



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. E036 OF 2020

BETWEEN

COS O SYSTEM SERVICES LIMITED..... 1ST APPELLANT

JAMES NGUGI GACHUHI..... 2ND APPELLANT

AND

SBM BANK LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. I. Orange, SRM dated 19th July 2017 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 194 of 2019)

RULING NO. 2

1. On 1st September 2020, I allowed the Appellant's Notice of Motion of Motion dated 24th August 2020 seeking an injunction restraining the sale of the suit property pending hearing and determination of the appeal on condition that the sale scheduled for 1st September 2020 be stayed upon payment of Kshs. 700,000.00 within 7 days and thereafter the appellant pay Kshs. 500,000.00 on every 5th day of every subsequent month from November 2020 until the appeal is heard and determined. In default of each instalment, the order would stand discharged.

2. It is not disputed that the Appellant defaulted on conditions for stay pending appeal. The Respondent advertised the suit property for sale on 29th September 2020. The Appellant has now moved the court by a Notice of Motion dated 25th September 2020 seeking to suspend the sale and an order to vary the orders of 1st September 2020 substituting it with an order for payment of Kshs. 500,000.00 and a lower sum for subsequent instalments.

3. The application is supported by the 2nd Appellant's affidavit in which he states that because of the prevailing harsh economic conditions brought about by the COVID- 19 pandemic, the Company has only managed to raise Kshs. 500,000.00 which he forwarded to the Respondent's Advocates on 22nd September 2020 but the sum was rejected. The 2nd Appellant further deponed that it deposited Kshs. 500,000.00 in court. The Appellants also request the court to allow them to pay a lower sum per month as it is unable to raise Kshs. 500,000.00 every month due to the prevailing economic circumstances.

4. The application is opposed by the Respondent through the affidavit of Danson Watetu, a Debt Management Officer. He depones that the Appellants do not deserve the orders sought on the ground that they did not comply with the conditions imposed by the court hence the Respondent was entitled to proceed with the sale of the suit property. The Respondent complains that the Appellants owe it a substantial amount of money which has not been paid and that in fact, the last instalment was paid on 19th November 2014. The Respondent adds that the Appellants have benefitted from the court stopping the auction twice before to its detriment.

5. The order I made on 1st September 2020 was intended to preserve the suit property pending the hearing and determination of the appeal. In making the order for stay, the overriding duty of the court is to do justice to both parties. An appellant is entitled to be heard on the appeal while a respondent is entitled to the benefit of the order appealed from. It is for this reason that the court imposed certain conditions. This approach is in line with the overriding objective stipulated in **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** under which the court is required to take into account proportionality and equality of arms which ultimately results in justice for both

parties (see (see *Tarbo Transporters Ltd v Absalom Dova Lumbasi* BGM HCCA No. 21 of 2012 [2012] eKLR and *Samvir Trustee Limited v Guardian Bank Limited* ML HCC No. 795 of 1997 [2007] eKLR).

6. It is in light of the principles aforesaid that I am inclined to hold that the mere failure to meet the terms of the stay should not, of itself, disentitle a party to discretion in its favour. At the end of the day the court must do justice to the parties by weighing the positions of both sides. the Appellants have not deliberately failed or refused to comply with the conditions the court had imposed. They have given reasons why they could not make the payment as directed by the court and they moved the court immediately after the entreaties to the Respondent were rejected. Lastly, the court is aware and takes judicial notice of the hardship caused by the COVID-19 pandemic that has had a negative effect on the economy.

7. The court is however not oblivious of the Respondent's concerns regarding the Appellants' indebtedness and default. Its position pending the appeal will be secured by an order for payment. Further, the appeal will be heard very soon and will in all likelihood settle the parties respective legal position. In the meantime, I note that the Appellant has sought other orders, which I think, are not within the purview of the appeal.

8. For the reasons I have set out above, I allow the Notice of Motion dated 25th September 2020 on the following terms:

(a) The time for payment of the 1st installment by the Appellants as ordered on 1st September 2020 be and is hereby extended and the same is deemed as duly paid.

(b) That the sum of Kshs. 500,000.00 paid into court by the Appellants shall be released to the Respondent forthwith.

(c) That the Appellants shall pay to the Respondent, Kshs. 200,000.00 on the 5th day of every subsequent month pending the hearing and determination of the appeal and in default the orders of stay shall stand discharged.

(d) The Appellant shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 23rd day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Mr Odoyo instructed by Kipkenda and Company Advocates for the Appellant.

Mr Kazungu instructed by Okubasu Munene and Kazungu Advocates for the Respondent.