



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.201 OF 2012

FAMILY BANK LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

BENARD GIKUNDI MWARANIA.....1ST DEFENDANT/RESPONDENT

MARGARET KARWIRWA MWONGER...2ND DEFENDANT/RESPONDENT

STEPU UP `HOLDINGS (K)LIMITED.....3RD DEFENDANT/RESPONDENT

PETER MURITHI MWARANIA.....4TH DEFENDANT/RESPONDENT

CICILIA NYARUAI KIRAGURI.....5TH DEFENDANT/RESPONDENT

JOHN MUTHAMI MURITHI.....6TH DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 13th July 2020. It seeks the following orders: -

1. Spent

2. spent

3. That there be a stay of execution of the judgment and Decree entered on 14th May 2020 pending the hearing and determination of the applicant's appeal against the said judgment and Decree.

4. Spent

5. That costs of the application be provided for.

2. Grounds on the face of the application are that the court entered judgment against the applicant on 14th May 2020 and awarded the defendants/respondents in part (d) and (e) judgment for the 4th defendant against the plaintiff for kshs 4 million as compensation for defamation and costs of the suit to be paid by the applicant to the defendants; that this court declined informal application for stay of execution of the judgment and decree upon delivery of judgment.

3. That the applicant/plaintiff is aggrieved by the judgment and intends to appeal against the entire judgment and have filed and served a valid notice of appeal upon the defendants/respondents.

4. That the application has been made without unreasonable delay and the applicant will suffer substantial loss if this application is not allowed.

5. Further that the plaintiff/applicant is willing to abide by any conditions as to security that that this court may set for due performance of the judgment/decree dated 14th May 2020 in the event the intended appeal does not succeed.

6. In response, the 5th and 6th defendants filed grounds of opposition dated 5th October 2020 which the other respondents relied on in response to the plaintiff's application.
7. They opposed the application on ground that the applicant/plaintiff has not demonstrated substantial loss it stands to suffer if the orders sought are not granted; further that the orders that relate to the 5th and 6th defendants are negative orders and therefore incapable of execution and that there has been inordinate delay in filing the application which has not been explained; and finally the applicant does not have arguable appeal; they prayed that the application be dismissed for being frivolous and abuse of court process.
8. Further that the orders as relates to the 5th and 6th defendants are negative; that the applicant does not have arguable appeal and there has been inordinate delay; that the notice of motion is frivolous and an abuse of court process.
9. The 1st and 2nd defendants filed replying affidavit sworn by the 1st defendant on 9th September 2020. He averred that the application was filed 2 months after delivery of judgment and the inordinate delay has not been explained and applicant is guilty of laches.
10. He further averred that the dismissal order did not order any of the parties to take any action or refrain from doing anything or to pay any sum and therefore there is nothing to stay in that respect; that the 3rd defendant's counterclaim was allowed and declarations made which do not require any party to do anything or abstain from doing anything and therefore nothing to stay and that he is aware that kshs 4Million was awarded to 4th defendant only and not to each defendant.
11. Further that the applicant has failed to attach draft memorandum of appeal before this court and this court cannot tell what grounds the applicant intends to advance in the appeal and whether or not the same raise serious legal issues.
12. He averred that in the judgment delivered on 14th May 2020, this court did not award decretal amount or make any positive order in favour of the 1st, 2nd, 3rd, 5th and 6th defendants and costs in this matter are far from being taxed, let alone executed for and therefore the application is premature and an abuse of court process; that costs that may be taxed and eventually paid are payable by refund in the event the plaintiff succeed in appeal which is highly unlikely and plaintiff has not placed any evidence before this court that the defendants would be incapable of making such a refund; and that he is aware that the 4th defendant is not a man of straw and in the event that the appeal succeed and an order of refund is made, he will comply.
13. The respondents further averred that the plaintiff has not offered any security and it is not enough to say the plaintiff is willing to comply with any condition as to giving of security; and the applicant has not demonstrated that the intended appeal is arguable and will be rendered nugatory if orders sought are not granted and has not offered security upon which court can exercise its discretion.
14. In a rejoinder, the applicant filed supplementary affidavit sworn by **Keziah Chelangat Ruto** the legal officer of the plaintiff. She averred that there was no delay in filing the application herein and if any it is not inordinate and the applicant has in no way employed any delaying tactics as they wish to have the matter resolved as soon as possible. She averred that there is no requirement to attach memorandum of appeal to application for stay and is only required to be availed after typed proceedings have been availed and that annexure of memorandum of appeal is a matter of good practice. She attached memorandum of appeal to the supplementary affidavit.
15. She further averred that the applicant is a bank of good repute and is capable of paying an adverse party when orders are made against the bank hence the respondents have no reason to worry that the applicant will not be in a position to pay kshs 4,000,000 that the court awarded in the event the appeal is not successful; on the other hand there is much prejudice to be suffered if the decretal amount is released to the respondent who is a natural person and who will have no means of repaying if he loses the appeal.

