REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 198 OF 2018

COMPANY FOR HABITAT & HOUSING

IN AFRICA (SHELTER AFRIQUE).....APPELLANTS

VERSUS

SUNSET PARADISE APARTMENTS LIMITED.....RESPONDENT

R U L I N G

1. In this ruling the court is called upon to determine the application by the Appellant, as a judgment-debtor, seeking an order that it be granted stay of execution of the decree of the court pending the hearing and determination of an appeal to the Court of Appeal.

2. The grounds said to premise the application were revealed to be the fact that a Notice of appeal had been filed; that the appeal has good prospects of success; that the applicant stands to suffer substantial loss unless stay is granted and that there is a bank guaranteed which is available for extension during the pendency of the appeal as security for the due performance of the decree.

3. The application was supported by the Affidavit of one Francisca Kakooza, the Company Secretary of the Appellant/Applicant, whose gravamen was that the respondents advocates for the decreeholder had shown very clear signs that it was intent to execute the decree unless the decretal sum was paid a fact that makes the applicant fear that execution may issue and sums paid before the appeal is heard and determined and therefore render the appeal nugatory yet the applicant has provided a bank guarantee for the decretal sum.

4. In opposition to the application, the Respondent/Decreeholder filed a Replying Affidavit sworn by one DR. FREDRICK GIKANDI a director of the decree-holder whose gist was that the guarantee filed in court had expired on 20/11/2019 and therefore it was not true that there was an existing valid guarantee and further that the purpose of the guarantee was to secure the payment of the decretal sum upon the determination of the appeal. It was then contended and asserted that there had not been a demonstration of how the payment of the decretal sum to the Respondent would render the intended appeal nugatory on the basis that the decree being monetary, the appeal can only be rendered nugatory if it be demonstrated that the decree-holder would be unable to effect a refund of the decretal sum.

5. The Respondent then deponed that throughout the period the two parties were in a business relationship the respondent always and promptly met its obligations in payment of the agreed instalments and that when the Applicant demanded the payment of its debt in the sum of Kshs.179,603,331/= it was promptly paid as evidence that the respondent is not impecunious but a company of repute and one which will be able to effect a refund even if the appeal to the Court of Appeal were to succeed. To show its ability to effect a refund, the respondent averred and exhibited evidence of ownership of what it calls prime properly in Shanzu area said to be worth substantial amount of money. The totality of that replying Affidavit is the assertion by the Respondent that it is a company of means and should the appeal to the Court of Appeal succeeds it shall not be unable to effect a refund.

6. Against that Replying Affidavit the Applicant opted to file no rebuttal and the application thereafter proceeded to hearing upon oral submissions by the counsel for the parties.

7. In his argument before the court, counsel for the Applicant reiterated largely the averments in the Affidavit in support while stressing the fact that there was exhibited a current bank guarantee valid upto 3/6/2020 which it was ready and willing to have extended as and when the court orders. He also asserted that the demand by counsel threatening execution included an element of costs which were yet to be taxed and that any execution would thus be premature.

8. On prejudice and loss to be suffered if stay is not granted, counsel submitted and asserted, from the bar and quite contrary to what was deponed to the Affidavit, that it was a matter of common notoriety that the applicant has had financial troubles and it needs every money at its disposal to carry out its business and therefore that if the guarantee was to be enforced then it would suffer prejudice by disruption of its operations.

9. On the assertion that the Respondent is an entity with means, the counsel and invited the court to note that the payment to it of Kshs.179 million was by Bank of Africa Ltd and secured by the property said to be worth substantial sum of money. He then cited to court the decision in ***Philmark Systems Ltd vs Andmore Enterprises Ltd [2017] eKLR*** for the holding that availing a bank guarantee is a demonstration that an applicant is willing to comply with court orders. He also cited to court the decision in ***Cecilio Murago Mwenda t/a Murango Mwenda & Co. Advocates vs Isiolo County Government [2017] eKLR*** for the proposition that even in garnishee proceedings known to be between the decree-holder and the garnishee, the judgment debtor is still entitled to a hearing.

10. The third decision relied on and cited to court was that of ***Danson Muriithi Ayub vs Evanson Muroko [2015] eKLR*** for the proposition that only an extracted decree can be executed because a party becomes a decree holder when the decree is in his favour. In conclusion counsel cited the decision in ***Francis Ndalebwa vs Ben Nganyi [2018] eKLR*** for the proposition that stay can only be granted where there is a pending appeal and then set out the principles to be considered in considering an application for stay. For those reasons the counsel urged that the application be allowed and stay granted pending the appeal exhibited by the Notice of Appeal.

