



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 3 OF 2020**

**FATMA TAHIR SHEIKH SAID.....PLAINTIFF**

**VERSUS**

**KCB BANK KENYA LTD [Formerly] KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Gikandi Advocate for the Plaintiff**

**Mr. Munyao Muthama & Kashindi Advocate for the Respondent**

**RULING**

The Ruling arises out of a Notice of Motion of the Plaintiffs filed on 22/3/2021 and supported with an Affidavit thereof of the same date. the Motion seeks for stay of execution of the Ruling the court determined on 26/2/2021 which is intended to be the subject of the Appeal.

**Applicants ground for stay of execution in brief**

- a. Whether the learned judge erred in law and fact in failing to assign any significance to the fact that the late Tahir Sheikh Said withdrew from Malindi ELC No. 2 of 2016 which had been filed without his knowledge.*
- b. Whether the learned judge erred in law and fact in failing to find that the Plaintiff in Malindi ELC No. 243 of 2017 had a separate and distinct statutory right from that of the late Tahir Sheikh Said.*
- c. Whether the learned judge erred in law and fact in finding that the suit was sub judice and res judicata Malindi ELC No. 2 of 2016 and Malindi ELC No. 243 of 2017 given the different statutory rights and causes of action pursued in those cases.*
- d. Whether the learned judge in any event erred in law and fact in failing to find that as fraud had been pleaded and evidence of it presented, the exceptions to the doctrine of res judicata and sub judice existed.*

In a gist the grounds which have been broken down into various species as averred by the Applicant and largely that there is a substantial question of law and identity of the matter to be adjudicated upon by the court of appeal. That if the stay order is not granted irreparable harm will be caused to the Applicant and

if successful on Appeal it will be rendered nugatory. It is further averred by the Applicant that there is both legal and equitable interest in the subject matter of the suit which ought to be canvassed to protect the right to ownership to private property.

### **The Respondents objection to stay of execution.**

On the Respondents part, as averred in the Replying Affidavit there are no meritorious grounds to support an order for stay of execution for the intended Appeal is frivolous and vexatious with no *bona fide* issues of law to be considered by the court of Appeal. The effect of the Respondent's objection is that should the court grant the stay of execution it will highly prejudice it or occasion an injustice.

The Applicant and the Respondent elected to canvass this application by way of written submissions. This court appreciates their perspectives and eventually will mirror the positions taken by both counsels in exercising discretion to determine the application. Given the competing issues I propose to ask the question whether the Applicant has met the yardstick for grant of stay order of execution pending appeal.

### **Legal analysis and determination**

An appropriate starting point in addressing this question is by considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The jurisdiction here is for the court to interrogate whether the application has been filed without undue delay. Secondly, whether the Applicants will suffer substantial loss that cannot be compensated by way of damages. Thirdly, whether the appeal is arguable and does raise serious issues within the jurisdiction of the court of appeal. Fourth, whether there is sufficient cause to order stay of execution of the decree or order. Finally, whether the denial of stay will render the appeal nugatory.

The approach to be adopted by the court on an application for stay of execution to construe and interpret Order 42 is outlined in several decisions of the superior court. In **Housing Finance Company of Kenya V Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** the court had the following to say;

***“the principles of governing the exercise of the Court’s jurisdiction under Rule 5[2] [b] of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this court should ensure that the appeal, if successful, should not be rendered nugatory. We need to restate these principles from Reliance Bank Ltd. [In liquidation] vs. Norlake Investment Ltd. – Civil Appl. No. Nai. 93/02 [UR], thus:-***

***“hitherto, this court has consistently maintained that for an application under Rule 5[2] [b] to succeed, the applicant must satisfy the court on two matter, namely: -***

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”***

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5 [2] [b]. [***See Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31***]...

