



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 217 OF 2017**

**EMRAY ENTERPRISES LIMITED .....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 8<sup>th</sup> January 2020 wherein the defendant/applicant seeks orders that: -

**1. Spent**

**2. Spent**

**3. There be a stay of execution of the judgment entered on the 9<sup>th</sup> December 2019, pending the hearing and determination of defendant's intended Appeal in the Court of Appeal.**

**4. The court be pleased to grant the orders sought herein subject to any conditions as the court may deem fit.**

**5. That costs of this application be provided for.**

2. The application is supported by the affidavit of the applicant's Legal Officer **Mr. Chrispus N. Maithya** and is premised on the grounds that: -

**1. That judgment was delivered on 9<sup>th</sup> December 2019 in this matter where judgment was entered in favour of the plaintiff.**

**2. The applicant is dissatisfied with the said judgment and has initiated an appeal against the same and intends to file an Appeal in the Court of Appeal.**

**3. The defendant was given an order of thirty (30) days stay of execution of the judgment of the court to enable them file a formal application for Stay of Execution pending the hearing and determination of the intended appeal in the Court of Appeal. Once the order of stay of execution lapses the plaintiff may proceed with the execution of the judgment and decree as against the defendant and therefore this application is of utmost urgency.**

**4. That unless the instant application is heard expeditiously, the plaintiff shall proceed and execute against the defendant and render the defendant's initiated appeal nugatory. The defendant will also suffer irreparable loss and damage if the orders sought herein are not granted.**

3. The plaintiff/respondent opposed the application through the replying affidavit of its Director **Mariam Alimdin Muhaji** who avers that the application does not meet the threshold set for the granting of orders of stay of execution pending appeal.

4. Parties canvassed the application through written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of order of stay pending appeal.

5. The procedural provisions of Order 42 Rule 6 of Civil Procedure Rules lays down the conditions upon which a stay of execution order will be granted that as follows: -

*(i) The Applicant will suffer substantial loss unless an order of stay of execution is granted;*

*(ii) The Application has been made without unreasonable delay; and*

*(iii) Security for the due performance of such decree or order has been given by the Applicant.*

6. Having regard to the above provisions, I find that grant of an order for stay of execution is a discretionary power of the Court which must be exercised judicially, and not capriciously and whimsically. It must be based on sufficient or reasonable cause or explanation. In the exercise of this power, the Court will also take into account inter alia, the special circumstances of the case and its unique requirement (*see Butt v Rent Restriction Tribunal (1982) KLR and Shah v Mbogo (1967) EA 470*).

#### **Delay.**

7. Based on the provisions of order 42 Rule 6 of the Civil Procedure Rules, I shall now deal with the issue as to whether this Application was filed without undue delay. I note that the application herein was filed on 8<sup>th</sup> January 2020 barely one month after the delivery of the judgment that is the subject of the appeal.

8. I am satisfied that the application meets the condition regarding the filing of the application for stay without delay.

#### **Substantial loss.**

9. In the case of *Kenya Shell Ltd v Kibiru & Another (1986) eKLR*, the Court of Appeal held that:

***“substantial loss is in various forms; it is the cornerstone of both jurisdictions for granting stay. This is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondent should be kept out of their money”.***

10. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto (2012) eKLR*, the Court held that: -

***“...no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss, under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal.”***

11. Similarly, *Sewankambo Dickson v Ziwa Abby HCT-00-CC MA 0178 of 2005*, the Court held that: -

***“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal....”***

12. In the present case, the subject matter of the impugned judgment was insurance cover in respect to a mortgage facility in the sum of KShs. 17,100,000. The judgment appealed against is for declaratory orders, redemption of the mortgage account, or in the alternative, the payment of damages equivalent to the insured sum and a permanent injunction. I note that even though the applicant claims that it will suffer substantial loss if the amount in question is paid or the judgment executed, the applicant has not explained or alleged that the respondent will not be able to repay the decretal sum should the intended appeal be successful.

#### **Security**

13. The Applicant did not offer any security at all as required under Order 42 Rule 6 of the Civil Procedure Rules. Courts have taken the position that in an application such as this, it is necessary to balance the interest of the applicant to its right to appeal and those of the respondent to the fruits of its judgment. In *Keshvaji Jethabhai & Bros Limited v Saleh Abdulla [1959] EA 260* the court laid down the principles that should guide it in the exercise of discretion in such matters as follows:

***a) whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;***

***b) the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;***

***c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;***

***d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.***

14. Having regard to the above cited case and in effecting this delicate balance that I will allow the instant application in the following terms.

a. There shall be stay of execution of the judgment entered on 9<sup>th</sup> December 2019 pending the hearing and determination of the intended appeal but on condition that: -

*i. The sum of Kshs 17,100,000.00 is deposited in a joint interest earning account to be held in a banking institution of repute in the joint names of counsel for the applicant and defendant within 60 days from the date of this ruling failure of which the stay orders shall be vacated.*

*ii. The applicant shall prepare and set down the intended appeal for hearing within 60 days from the date of this ruling or at the earliest and possible time depending on the caseload at the Court of Appeal.*

*b. The costs of this application shall abide the outcome of the appeal.*

**Dated, signed and delivered via Microsoft Teams at Nairobi this 24<sup>th</sup> day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr Chege for the defendant/applicant

Mr. Ibrahim for Kioko Kilukumi for the plaintiff.

Court Assistant: Sylvia