11. For the Respondent, submissions were offered to the effect that the application having been premised on Order 42 Rule 6, there was a singular duty for the applicant to bring out the cornerstone of grant of stay being that a refusal to grant stay would occasion to it a substantial loss and that a substantial loss in a monetary decree is only evidenced by the appeal being rendered nugatory, if successful, by the decree holder being unable to refund the sum paid to it under the decree. The counsel cited to court the notorious decision in ***Kenya Shell Ltd vs Benjamin Karuga Kibiru[1986] eKLR*** for the now well established principle of law on stay pending appeal that the applicant must demonstrate that the appeal would be rendered nugatory as the respondent would be unable to effect a refund. Counsel reiterated the dearth of any evidence as to substantial loss to be suffered while the respondent had demonstrated that is was an entity of means with the ability to effect a refund even in the event the appeal succeeds.

12. He urged the court to balance the right of the applicant to proceed on appeal with the right of the respondent to the property in the decree and the right to reap and enjoy the fruits of litigation. Counsel then said that when the KCB Bank Ltd was served with the demand to honour the undertaking, the bank declined payment insisting that there was no guarantee in place. Counsel then considered and submitted that the decisions cited by the applicant other than being merely persuasive were not relevant to the matter at hand and urged that the questions of garnishee proceedings be left to the trial court. On those grounds, it was urged that the application be dismissed with costs.

13. In his rejoinder to the respondent's submissions the applicants' counsel reiterated and invited the court to take judicial notice the fact that newspapers, especially the Business Daily, had repeatedly reported that the applicant is in financial troubles.

14. I have taken regard of the material offered to me by the parties and note that there is indeed a guarantee in place valid upto the 3/6/2020 and that the application was presented with promptitude and not after undue delay. I say there was promptitude because I delivered my decision in appeal on the 13/12/2019 and the application was filed on the 24/12/2019, just same 11 days later. On those two observations, the requirements of Order 42 Rule 6 (2)b have been met and what remains to be decided is whether a substantial loss would befall the applicant unless stay is granted.

15. Substantial loss has been defined to be the kind of loss which has the effect of negating any outcome of the appeal nugatory, worthless and or merely academic. In ***Kenya Airports Authority vs Mitubell – Welfare Society [2014] eKLR***, the court underscored the purpose of an order for stay pending appeal in the following words:-

> **"The nugatory limb is meant to obviate the spectra of a meritorious appeal, when successful, being rendered academic, the apprehended herein having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases"**.

16. Earlier on in ***Tabro Transporters Ltd vs Absalom Doua Lumbasi [2012] eKLR*** the court had held that the remedy for stay pending appeal was designed and intended to safeguard that a litigant is not made worse off by an order of the court.

17. Here, the court has been told two important facts on the parties abilities. The applicant is said to suffer financial troubles so that if ordered to pay the decretal sum it will be unable to meet its other obligations and operations while the respondent asserts to be a corporate of means and will not be disabled in effecting a refund even if the appeal were to succeed.

18. I think this is a unique situation where the applicant wants the court to consider its financial difficulties as basis of granting stay and to ignore the right of the respondent to the decree. In my view, a view founded on the decision of Kenya Shell (supra), it is the duty of the applicant, in an application for stay of a monetary decree pending appeal, to allege that the respondent is a person of the straw incapable of effecting a refund if the appeal succeeds then the respondent would then be called upon to rebut such assertion. Here it is the reverse, the respondent did so without prompting and the applicant instead of challenging that assertion has taken the tangent that its financial troubles entitles it to a stay. That I say is unique as it is strange. It is strange because the applicant is content to reverse the rules and put its own impecuneous status as the foremost consideration.

19. In taking that position, the applicant was not even minded to address the principles set by the Court of Appeal in Kenya Shell's Case that it is rare for a monetary appeal to be rendered nugatory by factors other than substantial loss.

20. On the materials availed, I do find that the respondent has adequately demonstrated that it is of means as to be able to effect a refund should the appeal succeed in which event I am unable to discern any loss let alone a substantial to visit to the applicant. Where there is no substantial loss, a court would go against the law in the rules and stare decisis to grant stay pending appeal.

21. The other reason which militate against a grant of stay in favour of the Applicant is its confession by counsel, even if from the bar, that it is in financial distress. If that was a consideration, it is the kind of consideration that would dictate that the decreeholder gets its property in the decree at this juncture and time before to worst happens. It cannot be just or fair that a financial institutions confession that it is in

financial doldrums should be the reason to kept a successful litigant from its property in a decree.

