



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CIVIL APPEAL NO. 81 OF 2017

ORIENTAL COMMERCIAL

BANK LTD.....APPELLANT/APPLICANT

VERSUS

SHREEJI CONTRACTORS LTD.....1ST RESPONDENT

PRAVINKUMAR SANKALDAS PATEL.....2ND RESPONDENT

MINAXIBEN PRAVINKUMAR PATEL.....3RD RESPONDENT

RULING

1. The 1st Respondent filed a suit at the lower court in Molo seeking a mandatory injunction against the Applicant respecting the release of original log books of certain motor vehicles held by the Applicant or, in the alternative, a permanent injunction barring the Applicant from transferring, selling, dealing with, disposing or in any way interfering with the same log books. The lower court found in the 1st Respondents' favour and ordered the Applicant to release the 1st Respondent's motor vehicles' log books. The Court also issued a permanent injunction as prayed. The Lower Court, also, dismissed a counter-claim for liquidated damages (of Kshs. 5,575,584 plus interests at 36% per annum) against all three Respondents. The Respondents were, also, awarded costs of the suit plus interest on costs. The Applicant was dissatisfied with the judgment and has appealed to this Court.

2. Subsequent to the judgment in the Lower Court, the Applicant filed two applications in that Court. The first, challenging the way the decree was extracted and the second, an application for stay of execution pending appeal. Both Applications were dismissed, the first prompting the filing of *Civil Appeal 126 of 2020* in this Court and the second, prompting the filing of this application within the main appeal.

3. The instant application seeks the following orders:

1) *Spent*

2) *THAT this Honourable Court be pleased to stay execution of the decree dated 31/05/2017 and issued on 19/11/2019 and all consequential orders in Nakuru CMCC No. 201 of 2013 pending the hearing and final determination of this application.*

3) *THAT this Honourable Court be pleased to stay execution of the decree dated 31/05/2017 and issued on 19/11/2019 and all consequential orders in Nakuru CMCC No. 201 of 2013 pending the hearing and determination n of this Appeal.*

4) *THAT the costs of the Application be provided.*

4. The Application is supported by the grounds on the face of it and the affidavit of Alphonso Victor Gambo, the Applicant's Chief Branch Manager at Nakuru. He contends that judgment was delivered by the lower court on 31/05/2017, in which the lower court allowed the 1st Respondent's claim together with costs and dismissed the Applicant's counterclaim.

5. The Applicant says that being dissatisfied with the judgment, the Applicant filed the present appeal, which is still, pending hearing. The reason given for the delayed hearing is that the Applicant is yet to get the proceedings despite having requested for the same.

6. He contends that it was the Applicant's belief that since the 1st Respondent had not extracted the decree, there was no threat of execution. He adds that the 1st Respondent never took any steps towards execution until 19/11/2019 when its advocates extracted the decree and applied for execution without any notice to the Applicant, contrary to the rules of procedure. That on 22/11/2019, the 1st Respondent's appointed auctioneers who proclaimed the Applicant's goods purportedly in execution of warrants of attachment issued on 22/11/2019 to recover Kshs.

7. Mr. Gumbo gives the chronology of events – including the two Applications the Applicant filed in the Lower Court as discussed above. He contends further that this Application has been brought without undue delay and that the Applicant stands to suffer irreparable loss if the decree is executed. He contends that from the information gathered by the Applicant's private investigator, the 1st Respondent has closed shop and the 2nd and 3rd Respondents moved out of the country. That in the event the appeal is successful, the Applicant will not be able to recover the amount paid out.

8. Mr. Gumbo avers further that the Applicant is a banking institution and is willing to give security which the court may order.

9. Mr. Gumbo, on behalf of the Applicant, also filed a Supplementary Affidavit dated 03/11/2020 in which he contends that at the time of making the Affidavit, the Respondents had proclaimed the Applicant's property in execution of the decree and for a sum of Kshs.635,633 and auctioneers' fees of Kshs.96,222/. He contends that that this action by the Respondents is intended to put pressure on the Appellant to pay the amount then have their advocate to apply to cease acting.

10. Mr. Gumbo depones that the 1st Respondent has closed shop and no longer operates in the country; and the 2nd and 3rd Respondents left the country. He, therefore, says that the Applicant is reasonably apprehensive that any monies paid to them will never be recovered. He insists that the Respondents' advocates have not challenged these averments so they must be taken as established.

11. The 1st Respondent filed a Replying Affidavit dated 05/11/2020. The same is sworn by Paul Murimi Kiongo, advocate for the 1st Respondent. He states that the present application is one in a series of frivolous and vexatious applications filed by the Applicant in the lower court; meant to delay and obstruct justice.

