



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 648 OF 2004**

**SANTOWELS LIMITED.....PLAINTIFF**

**VERSUS**

**STANBIC BANK KENYA LTD.....DEFENDANT**

**RULING**

1. Before this court is the Notice of Motion dated **19<sup>th</sup> November 2019** by which **STANBIC BANK KENYA LTD.** (the Defendant/Applicant) seeks the following orders:-

**"1. SPENT**

**2. SPENT**

**3. This Honourable Court be pleased to set aside the Warrants of attachment dated 14<sup>th</sup> November 2019 and the Proclamation by Tigwoods Auctioneers dated 15<sup>th</sup> November 2019.**

**4. Pending the hearing and determination of the Plaintiffs Appeal and the Defendant's cross appeal in Nairobi Civil Appeal No. 160 of 2018 Santowels Ltd. - vs - Stanbic Bank Kenya Ltd. there be a stay of execution of the decree dated 22<sup>nd</sup> March 2018.**

**5. The costs of this application awarded to the Applicant in any event".**

2. The application was premised upon **Article 40,50 and 159** Constitution of Kenya 2010, Sections **1A,1B and 3A,44 and 46** of the Civil Procedure Act and **Order 22 rule 18; Order 42, Rule 6, Order 51 Rule 1** of the Civil Procedure Rules, **Rules 6 and 11** of the Auctioneers Rules 1997 and all other enabling provisions of law and was supported by the affidavit of even date sworn by **ELISHA NYIKULI** Senior legal counsel with the Defendant Bank.

3. **STANBIC LIMITED** the Plaintiff/Applicant filed Grounds of Opposition dated **25<sup>th</sup> November 2019**. The Respondent also filed a Replying Affidavit dated **28<sup>th</sup> November 2019**, sworn by **KELVIN MOGENI** an Advocate of the High Court of Kenya.

4. The application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on **6<sup>th</sup> December 2019**, whilst the Plaintiff/Respondent filed its submissions on **16<sup>th</sup> December 2019**.

**BACKGROUND:**

5. The present application arises from the Judgment of this court delivered on **22<sup>nd</sup> March 2018** in which the court awarded to the Plaintiff a sum of **Kshs. 8,498,746.03** plus interest thereon at court rates from the date of filing of the suit until payment in full. The costs of the suit were also awarded to the Plaintiff.

6. The Plaintiff being aggrieved with the entire judgment of **22<sup>nd</sup> March 2018** filed an appeal against the same being **Civil Appeal No. 160 of 2018**. The Defendant also filed a Cross Appeal against the whole judgment on **12<sup>th</sup> March 2019**.

7. Consequent upon said judgment a decree was issued on **17<sup>th</sup> May 2018** was extracted.

8. In execution of that decree, the Plaintiff on **15<sup>th</sup> November 2019** moved to proclaim the Defendant Banks goods. The Applicants position is that the proclamation was based on an unlawful warrant as no notice to show cause was ever extracted and served yet the decree was over one year old.

#### **ANALYSIS AND DETERMINATION:**

9. I have carefully considered the submissions filed by both parties as well as the relevant law.

10. The Defendant/Applicant submits that it has an arguable appeal which will be rendered nugatory if execution is not stayed. Similarly, the Plaintiff/Respondent also submits that it has an arguable Cross-appeal.

It is not for this court to determine the merits or otherwise of the appeal or the cross - appeal.

11. The Applicant has submitted that it stands to suffer substantial loss if the stay orders sought are not granted as the Plaintiff may not be in a position to refund the decretal sum. The Plaintiff also argues that the items listed in the proclamation have been grossly undervalued, exposing the Plaintiff to prejudice should its appeal eventually succeed.

12. The Plaintiff is a registered company, but they have not annexed any evidence to show what resources are available to the company to enable them refund the decretal amount if and when called upon to do so.

13. In the case of **National Industrial Credit Bank Ltd. v Aquinas Francis Wasike & Another [2006] eKLR** the Court of Appeal held as follows:

**"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden". [own emphasis].**

14. Likewise, in the case of **Lawrence Musyoka Ndambuki & Another v Daniel Kato Ndambuki [2018] eKLR** the court held:

**"47. The decretal amount is substantial and the Respondent has no known source of income. Further, the Respondent has not demonstrated that he would be able to refund the said amount in the event the Applicants appeal is allowed.**

**48. There is no sworn affidavit of means that has been served upon and or on record.**

**49. The law as it is requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful they shall be in a position to reimburse/refund the decretal sum". [own emphasis].**

15. The Plaintiff has not in this matter annexed an Affidavit of means to confirm the resources available to it. Further, I find that the Applicant being a Commercial Bank in business is possessed of sufficient means to satisfy any award that may be made against by the Court of Appeal.

