



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E037 OF 2020

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED.....APPELLANT

AND

SKAKHON HOLDINGS LIMITED.....1ST RESPONDENT

SAMUEL KONGO KARANJA.....2ND RESPONDENT

JANE WAMBUI MUTAHL.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of Hon. D. M. Kivuti, RM

dated 21st August 2020 at the Milimani Magistrates Court in Civil Case No. 1499 of 2014)

RULING

1. The application for consideration is the Appellant's Notice of Motion before the court is dated 2nd August 2020 made, inter alia, under **Order 42 rule 6** of the **Civil Procedure Rules**. The Appellant seeks orders of stay of execution pending appeal against the orders issued on 3rd October 2019 and 21st August 2020. The application is grounded on the affidavit of Billy Ubindi.

2. It is agreed that on 3rd October 2019, the Subordinate Court dismissed the suit for want of prosecution on the ground that it had not been fixed for hearing within a period of 30 days as previously ordered. The Appellant applied for review of that order but the application was dismissed on 21st August 2020 thus precipitating this appeal. Thereafter, the Respondents extracted a decree and have now threatened to execute for costs assessed at Kshs. 89,450.00. The Appellant contends that it has an arguable appeal and that it will suffer and irreparable loss and damage if execution proceeds.

3. The Respondents have opposed the application through grounds of objection dated 8th September 2020. They contended that the orders sought to be stayed are negative in nature and are therefore incapable of being executed. The Respondents also submitted that the Appellant has not shown that substantial loss may result if the stay is not granted and that the Appellant has not offered security for due performance of those orders.

4. The principles governing the grant of an order for stay pending appeal are set out in **Order 42 Rule 1** and **2** of the **Civil Procedure Rules** which provides as follows:

42(1) 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...

(2) No order for stay of execution shall be made under sub-rule (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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. An Appellant has to demonstrate that it stands to suffer substantial loss unless the stay order is made, that the application has been made without unreasonable delay and that it has provided security or is ready to provide such security as the court may order. Further, a reading of the aforesaid provision contemplates that the order sought to be stayed is capable of execution. In this case the order appealed from is the order dismissing the application for review hence there is nothing to be stayed. In **Western College of Arts and Applied Sciences v Oranga and Others [1976] 1 KLR 63**, the Court of Appeal observed as follows:

But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered.

6. The award of costs is a consequential order to which the Respondents are entitled and even if I accept that it is an order that can be stayed, the Appellant has not shown that it will suffer substantial loss if a stay is not granted.

7. For the reasons I have stated, the Notice of Motion dated 2nd August 2020 is hereby dismissed with costs.

DATED and DELIVERED at NAIROBI this 28th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Waigwa instructed by Wamae and Allen Advocates for the Appellant.

Ms Kuria instructed by R. W. Kuria and Company Advocates for the Respondents.