



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 61 OF 2019

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

VERSUS

JRIM O. OBURE.....RESPONDENT

RULING

1. In its Notice of Motion application dated 12th June 2019 and filed on 14th June 2019, the Applicant an order of stay of execution pending the hearing and determination of the Appeal herein. Its application was supported by the Affidavit of its Head of Legal Department, Lawrence Karanja that was sworn on 12th June 2020.
2. The Appellant contended that it was dissatisfied with the entire judgment that was delivered by the lower court on 11th January 2019 and wished to appeal against the same. It stated that it filed the present application without delay and that it was ready and willing to offer any security or abide by any directive issued by the court including depositing the decretal sum in a joint interest earning account in the names of its advocates and those of the Respondent. It pointed out that it stood to suffer substantial and irreparable loss if it paid and failed to recover the decretal sum from the Respondent as he was a man of straw.
3. It averred that its application seeking similar orders was dismissed by the lower court and thus urged this court to allow its application as prayed.
4. In opposition to the said application, on 4th July 2019, the Respondent swore a Replying Affidavit. The same was filed on 11th July 2019. He stated that the present application was *res judicata* under Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) because the lower court had considered and dismissed a similar application, which fact it said the Appellant had failed to disclose. His Preliminary Objection raising the same issue was dated 4th July 2019 and filed on 11th July 2019.
5. He was categorical that the Appellant had not made out good grounds to be granted the order that it had sought herein. He contended that it ought to have demonstrated that it would suffer substantial loss if the said order was not granted and also deposited the sum of Kshs 366,641/= which comprised of the principal sum, interest thereon and costs. He pointed out that he was gainfully employed with a salary and was able to refund it the said sum in the event it succeeded in its Appeal.
6. It termed the present application as incompetent, lacking in merit, an abuse of the court process filed with the sole intention of denying him the fruits of his judgment. He thus urged this court to dismiss and/or strike out the said application with costs.
7. So as to expedite the matter herein, this court directed that both the present application and the Respondent's Preliminary Objection be dealt with together. This court found it prudent to address the merits or otherwise of the said Preliminary Objection in the first instance.
8. The Respondent argued that the Chief Magistrate's court was a court of competent jurisdiction and that having heard and determined a similar application to the present one and its decision not having been set aside or reviewed, the Appellant was estopped from relying on the same facts. He referred this court to the cases of **Yusuf Kifuma Chanzu vs Equity Bank Limited & Another [2014] eKLR** and **Nishith Yogendra Patel vs Pascale Mireille Bakshi & Another [2009] eKLR** in support of its arguments that the present application was *res judicata*.
9. On his part, the Appellant submitted that Section 7 of the Civil Procedure Rules applied to suits and not to interlocutory applications. He added that he had indeed disclosed that he had filed a similar application in the lower court but that the same was dismissed. He therefore asked this court to dismiss the said Preliminary Objection with costs.
10. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from

except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, **and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just** (emphasis court), and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

11. This court therefore took the view that it could grant the said order notwithstanding that the said order was not granted by the lower court. This is because the order for stay of execution could either be granted by the court from which an appeal was being preferred from or by the court to which an appeal was preferred. For all purposes and intent, the present application was not *res judicata* as envisaged in Section 7 of the Civil Procedure Act that states that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. Turning to the issue of the granting of an order for stay of execution pending appeal, this court noted that both parties were agreed on the conditions that must be met before such an order could be granted. The Appellant urged this court to allow its application for stay of execution pending appeal as it had already deposited the decretal sum in the Judiciary account. In this regard, it placed reliance on the cases of **Butt vs Rent Restriction Tribunal (1982) KLR** and **National Industrial Credit Bank Ltd vs Aquintas Francis Wasike & Another (Nairobi Civil Application No 238 of 2005)**.

13. On his part, the Respondent also placed reliance on the case of **Butt vs Rent Restriction Tribunal** (Supra) to argue that the Appellant had not met the conditions of being granted an order for stay of execution pending appeal.

14. Notably, before an applicant can be granted an order for stay of execution pending appeal, he has to demonstrate that he has met the following conditions that have been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

- a. That substantial loss may result unless the order is made.
- b. That the application has been made without unreasonable delay.
- c. Such security as the court orders for the due performance of the decree has been given by the applicant.

15. It is trite law that the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed as the Respondents pointed out in their submissions. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

16. The decretal sum herein was a sum of Kshs 271,737/= as per the Warrants of Attachment. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Means to demonstrate his ability to refund the Appellant the money in the event it was successful in its appeal. Going further, the difficulties in recovering the decretal sum that had been paid before an appeal is heard, which appeal has been successful, would in the mind of this court amount to substantial loss.

17. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, this very court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

18. In the absence of proof that the Respondent would be able to refund the Appellant the decretal sum without any hardship, this court was satisfied that the Appellant would suffer substantial loss. The Appellant had thus satisfied the first condition of being granted a stay of execution pending appeal.

19. Turning to the issue of filing the application without undue delay, this court noted that the decision the Appellant wished to appeal against was delivered on 11th January 2019. Contrary to the Respondent’s assertion, it had disclosed in Paragraph 10 of its Supporting Affidavit that the lower court dismissed its application for stay of execution pending appeal on 29th May 2019.

20. Be that as it may, this was not a material fact for consideration by this court because it could still have granted the Appellant an order for stay of execution pending appeal if its application was merited notwithstanding that the lower court had dismissed a similar application on the same facts.

21. Bearing in mind that the present application was filed less than two (2) weeks after the lower court dismissed the Appellant’s application seeking a stay of execution pending appeal, this court was satisfied that the present application was filed without any delay. The Appellant had thus satisfied the second condition for the granting of an order for stay of execution pending appeal.

22. The Appellant had indicated that it was ready and willing to furnish such reasonable security as this court would deem fit to grant. The Respondent had in fact acceded to the fact that the decretal sum should have been deposited in a joint interest earning account in the name of his advocates and those of the Appellant herein. As the Appellant subsequently deposited the sum of Kshs 271,737.80 in the Judiciary Nairobi Deposits account at Kenya Commercial Bank on 23rd October 2019, which was evidenced by a receipt from the court dated 6th February 2020, this court was also satisfied that it had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

23. Weighing the Appellant's right to have its dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if it was denied an opportunity to ventilate its Appeal on merit in the event an order for stay of execution was not granted. It was in the interests of justice that the Appellant be accorded a conducive environment to canvass its Appeal by being granted preservative orders.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Respondents' Preliminary Objection dated 4th July 2019 and filed on 11th July 20219 was not merited and is hereby dismissed. On the other hand, this court found the Appellant's Notice of Motion application dated 12th June 2019 and filed on 14th June 2019 to have been merited and the same is hereby allowed in terms of Prayer No (3) therein as follows:-

1. THAT there shall be an order for stay of execution of the Ruling of Hon M.W. Murage, SRM, that was delivered on 11th January 2019 in Nairobi Milimani Civil Suit No 3466 of 2016 Jerim O. Obure vs Co-operative Bank of Kenya Limited pending the hearing and determination of the Appeal herein.

2. Costs of the present application and those of the Preliminary Objection will be in the cause.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of September 2020

J. KAMAU

JUDGE