



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E007A OF 2021

EQUITY BANK LIMITED.....APPELLANT

VERSUS

JAPHET KUBAI IKIAMBA.....1ST RESPONDENT

JOMDOM KENYA LIMITED.....2ND RESPONDENT

[An appeal from judgment and decree in Tigania Principal Magistrate's Court Civil Case No. 148 of 2012 delivered on 26th November 2020 by Hon. Gathogo Sogomo, PM]

RULING

Application for Stay of execution

1. This is a ruling an application for stay of execution pending the hearing and determination of appeal from the decision of the trial court (Hon. Gathogo Sogomo, PM) in Tigania SPMCC NO. 148 of 2002 delivered on 26th November 2020 in which the court awarded Ksh.5,000,000/- for general damages for loss of business in wrongful attachment.

2. Some case-law in the High Court have, I presume *in abundanti cautela*, while considering applications for stay of execution pending appeal, employed the test developed in the Court of Appeal in exercise of that Court's discretion under Rule 5 (2) (b) of the Court of Appeal Rules requiring the presence of an arguable case and the need to prevent the appeal, if successful, from being rendered nugatory.

3. The correct test, however, for applications stay of execution in the High Court is, respectfully, set out in Order 42 Rule 6 of the Civil Procedure Rules which applies to the first instance courts (including the High Court) and to the High Court as a first appellate court. Of course, despite substantial loss stay should be refused if the appeal is clearly frivolous, and there can be no rendering of such a frivolous appeal nugatory.

4. The principles for the grant of stay of execution by the trial court and the High Court on first appeal is settled and set out in Order 42 Rule 6 of the Civil Procedure Rules. The court has power for sufficient cause to grant a stay of execution on conditions that the applicant demonstrates that –

a. substantial loss will result to applicant if stay is not granted; and

b. security is given by the applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and

c. the application is brought without unreasonable delay.

5. As explained by the Court of Appeal in *Halai & Another v. Thorton & Turpin (1963) Ltd* [1990] KLR 365 the High Court's jurisdiction for stay of execution is circumscribed as follows:

“1. The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

2. An application for stay of execution is made to the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal rules and that court's discretion under that rule is unfettered.”

The test for arguable case and appeal being rendered nugatory is a creation of the Court of Appeal for its guidance of exercise of that unfettered discretion. Applications for stay in the High Court fall to be considered within the parameters of Order 42 Rule 6 of the Civil Procedure Rules

Delay

6. It was conceded by the Respondent that the application for stay of execution was filed without unreasonable delay

Substantial loss

7. Substantial loss is demonstrated both by possible execution by attachment and sale of its property and being required to pay the decretal sum, to avoid execution. The loss may also be occasioned by the prospect of not being able to recover the money upon successful appeal.

Submissions

8. The applicant hinges his contention of substantial loss on the high amount of the decretal sum should its property be attached in settlement thereof or it be required to pay the same to avoid execution and, alternatively, on inability of the respondent to repay the amount, which it considers **colossal**, upon a successful appeal. The applicant's case is that the appeal has a high probability of success and it may be rendered nugatory if the amount of Ksh.5,000,000/- is paid to the respondent who has *"no known property or assets and or known sources of income and will not have the ability to refund the said sum of money, if paid to them, at the successful conclusion of the appeal. There is therefore high risk that the appellants/applicant stands to suffer substantial loss in that event."*

9. The applicant indicated that it was *"ready to offer security for the due satisfaction of any resultant decree that may be issued in favour of the respondent"* and pointing to its financial health as a bank with numerous branches around the country and therefore able to meet any decree that may issue herein for the payment of money urged that no security should be ordered by the court in the meantime. The appellant especially opposed the proposal by the respondent as a condition for the grant of the stay of execution for the payment of half the decretal amount - Ksh 2,500,000/- *"which is already a huge amount of money by any standards [because] the Respondents have not at all displayed any financial ability to refund the said half the decretal amount if the appeal herein succeeds."*

10. The respondents responded that the applicants had failed to discharge their duty to prove to prove substantial loss and specifically that the respondents were men of straw who would be unable to refund the decretal amount if the appeal were successful, and they urged that security be ordered in the manner of payment of half the decretal amount and the deposit into an interest earning account in the joint names of parties' advocates/firm of advocates pending hearing and determination of the appeal.

Burden of proof

11. The issue of the burden of proof of the fact of inability of the respondent to pay back the decretal sum is governed by the authority of the Court of Appeal in ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR** where the court (Omolo O'Kubasu & Githinji, JJA.) said:

"This Court has said before and it would bear repeating that while the legal duty is on an applicant 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 an applicant 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."

