



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E017 OF 2020**

**FAMILY BANK LIMITED.....APPELANT/APPLICANT**

**VERSUS**

**TITUS MUGAMBI MURIUNGI.....1<sup>ST</sup> RESPONDENT**

**SANLAM KENYA INSURANCE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant was successful in his application dated 6<sup>th</sup> August 2020 filed before the trial Court in Meru CMCC No. 155 of 2019 seeking to set aside an *ex parte* Judgement. Despite succeeding in setting aside the *ex parte* Judgement he was ordered to pay to the Respondents costs of the application and throw away costs. He is aggrieved by the part of the Ruling requiring him to pay costs and has brought the instant appeal challenging the order on payment of costs. He has also filed the instant application dated 30<sup>th</sup> October 2020 seeking stay of execution of part of the Ruling ordering him to pay costs of the Application dated 6<sup>th</sup> October 2020 and throw away costs of Ksh 7,000/= to the Respondent pending the hearing and determination of the Appeal. He also prays for stay of the proceedings in the trial Court pending the hearing and determination of this appeal.

***Applicant's Case***

2. The application is premised on the grounds on the face of it and on the Applicant's supporting affidavit sworn on 30<sup>th</sup> October 2020. His Advocate filed a further affidavit sworn on 19<sup>th</sup> May 2021. He also filed submissions dated 26<sup>th</sup> July 2021. His case is that the trial Court delivered a ruling on his application dated 6<sup>th</sup> August 2021 by which he sought to have the *ex parte* judgement set aside. He avers that his application was allowed but the Court ordered for him and the 2<sup>nd</sup> Respondent to pay throw away costs to the 1<sup>st</sup> Respondent. He urges that the trial Court erred in awarding throw away costs and costs to the 1<sup>st</sup> Respondent as he is apprehensive as to whether or not the hearing took place when the 1<sup>st</sup> Respondent claimed it did.

3. He relies on the provisions of Order 42 Rule 6 to indicate the conditions for grant of stay. He urges that an Applicant seeking stay must show that the appeal is arguable and that unless stay is granted, the appeal, if successful would be rendered nugatory. He further relies on the cases of *Charles Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others eKLR*; *Global Tours & Travel Limited vs Five Continents Travel Limited (2015) eKLR*; *Tabro Transporters Limited vs Absalom Dova Lubaasis 2012 eKLR*; and *Elena Doudaladova Korir vs Kenyatta University (2014) eKLR*.

4. He urges that the policy of the Court is to exercise latitude in its interpretation of rules so as to facilitate determination of appeals on merit; that he has an arguable appeal with overwhelming chances of success; that an arguable appeal is not one which must succeed but one that raises serious questions of law; that he faults the decision of the Court in finding that he failed to attend Court on an undisclosed date for hearing of the suit and proceeding to deliver judgement; that the Court erred in failing to adhere to the principle of *audi alterem partem* and proceeding to deliver judgement without hearing all the parties; that he reads foul play as to when the hearing took place if at all because the suit was scheduled for hearing on 15<sup>th</sup> April 2020 which in the circumstances brought about by Covid-19 pandemic could not have proceeded as scheduled; that having perused the record, it is not clear whether he was indeed issued with a hearing notice and that the Court did not bother to confirm the same before proceeding for hearing *ex parte*; that despite him raising these issues in his application in the lower Court, the same were not properly addressed; that the 1<sup>st</sup> Respondent has not annexed any notice or email communication sent to the parties despite insisting that such notice was given to them;

5. He urges that the appeal will be rendered nugatory should stay not be granted because he questions the legality of the finding by the Court that he failed to attend Court for hearing. He urges that due process was not followed; that it was not possible for the hearing of the case to proceed in open Court contrary to the directives of the Chief Justice to scale down Court activities due to the Covid-19 pandemic; that it is therefore only right that the proceedings in the lower Court be stayed pending determination of the appeal. He relies on the case of *Kenya Hotel Properties Limited vs Willesden Investments Limited (2007) eKLR* and *Katangiri Developers Limited vs Prafula Enterprises Limited & Another (2018) eKLR* and *Reliance Bank Limited vs Norlake Investments Limited (2002) 1 E.A 227*.

6. He urges that he is ready and willing to abide by any conditions upon which the orders sought in this application may be granted as the Court may deem fit. He claims that his appeal was filed timeously and that the 1<sup>st</sup> Respondent was duly served with the application.

### ***1<sup>st</sup> Respondent's Case***

7. The application is opposed by the 1<sup>st</sup> Respondent by his replying affidavit sworn on 21<sup>st</sup> April 2021. He also filed submissions dated 27<sup>th</sup> July 2021. His case is that the Applicant chose to remain silent on the issues of time having been raised by the Respondent that the appeal is filed in Court without the leave of Court. He urges that the Ruling was delivered via email on 14<sup>th</sup> October 2020 and the appeal was filed on 30<sup>th</sup> October 2020 and that the stay sought is in vain as there is nothing to execute in that the lower Court file has an injunction order issued against the Appellant restraining it from repossessing the subject motor vehicle. He urges that the Appellant filed his appeal and application on 20<sup>th</sup> October 2020 and directions were given by the Court on 10<sup>th</sup> November 2020 when the hearing was set for 14<sup>th</sup> April 2021 almost 10 months after and it is clear that the Applicant wants to steal a march and the application should be dismissed for want of service. He urges that whether or not to grant stay of execution is a matter of judicial discretion which must be exercised on sound basis and not capriciously and that the Court should balance the interest of a party who has Judgement in their favour. He urges that the Appellant has not met the threshold set out in Order 42 Rule 6 of the Civil Procedure Rules. He urges that no substantial loss is to be suffered because the subject matter is a motor vehicle which the Appellant seeks to sell by public auction in toto breach of the contract of insurance under policy. He further urges that he is seeking compensation in the lower Court matter and that the Appellant was seeking to set aside the Judgement of the Court but it was not ready to abide by the conditions issued by the Court and that even in the instant application, the Applicant has not demonstrated that it is willing to abide by any conditions that the Court may impose in terms of security. He finally urges that the Appellant has not surmounted the requirement of filing the appeal without unreasonable delay and that he did not file the Ruling and neither did he explain to the Court why it took 10 days. He urges that the delay is unreasonable.