12. He also contends that the Applicant has not satisfied any of the requirements for stay of execution set out under Order 42 Rule 6 of the Civil Procedure Rules: That first, the Applicant has not explained the inordinate delay in filing the present application, the judgment having been delivered on 31/05/2017. That even the application for stay in the lower court was filed on the 08/06/2020, over three years after the delivery of judgment.

13. He also contends that for the past three and a half years, the Applicant has not sought to prosecute its appeal. That the Applicant has not demonstrated that it will suffer substantial loss or that the 1st Respondent is unable to pay the sum of Kshs. 418,867, which is the amount of party-to-party costs. That the 1st Respondent having been previously able to pay a loan of Kshs. 2,000,000 and having Kshs. 20,206,340 in a separate account with the Applicant is proof that it is capable of repaying Kshs. 418,867. That additionally, the Applicant is also holding on to two motor vehicle logbooks belonging to the 1st Respondent.

14. He also contends that the Applicant has not offered any security and is not entitled to any discretionary orders. That further the Applicant is still in contempt of the lower court's judgment requiring it to release the two motor vehicle logbooks back to the 1st Respondent. That the Applicant has continued to file numerous motions before the court including applications, **Appeal No. 126 of 2020** and two preliminary objections which are intended to vex and avoid execution.

15. The Applicant subsequently filed a Preliminary Objection dated 07/12/2020 challenging certain averments in the Respondents' Replying Affidavit. The grounds of the Preliminary Objection are.

1. That the Replying Affidavit sworn on 8th November 2020 by PAUL MURIMI KIONGO is bad in law and should be struck out on the ground that it offends the provisions of Order 19 Rule 3, and Rule 9 of the Advocates Practice Rules.

2. That paragraphs 23, 25, 26, 28, 29, 30, and 31 of the Replying Affidavit sworn on 8th November 2020 by PAUL MURIMI KIONGO are oppressive and offend the provisions of Order 19 Rule 3, and Rule 9 of the Advocates Practice Rules.

3. The affidavit also contains contentious matters which only the Plaintiff can depose to and also contains arguments, thus being technically unsound.

4. That Paul Murimi Kiongo has not disclosed that he has been authorized to swear the affidavit on behalf of the Plaintiff.

16. The 1st Respondent filed its further Replying Affidavit dated 19/01/2021, sworn by Paul Murimi Kiongo. He contends that the matters deponed in the contested paragraphs are contained in the judgment and record of the lower court, which are not contentious matters. That the court record being a judicial pronouncement and public record, an advocate is entitled to refer to it and address matters addressed in it.

17. Lastly, he contends that the Preliminary Objection does not address the substance of the dispute before the court and offends the provisions of Article 159 of the Constitution.

18. The Application was canvassed by way of written submissions. I have keenly read both sets of submissions and the cases they refer to.

19. The first issue to consider is the Preliminary Objection raised by the Applicant that certain paragraphs in the Affidavit of Paul Murimi Kiongo are defective or oppressive and should be struck out. The gist of the Applicant's objection is that advocates should not swear affidavits on contentious matters; and further that, they should not swear affidavits on behalf of their clients unless they have been specifically authorized to do so; that an advocate is merely an agent who should not put themselves in a position where they are a potential witness for cross-examination. The Applicant cited several cases including **International Community of Women Living with HIV Registered Trustees v. Non-Governmental Organization Co-ordinations Board & 2 Others: Teresia Otieno (Proposed Interested Party)**

[2019] eKLR.

20. The Applicant also submits that the fact that an advocate acts for a party, does not entitle them to swear an affidavit on behalf of his client and must show that he has been specifically authorized to swear the affidavit. They cite the cases of ***In the Matter of the Estate of M'Magiri M'Mugira (Deceased) [2005] eKLR***, ***Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd [2018] eKLR*** and ***Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another v Peter O. Nyakundi & 68 Others [2020] eKLR***.

21. The Applicant argues that it is only the 1st Respondent who can show that it can refund the sum of Kshs. 418,864/- and not the advocate and further that the 1st Respondent's advocate cannot purport to say that the Applicant is holding motor vehicle when the Applicant is holding logbooks of vehicles that have not been valued. The Applicant submits that Article 159 of the Constitution does not come to the aid of the 1st Respondent and refers to ***Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] eKLR*** cited in the ***Magnolia*** case.

22. The Respondent's submissions are dated 09/11/2020 and Supplementary submissions dated 19/01/2021. On whether the 1st Respondent's advocates can swear the Replying Affidavit, the 1st Respondent submits that the facts deposed in the Replying Affidavit are not contested and are drawn from the trial court's judgment and record. They cite the cases of

Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR and ***Jane Jaoko Owino vs Blue Shield Insurance Co. Ltd HCC 359/2000***.