22. Before I wind up, an issue came up regarding the need to extract a decree before execution issues, which I think I need to comment upon. Yes, only a decree is capable of execution. In fact my long held view is that before a decree is extracted in accordance with the rules and costs taxed or agreed upon, there is nothing to execute because the final determination of the court in a judgment must be finally expressed in a decree. A decree itself should be complete, if monetary, if it discloses the full obligation; principal sum, interests and costs.

23. Regarding costs, the same cannot be by passed unless a court order is sought and obtained pursuant to Section 94 of the Act. That is the situation that I think must prevail where it is the decree of this court to be executed by extraction of warrants of attachment and sale. I hold the view that must apply in all situations where the decree to be executed results from a trial from the courts' original jurisdiction. It however may not always be the case where the decision to be enforced is out of a decree passed pursuant to the appellate jurisdiction.

24. I say not always because I hold the view that a decisions on appeal has the prospects of reversing the decision of the trial in whole or in part and substituting a decision by the appellate court or just upholding the decision appealed from. Where the decision at trial is upheld, like as done here, that decree remains to be enforced as issued by the trial court and the appellate court is not the executing court unless the execution be limited to recovery of costs if awarded and taxed or otherwise ascertained.

25. For that reason I do not agree that costs must be ascertained here and a decree drawn before the upheld decree can be enforced. The decree-holder has not obligation to enforce the lower court decree in this court and file. That court remains the executing court of its own risks.

26. The other scenario concerning enforcement of determination of appeals is the usual situations where a decree is stayed pending the outcome of appeal and security is provided for the due performance of the decree thereby passed. In such situation, the decretal sum has left the custody of the judgment debtor and it would be prejudicial to take out Warrants of Attachment and Sale and leave the security provided. A respondent whose decree at trial is upheld merely needs to resort to security given and have its decree satisfied. Like in this case, there was and exists today, a bank guarantee, dated 20/11/2018 and renewed on 6/12/2019 by which the bank covenants as follows:-

> **"Friday, December 06, 2019**
>
> **The Executive Officer**
>
> **Chief Magistrate's Court**
>
> **P.O. Box 90140-80100**
>
> **Mombasa**
>
> **KENYA**
>
> **Dear Sirs,**
>
> **RE: BANK GUARANTEE NO. MD1934000005R FOR KES.13,250,360.00 BY ORDER OF SHELTER AFRIQUE IN RESPECT TO CIVIL CASE NUMBER (CMCC NO.) 1424 OF 2017 SUNSET PARADISE APARTMENTS LIMITED VS COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER AFRIQUE)**
>
> **Whereas by the judgement dated 21st September 2018, and subsequent ruling delivered on 02nd November 2018, SUNSET PARADISE APARTMENTS LIMITED (Decree Holder) holds a decree in the above suit against the Defendant represented by Namachanja and Mbugua Advocates.**
>
> **This Guarantee on stay of execution of determination/order executed by KCB Bank Kenya Limited, Trade Finance Services, P.O. Box 48400-00100, Nairobi, Kenya, Incorporated/Registered under the Companies Act, and having our registered office at 5th Floor, Kencom House, witness:-**
>
> **Accordingly, we KCB Bank Kenya Limited, hereby convent, guarantee and affirm to irrevocably undertake to pay you the Executive Officer for and on behalf of the judgment debtor, the sum of Ksh.13,250,360.00 (say Kenya Shillings Thirteen Million, Two Hundred Fifty Thousand, Three Hundred Sixty only) within fourteen (14) days of service of the first, written demand from your court declaring the judgment debtor to be liable under court order from the High Court of Kenya.**
>
> **This Guarantee shall be valid until 03rd day of June 2020".**

27. With such a guarantee in place if the respondent was to sidestep it and take out Warrants of Attachment and Sale it would not escape the accusation of being high-handed, oppressive and acting in a manner not necessarily to have its decree satisfied but to humiliate, harass and embarrass the appellant and thereby abuse the court process. All the respondent here needed to do and which I am persuaded it correctly did, was to call upon the guarantor to meets its covenant in the guarantee.

28. Having so said, the Notice of Motion dated 23/12/2019 and filed in court on 24/12/2019 lacks merits and the same is hereby ordered to be dismissed with costs to the respondent.

Dated and delivered at Mombasa this 23rd day of January 2020.

P.J.O. OTIENO

JUDGE