



**REPUBLIC OF KENYA**

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

**HCCC NO. 49 OF 2018**

**HESHIMART ENTERPRISES.....PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE**

**BANK LIMITED.....DEFENDANT**

**RULING**

What is pending before the Court is the Plaintiff's application dated 22<sup>nd</sup> April 2021 and filed on 26<sup>th</sup> April 2021, seeking *inter-alia* the following reliefs:

**a) Spent.**

**b) THAT pending the hearing and determination of this Application inter-parties, an order of stay be issued restraining the Respondent whether by itself, servants, agents or whomsoever from implementing the judgment/decree of the Court.**

**c) THAT pending the hearing and determination of the Appeal an order of stay be issued restraining the Respondent whether by itself, servants, agents or whomsoever from implementing the judgment/decree of the Court pending the hearing and determination of an Appeal to the Court of Appeal.**

**d) THAT the costs of this Application be met by the Defendant.**

The said Application is supported by the Affidavit of **Samwel Mutahi Kamau**, sworn on 22<sup>nd</sup> April, 2021 and filed in Court on 26<sup>th</sup> April, 2021.

**Applicant's Case**

The applicant filed submissions on 7<sup>th</sup> June 2021. It submits that the High Court has pronounced itself on several instances, occasions and incidences on the requirements that the Applicant must satisfy the Honourable Court with before being granted the order of stay. The Civil Procedure Rules Order 42 Rule 6(2) sets out factors to be considered for stay of execution.

- 1. Where Substantial loss may result to the Applicant unless the order of stay is made.**
- 2. The Application must have been made without inordinate delay.**
- 3. Security for the due performance of such decree or order may ultimately be binding on him must have been made without inordinate delay.**

The Applicant herein averred has satisfied the three ingredients set out by the Court of Appeal. The Applicant has a sufficient cause since the charge document relied on by the Defendant in its evidence was not in relation to the property charged by the Plaintiff. The said charged document was annexed to the affidavit accompanying the Application and marked as "SKM3". Secondly the Defendant did not produce any evidence to confirm that there was proper service of the statutory notice pursuant to **Section 90 and 96 of the Land Act no 3 of 2012**.

The Applicant has an arguable Appeal and the Application has been filed timeously without undue delay. There will be miscarriage of justice if the Defendant is allowed to execute the statutory power of sale. The Plaintiff/Applicant will lose his property and thus it's submitted that the stay of execution be granted pending the hearing and determination of the appeal. The balance of convenience tilts in favour of the Plaintiff.

The judgment which the Applicant intends to Appeal was delivered on 16th March 2021. The said judgment was delivered online. The Applicant was unable to get email-copy until Counsel visited the registry on 22nd March, 2021 where he was given the hard copy of the said judgment. The Application was filed timely since it was filed barely a month after the judgment was delivered hence the same cannot be said to be inordinately delayed.

In the case of *Gideon Sitelu Kochella -vs- Daima Bank Limited (2013)Eklr* the Court while citing the case of *Mobk Kitale Service Limited -vs- Mobik Oil Kenya Limited* held that; -

***"It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously; the overriding objective of this Act and rules made hereunder is to facilitate the just; expeditious, proportionate and affordable resolution of the civil duties governed by the Act".***

It was submitted that the Application has been brought timeously and the same ought to be allowed.

In the case of *Siegfried Busch -vs- MCSK (2013) Eklr* the Court held that;

***"A superior Court to which the Application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on Appeal. It would be in those best circumstances to preserve the status quo so as not to render the Appeal an academic exercise. Even in doing so, the Court weigh this against, the success of a litigant who should not be deprived of the fruits of his judgment"***

In elucidating what is substantial loss, in the case of *Kenya Shell Limited -vs- Kibiru (1986)KLR 410 Platt, Aq. JA as he then was* at page 416 expressed himself as follows: -

***"It is usually a good rule to see if Order XLII Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss for the Applicant, it would be rare case when an appeal would be rendered nugatory by some other events. Substantial loss on its various forms is the cornerstone of both jurisdictions, prevented. Therefore, without this evidence it is difficult to see why the Respondent should be kept out of their money."***

The charge document the Defendant relied on its evidence is not in relation to the property charged by the Plaintiff. The same is evidenced under annexure "SKM3" to the supporting affidavit.

Should the Respondent proceed and sell the suit property via statutory power of sale the Applicant will suffer substantial loss, him being the owner of the property he will be unjustly denied his constitutional right to own property as enshrined under **Article 40 of the Constitution**. Should the imminent execution proceed before the intended appeal is heard and determined, the Appeal will be an exercise in futility at the expense of the Applicant.

**Order 42 Rule 6 (2) b** states that; -

***"Such security as the Court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the Applicant".***

The Applicant is willing and is ready to abide by the orders that will be given by this Honourable Court. The Respondent has not demonstrated that he has the means to compensate the Applicant should the Applicant become successful after the property has already exchanged hands. The petitioner humbly prays that the Court do proceed and give directions on security. the Applicant has satisfied the requirements needed to grant orders of stay pending appeal. Should the imminent execution by the Respondent proceed, the intended appeal will be an exercise in futility.

