



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 14 OF 2020

I & M BANK LIMITED.....APPELLANT

VERSUS

RODA OMBOYI NDULA

Sued as the legal representative of the

Estate of Gibson Ombonya Shiraku.....RESPONDENT

RULING

The appellant filed a notice of motion dated 27/1/2020 brought pursuant to **Article 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act Order 42 Rule 6, Order 51 Rule 1, of the Civil Procedure Rules** seeking for orders that

a. Spent

b. Pending the hearing and determination of this application, a stay of execution of the judgement and decree in Milimani CMCC No. 3500 of 2016 Gibson Omboya Shiraku v I&M Bank Limited do issue

c. A stay of execution of the judgement and decree in Milimani CMCC No. 3500 of 2016 Gibson Omboya Shiraku v I&M Bank Limited do issue pending the hearing and determination in Civil Appeal No. 14 of 2020 I&M Bank versus Gibson Ombonya Shiraku

d. Costs of the application be in the cause.

The application was supported by the affidavit of Alexander Irungu Wokabi a legal officer with the applicant. The appellants submitted that by a judgment delivered by Hon L.L. Gicheha (CM) on 22/11/2019 the court allowed the respondent's claim and awarded Kshs. 500,000 as damages for defamation, costs of the suit and interest. That being aggrieved by the said judgement an appeal was filed and it will be rendered nugatory if the application for stay is not allowed. The appellant submitted that the appeal is arguable and if the and order of stay is not granted, substantial loss may result as the respondent will not be in a position to refund the decretal sum in the event the appeal is successful. The appellant submitted that following the respondent's demise they do not know of any attachable assets that may be executed to recover the decretal sum and costs and further that the succession process might take a long period to be completed especially if contested. It would be prejudicial to subject the appellant to the succession proceedings to recover the decretal sum in the event that the appeal is successful.

The appellants indicated that they filed the application without unreasonable delay and that they are willing to provide security as ordered by the court.

The application was opposed by the replying affidavit of Livingstone Maina Ombete dated 17/2/2020. The respondent contended this is a money decree and there is no evidence that the respondent is so impecunious as to be unable to refund the decretal amount in the event the appeal succeed. That if the appellant was so desirous of appealing they would have made their application informally immediately after the learned Magistrate delivered her judgement and followed it with a formal application before that court before coming to this court. In the circumstances there are no good grounds provided by the appellant to justify a stay of execution

Analysis and determination.

The issue for determination is whether to grant a stay of execution pending the hearing and determination of the appeal. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-

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.

In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** the court held as follows: -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

1. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Judgement was delivered on 22/11/2019 while the present application is dated 27/1/2020 and was filed on 28/1/2020 it is therefore clear that there was no unreasonable delay in filing the application. There was the December court vacation after the expiry of thirty (30) days.

On substantial loss the appellant has submitted that following the respondent’s death they are not aware of any attachable assets that may be executed against to recover the decretal sum and it would be prejudicial to be subjected to a succession cause to recover the decretal sum. The appellants are willing to furnish security as the court deems fit.

The court, in **RWW vs. EKW [2019] eKLR**, addressed its mind to the purpose of a stay of execution order pending appeal in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

I do find that the appellant is likely to suffer substantial loss given the fact that the respondent is deceased and it has not been revealed how the decretal sum will be refunded if the appeal is allowed. The upshot is that the application dated 27/1/2020 is merited and is hereby granted as prayed on condition that:-

1. The applicant to deposit the entire decretal sum in court or joint account of both advocates within 45 days hereof.

2. In default of depositing the decretal sum as ordered herein, the orders of stay of execution shall stand vacated and the Respondent shall be at liberty to execute.

3. Costs shall follow the outcome of the Appeal.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE