



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC CIVIL APPLN. NO.21 OF 2020

BARCLAYS BANK OF KENYA LIMITED.....APPLICANT

VERSUS

FRANCIS MISOGA MEMA.....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 17/7/2020 brought, *inter alia*, under **sections 1A and 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**.

2. In the Motion, the applicant sought that there be a stay of execution of the judgment and decree of the Hon. Mrs. B. J Ofisi (RM) delivered on 29/5/2020 pending the hearing and determination of the intended appeal and for leave to file an appeal out of time against the said judgment and decree.

3. The grounds for the application were in the body of the Motion and in the supporting affidavit of **Castro Mutai** sworn on 17/7/2020. These were that; the judgment was delivered without notice and in the absence of the parties; it awarded general damages Ksh.3,000,000/- which were punitive; the applicant's advocates only became aware of the same on 16/7/2020; that the pecuniary ability of the respondent is unknown and he might not be able to refund the same if execution proceeds.

4. The application was opposed vide the respondent's replying affidavit sworn on 28/8/2020. He contended that the application was bad in law and an abuse of the court process; that on or about 29/5/2020, his advocates through the www.kenyalaw.org website learnt that the trial court had listed the matter for judgment which was not delivered in open court due to COVID-19 measures. That the same was on 16/7/2020 emailed to both parties.

5. He further contended that he was entitled to enjoy the fruits of the judgment and that the applicant will not suffer any significant loss. That he will be able to refund the decretal sum, interest and cost in the event that the appeal succeeded. In support of those contentions, he produced a valuation report in respect of **Kakamega/Lugovo/319, Majengo Township Vihiga** which showed its open market value to be Ksh. 3,200,000/-. He further stated that he was earning a monthly gross salary of Ksh.60,000/=.

6. The respondent further contended that in the event the court was inclined to grant a stay of execution, the applicant should pay half the decretal sum, costs and interest to him and deposit the balance in an interest earning account in the joint names of the parties' advocates within thirty days.

7. The parties were directed to file written submissions, but as at the time of writing this ruling, only the respondent had filed his submissions. It was submitted by the respondent that no prejudice will be suffered by the applicant if the stay is not granted. That the judgment will not be rendered nugatory if the appeal succeeded as the respondent will be able to refund the decretal sum. That if the stay is granted, the applicant will continue to harass him through physical visits, SMS's and phone calls.

8. It was further submitted that the respondent will not be able to access any credit or loans from any financial institution since he will continue to be blacklisted during the pendency of the intended appeal. On the other hand, the applicant will easily re-list the respondent with the CRB and recommence debt collection measures once the appeal is successful. The case of **Fredrick Kibwana Elabonga v Build Africa Kenya [2017] Eklr**, where an application for a stay pending appeal was dismissed on the basis that a respondent had demonstrated that he was employed and was capable of refunding the decretal sum if the appeal was successful.

9. Further, the cases of **Winfred Mutheu Kiamuko & another v Swaleh Breki Islam & another [2014] eKLR**, **Clifford Omondi Otieno v Geoffrey Muthiani Mutiso [2019] eKLR** and **Quest Resources Limited v Japan Port Consultants Limited [2015] eKLR**, were relied to demonstrate situations where the court granted a stay of execution on condition that an applicant pays to the respondent a certain fraction of the decretal amount and the balance to be secured by way of bank guarantee or kept in an interest earning account in the joint names of

the parties' advocates.

10. This is an application for extension of time for filing an appeal out of time and for stay of execution pending appeal. **Section 79G of the Civil Procedure Act** gives the Court discretion to extend the time for the filing of an appeal if the applicant demonstrates sufficient reason why he did not file the same within the required time.

11. The section provides: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” (Emphasis provided)

12. In the present case, it is not disputed that the trial court delivered its judgment on 29/5/2020 without notice to the parties. That was in breach of **order 21 of the Civil Procedure Rules** which require a judgment or ruling reserved should be delivered on notice to the parties. To my mind, the applicant having shown that the trial court delivered its judgment without notice to it, that was sufficient cause not to have filed the appeal within time.

13. The present application was filed 17/7/2020 after having received the copy of the judgment on 16/7/2020. There was no unreasonable delay in bringing the present application. In this regard, the applicant has shown sufficient cause to warrant the extension of time sought.

14. As regards the prayer for stay of execution, **Order 42 Rule 6(2) of the Civil Procedure Rules** provides the principles under which an application for stay is to be considered. These are that; the application should be made timeously, that the applicant must demonstrate that it will suffer substantial loss if the stay is not granted and that security must be provided.

15. I have already found that the application was timeously filed. The applicant received notice of the judgment on 16/7/2020 and lodged the present application the following day, 17/7/2020.

16. The second limb is substantial loss. The applicant contended that, the respondent was a man of straw. That if the decretal sum was paid to him and the appeal succeeded, the respondent will not be able to refund the same.

17. In **Equity Bank vs. Taiga Adams Company Limited [2006] Eklr**, it was held: -

“The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent, that is execution is carried out-in the event the appeal succeeds, the Respondent will not be in a position to pay – reimburse as he is a person of no means.”

18. In the present case, the respondent contended that he was not a man of straw. That if the appeal succeeded, he would be able to refund the amount. He produced a valuation report by **Odongo Kabita & Company Valuers** dated 11/08/2020 in respect of **LR. No. Kakamega/Lugovo/319, Majengo Township Vihiga**. The property was valued at Kshs.3,200,000/=. The respondent also demonstrated that he was in gainful employment earning a gross monthly salary of Kshs. 60,000/=.

19. In an application for stay of execution, the court always has to balance between the decree-holders right to enjoy the fruits of his judgment *vis a vis* the judgment-debtor's undaunted right of appeal. That the appeal, if successful should not be rendered nugatory.

20. In the present case, the respondent has a decree in his favour. The applicant has its undaunted right of appeal which it is desirous to exercise. It has contended that if the decretal sum is released to the respondent, he may not be able to refund. The respondent on his part has demonstrated that he is not a man of straw. He has means to refund the decretal sum if the appeal is successful.

21. Taking into consideration the value of the subject property owned by the respondent and his monthly income, and balancing the competing interests of the parties as aforesaid, I am inclined to allow the stay sought but order that the applicant release to the respondent a portion of the decretal sum.

22. Accordingly, the application dated 17/7/2020 is successful and is allowed as follows: -

a) The applicant is allowed to file and serve a Memorandum of Appeal against the Judgment of **Hon. Mrs. B. J. Ofisi** (RM) delivered on 29/5/2020 within 14 days of this ruling.

b) There be a stay of execution pending appeal on condition that the applicant pays to the respondent through the latter's advocates a sum of Kshs.1,500,000/- within 21 days of the date hereof and within the same period execute and lodge a Bank Guarantee for the balance with the Court.

c) In default execution to issue.

d) The costs of the application is awarded to the respondent in any event.

DATED and DELIVERED at Nairobi this 27th day of January, 2020.

A. MABEYA, FCI Arb

JUDGE