### ***Determination***

#### ***Stay of Execution***

8. An applicant seeking for stay of execution is required under the provisions of Order 42 Rule 6 of the Civil Procedure Rules to demonstrate that he is likely to suffer substantial loss should stay not be granted; that he is ready and willing to offer security for payment of any sums that may be found due to the other party after the appeal; and that he has come to Court without unreasonable delay.

9. The subject matter of the intended appeal is on the award of costs and throw away costs to the Respondent. The Applicant urges that costs ought not to have been awarded in the circumstances of the case and that he is doubtful as to whether any hearing ever took place in view of the restrictions imposed as a result of the Covid-19 pandemic. The award of costs is a matter of discretion, but it is not for this Court to go into the merits of the appeal at this stage.

10. As to whether the Applicant is likely to suffer substantial loss unless the order requiring him to pay costs is stayed pending appeal, this Court finds otherwise. First and foremost, the sum of Ksh 7,000/= throw away costs is not substantial and further, the Applicant has not shown the Court any certificate of costs with respect to the decree he seeks to appeal. This Court also takes judicial notice of the scale fees as per the Advocates Remuneration Order, 2014 with respect to applications which is a reasonable figure. Further, this Court observes that the Ksh 7,000/= ought to have been paid within 21 days which is long past and there has been no execution so far. Although he has claimed in his application that he is apprehensive that if the order stay is not granted, he may not recover the same from the 1<sup>st</sup> Respondent, this Court does not find the figures involved so substantial as to raise such apprehension. Ultimately, this Court finds that the Applicant has not adequately demonstrated the likelihood of suffering substantial loss if stay is not granted. Furthermore, there has been no threat of execution just yet.

11. The Applicant indicated willingness to comply with any conditions that the Court may impose. As to the period it took to bring the application, this Court observes that Ruling was delivered on 14<sup>th</sup> October 2020 and the application was filed on 9<sup>th</sup> November 2020, 26 days later. This is not unreasonable delay but this condition has to be considered alongside the others. All in all, this Court is not convinced that the intended appeal will be rendered nugatory should stay not be granted.

#### ***Stay of Proceedings***

12. The other prayer sought is for the stay of the proceedings in the trial Court pending hearing and determination of the appeal. This Court finds this prayer unconscionable for the reason that the issue of costs has no bearing in the substantial issue at the trial Court. The finding of this Court, as an appellate Court on the correctness of the order requiring the Applicant to pay costs will not in any way affect the finding of the trial Court on the merits of the case which is on the intended public auction of the subject motor vehicle.

13. The Applicant rightfully admits that he is only challenging the part of the Ruling requiring him to pay costs and throw away costs. It would therefore not be fair to delay and/or stall the hearing of the main suit at the trial Court when in the end, this Court's finding will not affect the main suit. This would not be in line with the overriding objectives of the civil process under section 1A and 1B of the Civil Procedure Act requiring the fair, just and expeditious disposal of matter.

14. Furthermore, the order requiring the payment of costs was made on 14<sup>th</sup> October 2020 and it has since been over 10 months. It is not clear at what stage the hearing of the matter in the trial Court has reached and it could well have reached its final stages. This Court is therefore not convinced that there is any prejudice whatsoever to be suffered if the order for stay of proceedings is not granted.

### ***Conclusion***

15. The Applicant has failed to demonstrate the likelihood of suffering substantial loss if the payment of the meagre amount of Ksh 7,000/=

as throw away costs and the unspecified amount of costs is done to the Respondents. Although his application has been brought without unreasonable delay and although he claims to be apprehensive of the inability of the Respondent to pay, the Court does not see any reason to grant stay over such unsubstantial and unspecified sums of money. Further, there have been no attempts at execution just yet and looking at the time it has taken between the filing of this application and the delivery of this Ruling, this Court does not find that grant of stay will serve any meaningful purpose in the circumstances and/or failure to grant stay will occasion any great prejudice to the Applicant. This Court will therefore not issue stay of execution.

16. On the request to have the main suit stayed pending the hearing of this application, this Court does not find this to be the most efficacious and just way to proceed noting that the subject matter of the appeal, on the payment of costs has no nexus whatsoever with the subject matter of the main suit, on the auction of the motor vehicle. This Court will therefore not stay the proceedings at the main suit.

### **ORDERS**

17. Accordingly, for the reasons set out above, this Court makes the following orders:-

*i) The Applicant's application dated 30<sup>th</sup> October 2020 is dismissed.*

*ii) The Costs of the application shall be in the Appeal.*

*Order accordingly.*

**DATED AND DELIVERED ON THIS 24<sup>TH</sup> DAY OF AUGUST, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S Ngeri, Omiti & Bush Advocates for the Appellant/Applicant**

**M/S Kitonga & Co. Advocates for the 1<sup>st</sup> Respondent.**