23. In their supplementary submissions, the Appellants submit that there is nothing under Rule 9 of the Advocates Practice Rules which prevent an advocate from swearing an affidavit in the suit he appears. They argue that an advocate can depone to issues of law, undisputed facts, facts pertaining the chronology of events in a case. They also submit that an advocate can swear an affidavit without the authority of the client in special circumstances. They rely on the case of ***First Community Bank Limited v Talib Omar Said [2020] eKLR***, ***Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR*** and ***Factory Guard Limited v Factory Guards Limited [2014] eKLR*** in support of their of their argument that the mere fact that an affidavit was sworn by an advocate does not render it incurably defective.

24. They submit that an advocate can swear an affidavit where his client cannot be readily found. They cite the case of ***Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others [2005] eKLR***.

25. On this preliminary issue, the Applicant is acutely right on the legal principles but precisely wrong on their application whether the affidavit sworn by the advocate contains contentious matters, it is now common knowledge that an advocate is prevented from swearing affidavits on contentious issues he has no knowledge of. This rule prevents the possibility of an advocate, being an agent of a party to a suit, having to be cross examined on matters which he has deposed to.

26. As a general rule, a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless they are specifically permitted by law or the Court to do so or unless the matter is purely formal or uncontroverted.

27. In ***Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR***, the Court dealing with similar issue states as follows:

Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

28. This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the Court to retain an appropriate level of professional objectivity. To protect the integrity of the legal process, the Court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence. However, countless cases have stated that there certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary. Such is the case here. The affidavit by Paul Murimi Kiongo merely makes deductions from matters which are on the Court record in the form of judgment and rulings. For the most part, the impugned paragraphs contain re-phrased sections of the lower court's judgment of 31/05/2017. The advocate was on record for the Respondent's in the case before the lower court. These are matters within the court's record. They cannot be said to be contentious issues. It would probably have been preferable for those matters to have been submitted on rather than deposed to in his affidavit – but none of the matters are contentious, oppressive or scandalous. I therefore decline the invitation to strike them off.

29. I will now turn to the substantive issue: whether a stay of execution is merited in the circumstances of this case.

30. The Applicant argues that it has satisfied the conditions for grant of stay under the criteria laid out under Order 42 Rule 6. It relies on ***Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR*** and ***Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR***.

31. The Applicant submits that there has been no delay in filing the application for stay of execution. It argues that from the provisions of Order 42 Rule 6, only a decree or order can be stayed and in the absence of an extracted decree or order there is nothing to execute nor stay.

The Applicant cites *Rubo Kimnetich Arap Cheruiyot v Peter Kiprof Rotich [2006] eKLR*, *Interractive gaming & lotteries Limited v Flint East Africa Limited & 2 Others [2014] eKLR*, *P.K. A v M.S.A [2009] eKLR* and *Ponderosa Logistics Limited v Geoffrey Langat Kipkurui [2016] eKLR*.

32. Consequently, the Applicant argues that it took action to seek stay immediately after it became aware that a decree had been extracted.

33. The Applicant also submits that there is a risk of substantial loss being occasioned to it. That in the absence of denial of the deposition that the 1st Respondent has closed shop and the 2nd and 3rd Respondents moved out of the country, the burden shifted to the Respondents to prove their ability to repay the same. The Applicant relies on *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR* and *Kenya Orient Insurance Co. Limited v Paul Mathenge Gichuki & Another [2014] eKLR*.

34. On the 3rd requirement for the issuance of stay, the Applicant submits that it is willing and ready to pay any security ordered by the court. The Applicant cites the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR*. The Applicant also prays that the 1st Respondent pay the costs of the application for not conceding the application upon being offered security and rely on the case *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others [2014] eKLR*

35. On the other hand, counsel for the 1st Respondent reiterates that there was unreasonable delay between the date of judgment and the date of filing the applications for stay both before the lower court and this court. Counsel cited *Daniel Wambua Ndabi v Peter Luka Nduku [2008] eKLR* and *Francis Kirwa Magut v Grace Agiso [2015] eKLR*. He argues that the Applicant has not made any efforts to prosecute their appeal.

36. On whether the Applicant will suffer substantial loss, the Counsel for the 1st Respondent argues that the Applicant has failed to show how execution for the sum of Kshs. 418,864.00 will occasion them substantial loss. He contends that the Applicant has not filed a copy of the report from the investigator showing that the 1st Respondent closed shop or that the other two Respondents left the Country. He cited *Machira va Machira & Co Advocates v East African Standard [2002] eKLR* to argue that the Investigator did not establish that the 1st Respondent was wound up or does not have assets in the country.

