



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 189 OF 2019**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VS.**

**JIWEZE IMPROVED PRODUCTIVITY LIMITED.....RESPONDENT**

**RULING**

1. Judgment was entered in Kiambu Chief Magistrate's Court Civil case No. 42 of 2018 on 13<sup>th</sup> November, 2019 in favour of Jiweze Improved Productivity Limited (Jiweze) for Kshs.820,600/= plus costs and interest. That judgment was against Co-operative Bank of Kenya Limited (Co-operative). Co-operative being aggrieved by that judgment filed this present appeal. Co-operative by its Notice of Motion application dated 3<sup>rd</sup> December, 2019 seeks stay of execution of the aforesaid judgment pending hearing and determination of this appeal. The application is opposed by Jiweze.

2. Co-operative relies on the grounds that if stay of execution is not granted its appeal will be rendered nugatory and it will suffer substantial loss if execution for the decretal sum does proceed. Co-operative stated that it is willing to abide by any condition of security ordered by the court.

3. Jiweze relied on the affidavit of its managing director Reuben. Waweru Mwaniki in opposition to the application. After setting out the circumstances under which its bank account with Co-operative was irregularly debited with an amount of Kshs.820,600/= Jiweze stated through that affidavit that Co-operative had failed to show what loss it may suffer if stay of execution was not granted. Jiweze further stated through its Managing Director affidavit that it is financially sound and continues to maintain its bank account with Co-operative.

**ANALYSIS AND DETERMINATION**

4. Stay of execution of a decree is granted on condition of the applicant satisfying the requirements of **Order 42 Rule 6(2)** of the Civil Procedure Rules which provide as follows:-

*“(2) No order for stay of execution shall be made under sub-rule (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.”*

5. The application was filed by Co-operative on 3<sup>rd</sup> December, 2019 seeking to stay the judgment of the subordinate court delivered on 13<sup>th</sup> November, 2019. In my view the application by Co-operative was made without unreasonable delay. The second limb of **Order 42 Rule 6(2)(a)** is therefore satisfied.

6. Co-operative by its application did confirm that it shall comply with this Court's order on security for due performance of the decree. That also satisfied **Order 42 Rule 6(2)(b)**.

7. It is debatable whether Co-operative has shown what, if any, substantial loss it will suffer if stay of execution is not granted. In the affidavit of the legal officer of Co-operative, in support of its application, it was deponed that the subordinate court's judgment “has far reaching implication across the banking industry.” That legal officer further deponed that, “in event, the appeal herein, which as demonstrated hereinabove is not frivolous, will be trifled and rendered nugatory occasioning the applicant (Co-operative) substantial loss.” It will be noted that Co-operative did not doubt Jiweze's ability to refund the decretal sum in the event the appeal was successful. One

therefore fails to see how Co-operative will suffer substantial loss if stay of execution is not granted. It has often been stated that the act of execution on its own, does not amount to substantial loss. This was made clear in the case of H.E. V. S.M. (2020) eKLR thus:-

**“11. As to what substantial loss is, it was observed in JAMES WANGALWA & ANOTHER VS. AGNES NALIKA CHESETO [2012] eKLR, that:-**

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

8. I have considered the parties submissions and authorities. I am of the view considering the totality of the matter and accepting the submissions made by Co-operative that Jiweze did not bring before court evidence of its ability to refund the decretal sum, if the appeal is successful, and also accepting the submission that Jiweze could, any time before the conclusion of this appeal, cease to bank at Co-operative bank, I will attempt to balance the interests of both parties. This is what the court in the case TASSAM LOGISTICS LTD VS. DAVID MACHARIA & ANOTHER (2018) eKLR considered thus:-

**“16. They cite the authority of KENYA COMMERCIAL BANK LTD –VS- SUN CITY PROPERTIES LTD & 5 OTHERS [2012] eKLR where it was held:-**

**“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”**

9. Doing the best in balancing the interests of both parties I will grant stay of execution on condition co-operative does deposit the decretal sum into interest earning account in the names of both law firms, hereof.

#### **DISPOSITION**

10. In the end I make the following orders:-

(a) The amount deposited into court by Co-operative Bank of Kenya Limited in obedience to this Court’s order of 3<sup>rd</sup> December, 2019 shall forthwith be refunded to them.

(b) A stay of execution of the judgment in Kiambu Chief Magistrate’s court Civil Case No. 42 of 2018 is granted pending the determination of this appeal on condition that within 30 days from today Co-operative Bank of Kenya Limited shall deposit into an interest earning bank account in the names of both Law firms hereof Kshs.1million (one million).

(c) If no such deposit is not made due to the default of Co-operative Bank of Kenya Limited as ordered in (b) above execution shall issue.

(d) The costs of the Notice of Motion dated 3<sup>rd</sup> December, 2019 shall abide with the outcome of the appeal

**RULING DATED AND DELIVERED AT KIAMBU THIS 19TH DAY OF APRIL, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

C/A

For the Appellant.....Ms. Okimaru

For the Respondent.....N/A

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**