We are further guided by this Court’s decision in ***Carter & Sons Ltd. V . Deposit Protection Fund Board & Two Others – Civil Appeal No. 291 of 1997*** , at page 4 as follows:

***“...the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay....the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable***

*delay”.*

Based on the *dicta* in *Edward Kamau & another v Hannah Mukui Gichuki & another [2015] eKLR* grant of stay lies within the discretion of the court and the principles under Order 42 Rule 6 only remain to be instructive and not prescriptive in exercising that judicial discretion. In the case; “The commanding preamble provisions of Order 42 Rule 2. No order for stay of execution shall be made under Sub Rule [1] unless...imply that the three conditions are inextricable. They must all be met for an applicant to be granted the order of stay of execution pending appeal. However, those conditions are guidelines which the courts follow in the exercise of the discretion to grant or refuse to grant orders of stay of execution pending appeal. In making any orders under the said provisions, this court is enjoined to consider the justice of the case for both parties. Having found that the right of appeal is intrinsically linked to a right to fair hearing and a right to access justice, while appreciating that the respondent should not be denied the enjoyment of the fruits of her lawfully obtained judgement, under Article 159 of the Constitution, justice shall be done to all irrespective of status, which right has to be balanced out against the right of the appellant not to be ousted from the seat of justice by denying them a stay since justice is a two way traffic.

This court appreciates that the applicant being a party seeking favourable exercise of the court’s discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words, they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory.

Two points that obviously arises in cases like these and I think I had better make provision for them. First, it’s the primary principle that a successful litigant should not be deprived the fruits of his /her judgment for the mere reason that the aggrieved party has filed an appeal. Secondly, the court ought to see and safeguard that a party exercising his /her right of appeal does not have the appeal if successful rendered nugatory. In *Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA 2065* the court was more emphatic as Clarke L.J said:

***“whether the court will exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the Respondent?”***

From the perusal of the notice of motion, the grounds and the affidavits in support and the corresponding draft memorandum of appeal I make the following findings; First, the appeal has been filed without undue delay. Second, the limb on substantial loss is purely dependent on the hearing and its determination in regard with the issues on fraud or forgery as alleged by the applicants. Whether that is a matter for this forum or ELC is moot question. These are issues to my mind which in my view would best be addressed by that court with equal status of the High Court. I cannot however, emphasize at this stage whether the issues will be successful in favour of the applicant. I have no jurisdiction to do so. Taking the matter at the face value and on the essential questions legitimately stated in the body of the Notice of Motion and the affidavit without a stay of execution there is a likelihood of the Applicant being ruined if the contemplated appeal has some measure of success. There is however, a discrete point of statutory construction that the anticipated deposit of security for due performance of the decree may not be necessarily applicable to the facts of this case. The important difference here is that the interest of the individual parties is yet to be conclusively dealt by the court.

I have always found justice to be elusive when it comes to balancing the competing interest of the respective parties to a dispute. Sometimes the fulcrum of the justice scale tends to tilt on either side. However, for this matter I take the approach given the substratum of the suit and the pending ongoing proceedings it would not be prejudicial to grant the Applicants a second bite of the cherry before the Court of Appeal in the bigger rubric principle commonly referred to as **for the interest of justice**. This is

to remedy the risk and irremediable harm against the applicants in the event the superior court does review or vary my Ruling. This is not to say that there is merit in the appeal. It cannot be gainsaid that the Applicants desire to challenge the ruling of this court is a right underpinned in our Constitution. It is not lost on this court that the Respondent is generally of a different view and persuaded this court not to prolong the dispute with continued stay orders of execution on an unmeritorious appeal. The slight balance based on the above observations tends to tilt in favour of the Applicants for the very reason so as not to risk the intended appeal being rendered nugatory. I accept in exercising discretion with regard to stay I am in a way giving effect to the overriding objective with particular regard to the need in so far as practicable to ensure that the parties to the claim are on an equal footing. Similarly, that the issues are dealt with in a way which is proportionate and fair to the position of each party. Those aspects of the overriding objective seem to me to be embedded in any event in the principles laid down under Article 50 of the Constitution on the right to a fair hearing and the opportunity for a party to exercise his right of appeal. The overriding purpose of exercising this jurisdiction is to enable the Applicants to present their case to the Appellate court without being exposed to any such financial risk that may arise should the court consider the ruling worthy of their interference.

Accordingly, the Notice of Motion dated 22/3/2021 is allowed with the costs of the application to be in the intended appeal.

**DATED, SIGNED AND DELIVERED AT MALINDI VIDE LAST KNOWN EMAIL ADDRESS OF THE RESPECTIVE COUNSELS THIS 29<sup>TH</sup> DAY OF APRIL 2021.**

.....

**R. NYAKUNDI**

**JUDGE**

**NB:**

*In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [munyao@mmkadv.com, info@mmkadv.com, [gikandiadvocate@yahoo.com](mailto:gikandiadvocate@yahoo.com)]*