



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.396 OF 2014**

**NITI DISTRIBUTORS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**OCCIDENTAL INSURANCE**

**COMPANY LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. In a ruling delivered by this court on 27<sup>th</sup> June 2019, the defendant's application for stay of execution pending appeal was allowed in the following terms:

***a) That the applicant pays the sum of Kshs 5 million to the respondent being part of the decretal sum within 30 days from the date of this ruling.***

***b) That the applicant furnishes a bank guarantee in the sum of kshs 12,500,000 as security for the due performance of the decree within 30 days from the date of this ruling.***

***c) In the event of failure to comply with conditions a) and b) above the stay of execution orders will automatically lapse and the respondent will be at liberty to execute the decree for the full decretal sum.***

***d) I make no orders at to costs.***

2. Through the application dated 25<sup>th</sup> September 2019, the defendant/applicant seeks orders, inter alia, that this court do certify that it has complied with the conditional stay orders issued on 27<sup>th</sup> June 2019 and proceeds to uphold the stay of execution orders.

3. The application is supported by the affidavit of the applicant's Legal Manager **Mr. Benard Ayuko** and is premised on the grounds that despite the fact that the defendant has since complied with conditional stay orders the plaintiff is still adamant that there is non-compliance and has threatened to proceed with the execution.

4. It is the applicant's case that the intended execution will prejudice its right of appeal and occasion a serious miscarriage of justice. The plaintiff/decreed holder filed a replying affidavit in opposition to the application in which it states that the bank guarantee issued by the defendant does not conform with the court order.

5. I have considered the application, the response tendered by the decree holder and the parties' submissions. The main issue for determination is whether the applicant has complied with the terms of the ruling delivered on 27<sup>th</sup> June 2019.

6. It was not disputed that the applicant paid the sum of kshs 5 million to the plaintiff/decreed holder and issued a bank guarantee for the sum of Kshs. 12.5 million as shown in the applicant's annexures marked "BA 1, 2,3 and 4.

7. The decree holder's case is that the bank guarantee provided by the applicant does not conform with the terms set by the court as it imposes other conditions relating to the contractual relationship between the beneficiary and its customer thus ceasing to be a guarantee.

8. The plaintiff submitted that the bank guarantee presented by the applicant does not secure the decretal sum because it is not only limited in time but is also enforceable by production of a court order sanctioning its release. It was the plaintiff's case that the fact that an order is required in order to enforce a guarantee waters down the very purpose of the guarantee.

9. In a rejoinder, the applicant submitted that the court did not dictate to the defendant the wording of the bank guarantee and added that even though the bank guarantee was set to last until 25<sup>th</sup> January 2020, the same has since been extended up to 24<sup>th</sup> January 2021. It was submitted that Bank Guarantees have a defined time frame and cannot be issued for an indefinite period of time.

10. I have perused the Bank Guarantee issued by the defendant/applicant pursuant to the orders of this court issued on 27<sup>th</sup> June 2019 and I note that it is worded, in part, as follows: -

***“THEREFORE, we hereby affirm that we are Guarantors and responsible to you on behalf of the respondent up to a total of Kshs 12,500,000.00 (Kenya Shillings Twelve Million, Five Hundred Thousand only) and we undertake to pay you, upon your first written demand accompanied with necessary court order authorizing release of payment of any sum or sums within the limits of Kshs 12,500,000.00 (Kenya Shillings Twelve Million, Five Hundred Thousand only).***

***Notwithstanding anything contained herein above, this Bank Guarantee is restricted to Kshs 12,500,000.00 (Kenya Shillings Twelve Million, Five Hundred Thousand only) and will remain valid and operative up to the 25<sup>th</sup> day of January 2020. If no claim is received by the bank in writing as per the terms of this Bank Guarantee till the close of business hours on the 25<sup>th</sup> day of January 2020, this Bank Guarantee will stand invalid, void and expired, and the bank will stand full discharged from all liabilities and claims under this Bank Guarantee, whether or not the original is returned to the bank for cancellation.***

***This guarantee is personal to yourselves and is not transferable.***

***Issued at Skypark, Westlands, Nairobi on this 26<sup>th</sup> day of July 2019.”***

11. The decree holder took issue with the fact that the bank guarantee stipulates that the guaranteed sum of Kshs 12.5 million is payable on production of a court order. I find no harm in the provision contained in the guarantee that it shall be payable upon production of a written demand accompanied by necessary court order authorizing the release of payment.

12. The plaintiff argued that the said condition implies that the dismissal of the appeal would not be enough to trigger the payment of the guaranteed sums as the plaintiff would still be required to file an application and obtain an order before the guarantee can be honoured.

13. I do not buy the plaintiff’s position regarding the filing of an application before honouring the guarantee should the appeal be unsuccessful.

14. My take is that the release of the sums secured by the bank guarantee is an issue or an application that the plaintiff can make orally in court immediately the appeal is dismissed.

15. It is clear that the conditions for stay were specific that the same would only last pending the hearing and determination of the appeal, which means that depending on the outcome of the appeal, if unsuccessful, the plaintiff will be entitled to approach the bank to release the secured sums to it. It therefore naturally follows that such a release cannot be acted upon by the bank in the absence of a specific court order to that effect.

16. Turning to the condition, in the bank guarantee, limiting its lifespan to a specific period, I find that such limitation has the potential of leaving the decree holder exposed should the guarantee expire and, for some reason the same is not extended by the time the judgment is delivered by the appellate court in the plaintiff’s favour.

17. This court is of the view that in view of the fact that the guarantee cannot be for an indefinite period, the same should be worded in such a manner that there is provision for its automatic renewal upon its expiry up to and until such a time that the appeal is heard and determined.

18. For the reasons that I have stated in this ruling, I find that the applicant has not made out a case for the granting of the orders sought in the application.

19. I reiterate that the orders sought can only be allowed once the applicant satisfies this court that the wordings of the bank guarantee in respect to its time frame are such that they do not leave the decree holder exposed at any given time.

20. I make no orders as to costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29<sup>th</sup> day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mogambi for Defendant/Applicant.

Ms Kalu for Mutua for Plaintiff/Respondent.

Court Assistant: Sylvia.