APPLICANTS SUBMISSIONS

16. The plaintiff submitted that grant of stay of execution in the High Court is governed by **Order XLI Rule 4(2)** and the question to be considered is whether substantial loss is likely to result and whether the applicant has given security and cited that case of **Rhoda Mukuma Vs John Abuoga [1988] eKLR** where the court stated that in the absence of the affidavit of means, it may be construed that the respondent is not possessed sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed
17. The applicant further cited the case of **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike Civil Appeal No.238 of 2005** where the Court of Appeal held that whereas it is the duty of the applicant to prove the allegation that the appeal would be rendered nugatory, it would be unreasonable to expect the applicant to know in detail resources of the respondent and once reasonable fear is expressed by the applicant the burden to show resources shift to the respondent since that is a matter which is peculiarly within his knowledge.
18. The plaintiff submitted that all the respondents were awarded costs and 4th respondent was awarded damages of 4,000,000 and costs.
19. The plaintiff submitted the amount awarded to the respondent is substantial and the plaintiff will suffer substantial loss should the judgment be executed and plaintiff be unable to recover the decretal amount and appeal rendered nugatory as the 4th defendant's assets are unknown to the plaintiff; that it will be in the interest of justice to grant order of stay pending appeal; that respondents have failed to discharge evidentiary burden of proof that they are men of means.
20. The applicant further cited that case of **G. N. Muems P/A Mt View Maternity & Nursing Home Vs Miriam Maalim Bshar & Another [2018] eKLR** where the court held that substantial loss does not have to be a lot of money and that it was sufficient for an applicant to demonstrate that it would have to go through hardship such as instituting legal proceedings to recover decretal amount; and submitted that from the replying affidavit by the respondents, it is clear the applicant will suffer substantial loss because it will be forced to file proceedings to recover sums paid to the respondents or go through hustle of selling land or car to recover the decretal amount.

21. The plaintiff submitted that in paragraph 11 of affidavit of **Keziah Chelangat Ruto**, the applicant has made an offer to deposit the entire decretal amount as security for due performance and to abide by any conditions that the court may impose as a condition for stay; and submitted that the applicants offer to deposit the entire decretal sum is sufficient in the circumstances and has satisfied the mandatory condition for stay of execution.

22. The applicant further submitted that the application has been made in good time as judgment was delivered on 14th May 2020 and application was lodged for filing under certificate of urgency on 13th July 2020 and finally filed on 29th July 2020; the applicant urged this court to take judicial notice of the fact that the judgment was delivered at the thick of Covid-19 pandemic leading to instability in the country and lockdowns which including offices, court registries being temporarily closed; that all events considered, the time taken to file the application is excusable, ordinate and reasonable.

23. On whether the appeal has chances of success, the applicant submitted that this court is not required to consider the application on the basis of the merits or otherwise of appeal.