37. On the issue of security, the Counsel relies on *Solomon Odira Okello Fridah & Another v Esther Laboso [2019] eKLR* for the proposition that the court ought to look at the Applicant's previous conduct. He also argues that where the Applicant does not prove substantial loss, the issue of security does not arise. They cite the case of *Sankale Ole Kantai F/A Kantai & Co. Advocates v Housing Finance Co. (K) Ltd [2014] eKLR*.

38. In the alternative, Counsel for the 1st Respondent asks that the Appellant immediately releases the two logbooks and pay the entire sum of Kshs. 418,864.00 as security. He submits that that the Appellant is not entitled to discretionary reliefs and relies on *Silas Koome Maingi v Michael Murithi [2006] eKLR* and *Francis Kirwa Magut & Another v Grace Agiso [2015] eKLR*.

39. In an application for stay pending appeal, the Court considers four factors derived from Order 42 Rule 6 and case law. These are

- a. The appeal is arguable;
- b. The Applicant is likely to suffer substantial loss unless the order is made or the appeal will be rendered nugatory if the stay is not granted;
- c. The application was made without unreasonable delay; and
- d. The Applicant has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

40. This being a first appeal, the arguability of the appeal is hardly in question. As numerous cases have stated, the appeal need not be one that will necessarily succeed; it only needs to be one that is not frivolous and/or idle. See, *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia [2021] eKLR*. Here, I have considered the Applicant's memorandum of appeal. Among the issues raised by the Applicant are whether the Lower Court was right in concluding that the loan of Kshs.2,000,0000 taken by the Respondents from the Applicant bank had been fully repaid; and whether the Applicant had a right of consolidation and set off with regard to two separate accounts under the names of the Respondents. These and the other issues raised in the Memorandum of Appeal deserve consideration by this Court. The appeal is therefore an arguable one.

41. The Application really turns on the question whether there was an inordinate delay before bringing the Application. Judgment in the Lower Court was given on 31/05/2017. The Appeal herein was timeously filed on 29/06/2017. However, the Applicant explains that it was unable to apply for stay because the Respondents had not taken any action to extract the decree. The Applicant states that as soon as it learnt that the decree had been extracted, it moved to Court for a stay – but not before challenging the process for the extraction of the decree. I note that the issue of extraction of the decree is the subject of another appeal filed by the Applicant before this court.

42. It is curious that the Applicant, as the Judgment Debtor who would potentially face execution chose to wait for the Judgment Creditor to extract the decree when it stands to lose the most upon execution. The Applicant began the appeal process on 29/06/2017 by filing a Memorandum of Appeal. The Applicant would have needed to file the Decree as part of the Record of Appeal. The Applicant's choice to wait for the Respondents to extract a decree first is, therefore, curious at best.

43. However, that inquiry would be most relevant to the question whether the Applicant has been truly diligent in prosecuting its appeal. For purposes of this Application, some of our decided cases have interpreted the provisions of Order 42, Rule 6 as requiring an extracted decree

as a demonstration of the imminence of execution before permitting an application for stay to move forward. The Applicant cited some of those cases. In my view, its position is tenable that it had a genuine belief that it could not bring forward the Application for stay before the decree had been extracted. Given the speed with which it proceeded to act once it became aware that the decree had been extracted, it deserves the benefit of doubt.

44. On what substantial loss the Applicant would suffer, the Applicant says that the 1st Respondent closed shop, while the 2nd and 3rd Respondents have moved out of the country. This they say would render the appeal nugatory in case it was successful. The Respondents on the other hand argue that the Applicant is holding onto the logbooks for the Respondent's motor vehicles and that they have previously been able to pay loans taken from the Applicant.

45. The Respondents do not deny that the 1st Respondent has closed shop or that the 2nd and 3rd Respondents moved out of the country. They rely on the assets mentioned in the impugned judgment which is the subject of the present appeal. They also claim that the Applicant has not proved that they do not have assets in the country. This would be upon the Respondents to present proof of the assets they allude to. Given these facts, I am sceptical that that if the entire amount is paid out and the appeal succeeds, the Respondents will be able to refund the money promptly and without much hardship.

46. Still, I must also appreciate that the Respondents have a judgment and a decree on Party and Party Costs in their favour. To balance both sides, I find that a conditional stay would be fair and just in the circumstances of this case.

47. Accordingly, I grant orders of stay of execution on condition that the Applicant deposits the entire decretal amount in the joint names of counsel for both parties within 15 days from the date hereof failing which the stay orders will automatically lapse.

48. Costs of the application will be in the appeal.

49. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.