12. In this application, however, the applicant did not set off the shift in the balance of proof because there was no allegation of fact in the supporting affidavit or in the Notice of Motion that the Respondents would be unable to repay the decretal sum upon a successful appeal. The full text of the supporting affidavit sworn by the bank's representative Peter N. Marigu, the Appellant Bank's Branch Manager on 29th January 2021 is set out in full below:

"Supporting Affidavit of Peter N. Marigu

- 1. That I am the Branch manager of the Appellant's Meru branch, properly versed with all the issues deposed to herein hence competent to make and swear this affidavit.*
- 2. That judgment in Tigania PMCC No. 148 of 2012 was entered in favour of the Respondents against the Appellant herein to the tune of an award of general damages for wrongful attachment of Ksh 5,000,000/= plus costs of the suit and interests thereon.*
- 3. That the Appellant was aggrieved by the decision and judgment of the trial court and has preferred an appeal herein.*
- 4. That owing to the high decretal amount awarded by the trial court, the Appellant shall suffer great and substantial loss if execution proceeds as intended by the Respondent.*
- 5. That the Respondents are now out to execute the judgment and decree obtained in Tigania PMCC No. 148 of 2012 against the Appellant.*

6. That additionally, if execution proceeds, then the Appeal preferred herein shall be rendered nugatory and its substratum shall be lost.

7. That the appeal herein as filed has very high chances of success as evidenced by the annexed memorandum of appeal.

8. That it is therefore in the interests of justice and fairness that the orders sought be granted to ensure that the Appellant is not prejudiced.

9. That the Appellant is ready and willing to abide by reasonable conditions for stay of execution that the Honourable Court may issue.

10. That the instant application is made in good faith and has been preferred without any delay whatsoever.

11. That no party herein shall be prejudiced if the orders sought are granted.

12. That I depose to the foregoing believing the same to be true to the best of my knowledge, belief and understanding.”

13. There is absolutely no reference or allusion to a fear that the respondent would be unable to repay the decretal sum and, consequently, it is utterly untruthful to submit as counsel for the applicant does in their submissions dated 4th March 2021 that –

“It should be noted your Lordship that the appellant/applicant through its representative stated in the supporting affidavit to the application that the Respondents, will not have the financial ability to refund the decretal sum in the event of a successful appeal. This statement has not been rebutted by the respondent and no effort has been made by the Respondents to show that they have the ability to make such refund. The appellant/applicant has further stated that the Respondents has no known assets or property and have no known sources of income. This has similarly not been rebutted, or disputed by the respondents.”

As these allegations were made in the submissions by counsel there was no opportunity for the respondents to respond by evidence in their replying affidavit.

14. An untruthful applicant is undeserving of favourable exercise of discretion of the court.

Security for due performance of decree.

15. The bank shall file a Bank Guarantee. It matters not that the appellant is a healthy Bank. The rule requires security be provided, and security is not given by reputation of the applicant or by the money it holds in its vaults but by the deposit of money or other property; Bond, Guarantee or other Undertaking to pay, as the case may be, lodged with the Court or as the Court may direct. Being a healthy institution only shows that the security given is good and capable of quick realization, not that security is, therefore, unnecessary.

Payment of part of the decretal sum to the Respondent

16. The applicant has raised reasonable apprehension that the respondent is unable to refund the decretal sum or part thereof sought by the respondent upon successful appeal, as is necessary to shift the evidential burden of proof thereon. The court considers that the payment of a sum approximating a third of the decretal sum at Ksh.1,600,000/- does not expose the appellant to substantial loss, and will order the payment thereof to the respondent as a condition for stay of execution coupled with a deposit into court of a Bank Guarantee for the balance. Being a bank institution which deals money, there is no need to make an order for the cash deposit into an interest earning account in its joint names with the respondents as the Bank Guarantee will cover the interest accruing together with costs.

Orders

17. Accordingly, for the reasons set out above the court makes the following orders:

1. The court grants an order for stay of execution of the Judgment and Decree of the trial court in Tigania PMCCC NO. 148 of 2012 made on 26th November 2020 pending the hearing and determination of the appeal.

2. The appellant shall within **Thirty (30) days** pay to the Respondents the sum **Ksh.1,600,000/-** being approximately one third of the decretal sum of Ksh.5,000,000/- and deposit with the Court a Bank Guarantee or Insurance Bond for the payment of the balance of Ksh.3,400,000/- together with interest and costs as may be adjudged against it upon unsuccessful appeal.

3. In default of the payment and deposit of the Bank Guarantee in Order NO. 2 above, the stay of execution herein granted shall lapse and be of no effect.

4. The cost of the application shall abide the outcome of the appeal.

18. For the expeditious disposal of the dispute the court shall order that the Record of Appeal be filed within 30 days and the appeal be listed for hearing within the next 90 days.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S MITHEGA & KARIUKI ADVOCATES FOR THE APPELLANT.

M/S MWIRIGI KABURU & CO. ADVOCATES FOR THE RESPONDENTS.