



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.549 OF 2010

ESTHER MUTHONI SOSPETER.....1ST PLAINTIFF/RESPONDENT

EDWARD MBURU IRUNGU.....2ND PLAINTIFF/RESPONDENT

MARGARET WANGUI.....3RD PLAINTIFF/RESPONDENT

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. Before this Court is the Notice of Motion dated **12th August 2019** by which **THE CO-OPERATIVE BANK OF KENYA LIMITED**, (the Defendant/Applicant), seeks the following **Orders:-**

“(a) SPENT

(b) SPENT

(c) THAT pending the hearing and determination of the intended Appeal, the Honourable court be pleased to issue an order of stay of Execution on and further proceedings arising from the Judgment and orders of the Honourable Justice Olga Sewe delivered on 12th July 2019 by the Honourable lady Justice Maureen Odero.

(d) THAT the costs of and incidental to this Application be provided for.

2. The application was premised upon **Article 159 of Constitution of Kenya 2010, Section 7 appellate Jurisdiction Act, Order 50 Rule 6 and Order 51 Civil Procedure Rules 2010 and Section 1A, 1B & 3A of the Civil Procedure Act** and all enabling provisions of law. The same was supported by the Affidavit of even date sworn by **LAWRENCE KARANJA** a legal officer with the Defendant Bank.

3. The 1st Plaintiff/Respondent **ESTHER MUTHONI SOSPETER** filed Grounds of Opposition dated **19th September 2019**. The application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on **28th October 2019** whilst the Plaintiff/ Respondents filed their submissions on **15th November 2019**.

BACKGROUND

4. The genesis of this application is the Ruling of **Hon Lady Justice Olga Sewe** dated **2nd July 2019**. In that ruling the Honourable Judge entered judgment in favour of the 1st Plaintiff against the Defendant in the amount of **kshs.1,000,000/=** with interest thereon from the date of the said judgment until payment in full. The 1st Plaintiff was also awarded the costs of the suit.

5. Being aggrieved by that decision the Defendant/Applicant filed an appeal. They now pray that execution be stayed pending the hearing and determination of the said appeal.

6. The 1st Plaintiff/Respondent raised the following Grounds of Opposition to the application.

“1. THAT no execution can be done in the High Court without the ascertainment of costs through taxation as is provided

under section 94 of the Civil Procedure Act. The application for stay of execution, which execution is not imminent is premature, unnecessary and an abuse of the process of the Court.

2. THAT the Plaintiffs themselves are aggrieved by and dissatisfied with the impugned judgment and they themselves have filed and served their notice of appeal. They cannot, in those circumstances, execute the decree out of a judgment they are appealing against as to do so will prejudice their appeal.

3. THAT the application is incompetent, misconceived and the same clearly an abuse of the process of the court as the jurisdiction of the court to grant stay of execution pending appeal is donated by *Order 42 rule 6 of the Civil Procedure Rules* and not the many provisions the Applicant has quoted in the application which are irrelevant to the issue at hand.

4. THAT the applicant has not offered any security for due performance of any decree or order that may ultimately be binding upon it. The court should take judicial notice that it is now public knowledge that the Defendant/ Applicant is at the verge of being taken over by another entity.

5. THAT the Supporting Affidavit of *Lawrence Karanja* contradicts the application making the application incompetent for the reason of departure.

6. THAT the application is otherwise one made in bad faith which disqualifies the Applicant from being a beneficiary of the court's discretion. The plaintiffs will consequently apply that the said application be struck/dismissed with costs.

ANALYSIS AND DETERMINATION

7. In the case of *A.M VS MM [2017] eKLR*, the Court stated:-

“It is trite that the following conditions must be satisfied before stay of execution is granted.

- That the application has been made without unreasonable delay.

- That substantial loss will result to the Applicant unless such an order is made.

- Security for due performance of the decree has been given by the Applicant. (See Order 42 Rule 6 of the Civil Procedure rules, *Kiambu Transporters –Vs- Kenya Breweries*)”

8. Likewise in *GLOBAL TOURS TRAVELS LTD, Nairobi winding Up Cause No.43 of 2000* it was held:-

“...Whether or not to grant a stay of proceedings or further proceedings...is a matter judicial discretion to be exercised in the interest of justice...the sole question is whether is in the interest of justice to order a stay of proceedings and if it is, on what terms should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in consider-ing those matters, should bear in mind such factors as the need for expeditious disposal of case, the optimum utilization of judicial time and whether the application has been brought expeditiously” [emphasis]

9. In *BUTT –VS- RENT RESTRICTION TRIBUNAL [1982] KLR 82* the court of Appeal held that:-

“1. The power of the Court to grant or refuse an application for stay of execution is a 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.” [own emphasis]

ANALYSIS AND DETERMINATION

10. I have carefully considered the written submissions filed by both parties in this matter. I note that the judgment in this matter was delivered on **12th July 2019** and the present application seeking stay was filed on **16th august 2019** about one month later. I find that the application was filed within a reasonable time. I note further that the 1st Plaintiff/Respondent has also indicated her intention to file an appeal against the said judgment.

11. Although the Respondents insist that execution is not imminent. I am inclined in the interests of justice to grant the stay sought by present application **SUBJECT TO** the Defendant/Applicant depositing as security the sum of **Kshs.1,000,000/=** into a joint interest earning account to be opened in the names of the Advocates to both parties. The said account to be opened within Forty (40) days of today's date. Failure to comply means the stay will automatically lapse with no further reference to the Defendant/Applicant. It is so ordered. No orders on costs.

Dated in Nairobi this 12th day of June 2020.

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Justice Maureen A. Odero