power to stay its own decisions pending the hearing and determination of a certification application to the Supreme Court. In similar view the Supreme Court can stay a decision of the Court of Appeal as it considers such an application.

10. The Applicant is inviting this Court to punch above its weight. I respectfully decline the invitation. The Application of 14th August 2020 is struck out with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Luseno for the Applicant.

K'opere for the Respondent.