RESPONDENTS' SUBMISSIONS

24. The respondents relied on submissions filed by the 5th and 6th respondent. They submitted that the applicant has not demonstrated that it stands to suffer if stay is not granted; that the applicants apprehension that the 4th defendant may not be able to pay back kshs 4,000,000 in the event appeal is successful is unfounded; and submitted that the order for payment of 4,000,000 was made in favour of 4th defendant do not concern the other defendants and a mere mention by the applicant that kshs 4,000,000 is substantial does not demonstrate substantial loss and submitted that the need for cogent evidence as to substantial loss was highlighted in the case of **New Wide Garments EPZ(K) Ltd Vs Ruth Kanini Kioko[2019]eKLR** where the court quoted with approval the case of **Samvir Trust Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** in which **Warsame J.** expressed himself at page 6 as follows:-

“... it is not enough to merely put forward mere assertions of substantial loss, there must be empirical and documentary evidence to support such contention...”

25. The respondents further submitted that the decree of payment of kshs 4,000,000 to 4th defendant is money decree and it will not render appeal nugatory and cited the case of **Kakamega Paper Converters Limited Vs Mohanlal Arora & 4 others [2011] eKLR** where the court held as follows:-

“Along with this is the fact that this is a money decree, Even the 4th defendant in its written submissions conceded that it is not normal for an appeal to be rendered nugatory in a monetary decree...”

26. In respect to inordinate delay, the respondents submitted that the applicant filed this application 2 months 15 days after delivery of judgment which constitute inordinate delay and thus fails the second limb of **Order 42 Rule 6 of the Civil Procedure Rules 2020**.

27. In respect to offer security for performance of decree, the respondents submitted that it inconsequential as the applicant has failed to demonstrate substantial loss and application not filed timeously.

28. The respondent further submitted that stay orders cannot be granted in respect to negative orders and cited the case of **Kenya Commercial Bank Limited Vs Tamarind Meadows Limited & 7 others [2016] eKLR**; that an order for dismissal is a negative order incapable of execution and there can be no stay of such order; and concluded that an order for stay cannot be granted on dismissal orders.

ANALYSIS AND DETERMINATION

29. The applicant/plaintiff herein is aggrieved by the judgment of this court delivered on 14th May 2020 and seeks stay of execution pending appeal. The defendants are opposed to the application on grounds of inordinate delay, that negative orders were made in respect to 1st, 2nd, 3rd, 5th and 6th defendants and there is no award to them warranting stay of execution; that declaratory orders have been made and costs are yet to be taxed making the application premature.

30. They have further argued that in respect to 4th defendant, applicant has failed to demonstrate that he will be unable to refund decretal amount if paid to him.

31. Defendant have also argued that there is no memorandum of appeal to enable court to determine whether its arguable or not.

32. Conditions for grant of stay pending appeal are set out in the case of **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** as follows: -

i. The application must be made without delay

ii. That the applicant must demonstrate that they will suffer substantial loss unless the order sought is granted

iii. Such security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant.

33. In the case of **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another [2014]** the court allowed a similar application which was filed one year after delivery of judgment. There is no dispute that the appeal was lodged two months after the judgment.

34. On irreparable loss being suffered by the applicant, it is clear from judgment that an award was made to 4th defendant only; that execution that can occur in respect to the other defendants is in respect to costs. There is no indication that costs have been demanded and even after demand execution can only issue after taxation and decree issued. I do not therefore see any kind of loss that the plaintiff is likely to suffer in respect to orders made in favour of 1st, 2nd, 3rd, 5th and 6th defendant. In respect to 4th defendant, the amount is colossal and I note from the 4th defendant evidence that he was terminated from employment and in my view, it would be safe to have part of the decretal sum deposited in court as security for performance.

35. FINAL ORDERS

1. Stay of execution do issue in respect to judgment entered in favour of the 4th respondent on condition that kshs 4,000,000 is deposited in court within 30 days from the date of this ruling.

2. Costs of this application to abide by the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 27TH DAY OF MAY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer- Court Assistant

Mr. Cheluget Advocate for Appellant

Mr. Arizala advocate for 5th and 6th defendant

Mr. Konosi Advocate for 2nd defendant and hold brief Mr. Nyagaka for 3rd defendant/respondent