## **RESPONDENT'S CASE**

The respondent filed submissions on 11<sup>th</sup> May 2021. The respondent submits that in the instant case, the decree sought to be stayed is a decision that dismissed a suit for an injunction in this honourable court. That decision sought to be stayed was a negative decision and therefore the question is whether a negative decree can be stayed.

In the case of *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others Vs County of Nairobi Government & 3 Others [2014] eKLR*, the Court of Appeal made it clear that a negative order is not capable of being stayed, save for costs.

Further, in the case of *Western College of Arts And Applied Sciences Vs Oranga & Others [1976] KLR 63* the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated;

***"But what is there to be executed under the judgment, the subject of the intended appeal. The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs"***

***The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction."***

**Judge R.E. Aburili** in the case of *Lucia Abaja Otieno & 2 Others V Filgona Omogo Okoth [2018] Eklr* stated that,

***“In the motion before me, what the applicant is seeking is stay of dismissal of the suit in the trial court which was a negative order which, by parity of a long line of decisions of the Court of Appeal as set out hereinabove, is incapable of being stayed.”***

This honourable court has no jurisdiction to proceed with the present application and / or grant the orders sought. The other issue before this court is whether the applicant herein has met the threshold for the prayer of stay to be granted.

In the present application the Plaintiff is relying on the grounds that no statutory notices were issued, yet the same were marked and produced during the trial. The plaintiff further avers that the charge document related to the subject property relied on which was not produced. However, the same formed part of the evidence of the Defendant.

The Plaintiff did admit being indebted to the Defendant and he confirmed that he did provide the subject property as security to enable him secure the loan.

In *Tabro Transporters Ltd -Vs- Absalom Dova Lubasis 2012 Eklr*; the Court held that,

***“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the Court, as such order does not introduce any disadvantage, but administers the justice that the case deserves.”***

The conditions for granting stay order has been clearly set out in **Order 42 rule 6 of the Civil Procedure Rules 2010** in *Elena Doudoladova Korir -Vs- Kenyatta University [2014]eklr Justice Nzioki Wa Makau* had this to say: -

***“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another -vs- Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely sufficient cause, Substantial loss would ensure from a refusal to grant stay. The Applicant must furnish security; the application must be made without unreasonable delay.”***

### **1) Substantial Loss**

This cause arose in 2018, the Defendant advanced the Plaintiff the loan in 2015. The Defendant has since then been deprived of its money for a period of over 4 years.

The Plaintiff has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss. In the instant application no such evidence has been produced. If the court grants the order of stay, the Defendant will continue to suffer substantial loss to the tunes of millions which amount will outstrip the value of the property which will leave the bank at a disadvantage.

In the case of *Machira T/A Machira & Co. Advocates -Vs- East African Standard (No. 21 [2002] 2 Klr 63*, Honourable Kuloba J. (as he was then) held as follows; -

***“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”***

The Plaintiff has not shown or established any irreparable loss or at all that the same is bound to accrue or suffer if the orders are not granted.

### **2) Furnish of security**

Despite the Plaintiff in his statement and evidence admitting to being indebted to the Defendant, he has not offered any security, nor proposal on how to settle the amount owed to the Defendant; not a single coin has been paid since 2017 and even after the delivery of the judgment or deposited in court.

Under the provisions of **Order 42 Rule 6 (U) (2) of the Civil Procedure Rules**, ***“a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant.”***

The respondent cited the case of *Equity Bank Ltd -Vs- Taiga Adams Company Ltd [20061 Eklr*.

The Plaintiff has been silent on the issue of security in this matter. The offer for security should come from the Plaintiff, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. The application has been filed over 30 days from the date of judgment which delay is inordinate in the circumstances.

The Plaintiff has failed to lodge or serve letters requesting for typed proceedings upon the Defendant in contravention of **Rule 82 (2) of the Court of Appeal Rules** and as a demonstration of his seriousness to prosecute the intended Appeal.

The plaintiff has failed to sufficiently satisfy the required pre conditions to allow the Court to exercise its discretion.

### **ISSUES FOR DETERMINATION**

**Whether the court has jurisdiction to entertain this application.**

The respondents have brought up the issue of jurisdiction. They base it on the fact that in the instant case the decree sought to be stayed is a decision that dismissed a suit for an injunction and that decision was a negative decision which cannot be stayed. The decision annexed as SKM1 is dismissal of the suit. This then raises the question of what the application seeks to stay.

In *George Ole Sangui v. Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015) the Court citing the famous case of *Western College of Arts and Applied Sciences v. Oranga & Others [1976] KLR 63*, pronounced itself as follows: -

*“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.” (Emphasis ours)*

In the premises, a negative order is not capable of being stayed. Therefore, this court has no jurisdiction to entertain the application as there is no order capable of being stayed. The application is an attempt to obtain the declined orders through the backdoor.

The application is unmerited and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT ELDORET VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2021.**

.....

**S. M. GITHINJI**

**JUDGE**

**In the presence/absence of:**

**1. MS KARUGA FOR THE DEFENDANT PRESENT AND IN THE ABSENCE OF MR MENGICH FOR THE PLAINTIFF**