16. I do agree with counsel for the Applicant that in the circumstances it would be prudent to grant a stay sought as this will enable both parties to ventilate their respective arguments before the Court of Appeal.

17. The Applicant submits that the Plaintiff/Respondents failed to comply with **Order 22 Rule 18** of the Civil Procedure Rules which provides:

**"18. (1) Where an application for execution is made:**

**(a) More than one year after the date of the decree;**

**(b) Against the legal representative of a party to the decree; or**

**(c) For attachment of salary or allowance of any person under rule 43;**

**The Court excluding the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him .....**".

18. The Defendant/Applicant submits that the Respondent failed to take out a Notice to show cause as per the mandatory requirements of **Order 22 rule 18**.

19. The Respondent counters that **Order 22 Rule 18** contains a proviso as follows:-

"... provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the Decree and the application for execution if the Application is made within one year from the date of the court order against the party against whom the execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution for execution against the same person, the court has ordered execution to issue against him, provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment".

20. It is not in dispute that the decree herein was issued on 17<sup>th</sup> May 2018. Proclamation was done on 15<sup>th</sup> November 2019, eighteen (18) months or 1<sup>1/2</sup> years after issuance of the decree. Therefore, on terms of **Order 22 rule 18** it would appear that a Notice to Show Cause ought to have been issued by the Respondents.

21. The Applicants have cited in support of their submissions the case of **Metro Petroleum Ltd V Turbo Highway Eldoret Ltd [2006] eKLR** where **Hon. Justice Azangalala** held that:

"It is clear that between 24.11.2004 and 22.2.2006 a period in excess of one year had elapsed. Accordingly, the court should have issued a notice to the defendant to show cause why the decree should not be executed against it. I have not traced a copy of such NTSC in this record. I take it therefore that no such notice was issued. I have not also seen reasons recorded dispensing with the requirement of the NTSC. In the premises, the execution in question having occurred without compliance with the rules regarding NTSC is irregular". [own emphasis].

22. However, in terms the proviso to said **Order 22 Rule 18** no Notice to show cause will be required to be issued if the application for execution is made

"within one year from the date of the last order against the party against whom the execution is applied for".

23. **Order 22 rule 18** is couched in mandatory terms. I have looked at the proviso to said order and in my view it is not applicable in the present circumstances. Accordingly, I find that the Respondents erred by failing to issue the Applicants with a Notice to Show Cause in compliance with **Order 22 Rule 18**.

24. Finally, the Applicants place reliance upon Section **44 (i) (ii)** of the Civil Procedure Act which provides that:-

"All property belonging to a judgment debtor including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree provided that the following shall not be liable to attachment or sale-

(i).....

(i) The tools and implements of a person necessary for the performance by him or his trade or profession". [own emphasis].

25. A copy of the Proclamation Notice is annexed at pages 19- 21 of the supporting Affidavit dated 19<sup>th</sup> November 2019. The proclaimed items include, inter alia;

- Photocopying machines;
- Printers,
- Money counting machines,
- Projector machine,
- Vault safe.

The above are in my view tools of trade in the Banking Industry and without them the Defendant Bank would be greatly hampered in carrying out its core mandate on behalf of its customers. I am satisfied that, amongst the items which were proclaimed were necessary tools of trade which under **Section 44 (1) (ii)** are not attachable.

26. The remaining submissions made by the Applicant relate to matters which in my view, properly reside within the domain of the Appeal and or such, I will not comment on the same.

27. **Order 42 Rule 6 (2)** of the Civil Procedure Rules provides:-

"(2) No order for stay of execution shall be made under subrule (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."**

28. From the foregoing discussion, I am satisfied that the Applicants have demonstrated that they stand to suffer substantial harm if the stay of execution is not granted. I am therefore inclined to grant the stay applied for which I hereby do. With respect to security, I direct that the Applicant do deposit as security within 30 days of the date of this Ruling the sum of Kshs. **4.0 Million (Four Million only)** in a joint interest earning account opened in the name of both counsel.

29. Failure to comply with the above means that the stay granted will automatically lapse with no further reference to the Applicant. Costs of this application are awarded to the Applicant.

It is so ordered.

**Dated, delivered and signed in Nairobi this 30<sup>th</sup> day of July 2020**

**M.A ODERO**

**JUDGE**