



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 265 OF 2016**

**JACKLINE WANJIRA NJERU.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**EQUITY BANK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT**

**METROPOL CREDIT REFERENCE**

**BUREAU LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The 2<sup>nd</sup> respondent/applicant herein took out the Notice of Motion dated 19<sup>th</sup> May, 2020 supported by the grounds set out on the application and the facts deponed in the affidavit of **Job Nyasimi Momanyi**. The applicant sought for an order for stay of execution of the ruling delivered by the trial court on 28<sup>th</sup> April, 2020 and all consequential orders pending the hearing and determination of an intended appeal against the said ruling.
2. The plaintiff/respondent opposed the Motion by filing the Grounds of Opposition dated 10<sup>th</sup> June, 2020 and put forward the following grounds:
  - a) *The Notice of Motion as drawn is frivolous, vexatious and otherwise an abuse of the court process.*
  - b) *The Notice of Motion is misplaced, incurably defective and improperly before this Honourable Court as the 2<sup>nd</sup> defendant/applicant has no basis in law to require this Court to stay its own orders.*
  - c) *The Notice of Motion is a vain attempt by the 2<sup>nd</sup> defendant to delay the determination of the suit.*
  - d) *The plaintiff therefore prays that the Notice of Motion be dismissed with costs.*
3. The parties were directed to file and exchange written submissions on the Motion. The 1<sup>st</sup> defendant did not participate at the hearing of the Motion or file any responding documents.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavit supporting it; the Grounds of Opposition and the submissions on record.
5. A brief background of the matter is that the respondent instituted a suit against the 1<sup>st</sup> defendant and the applicant vide the plaint dated 7<sup>th</sup> October, 2016 and sought for damages arising out of the tort of defamation.
6. According to the court proceedings, interlocutory judgment in default of appearance and defence was entered against the 1<sup>st</sup> defendant and the applicant on 5<sup>th</sup> February, 2018 upon the request of the respondent.
7. Subsequently, the applicant filed the application dated 16<sup>th</sup> May, 2019 seeking to have the interlocutory judgment set aside and for leave to file its statement of defence.
8. Upon hearing the parties, the court vide the impugned ruling delivered on 28<sup>th</sup> April, 2020 allowed the application but set specific

conditions thereto, including the condition that the applicant pays to the respondent thrown away costs in the sum of Kshs.100,000/ within 14 days therefrom, failure to which the respondent would be at liberty to apply for the striking out of the applicant's statement of defence, if filed and/or to proceed with the formal hearing of the case. Being aggrieved by part of the aforementioned ruling, the applicant desires to challenge it on appeal before the Court of Appeal.

9. On the instant Motion, the question as to whether the applicant's appeal is arguable, which issue was addressed in the Motion, cannot be determined by this court since it is the preserve of the Court of Appeal.

10. It is that whereas the respondent argued in her Grounds of Opposition that the Motion is *inter alia*, frivolous; vexatious and an abuse of the court process; and further that it is intended to delay the determination of the suit, she did not bring any arguments or material to support her arguments. In the circumstances, I find no basis to dismiss the Motion on any of those grounds, therefore I will proceed to consider the same on its merits.

11. The guiding provision in considering an application seeking for an order for a stay of execution pending appeal is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the following conditions in determining an application for stay:

*i. The application should have been brought without unreasonable delay;*

*ii. The applicant must demonstrate the substantial loss to be suffered; and*

*iii. There must be provision of security for the due performance of the decree or order being appealed against.*

12. The above conditions were restated in the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** cited in the applicant's submissions.

13. On the first condition, the applicant avers and submits that the Motion has been timeously filed. Upon perusal the record and the impugned ruling, I note that it was delivered on 28<sup>th</sup> April, 2020 which is barely one (1) month prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.

14. Under the second condition on substantial loss, it is apparent from the Motion that the applicant is anxious that unless an order for a stay of execution is granted and the respondent proceeds to have its statement of defence struck out for failure to pay the thrown away costs, it will lose its right to defend itself and ultimately, its right to be heard, thereby resulting in substantial loss.

15. The applicant relied upon the decision by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1979] eKLR** when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not render the appeal in question nugatory, if successful.

16. From my study of the impugned ruling and as earlier indicated, among the conditions for setting aside the interlocutory judgment is the condition that the applicant pays to the respondent thrown away costs of Kshs.100,000/=.

17. I also observed that the Motion; supporting affidavit of advocate Job Nyamisi Momanyi; and the draft memorandum of appeal annexed to the Motion, that the amount in thrown away costs is one of the issues to be challenged on appeal, since the applicant is of the view that the same is manifestly excessive.

18. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant's constitutional right to be heard on its defence in the dispute before the same is conclusively determined.

19. I am convinced that the applicant has reasonably shown the substantial loss it may suffer should the order for a stay of execution be denied.

20. In respect to the third and final condition, the applicant expressed its willingness to abide by the conditions to be set by this court.

21. In the end therefore, the Motion dated 19<sup>th</sup> May, 2020 is found to be meritorious and it is allowed, therefore giving rise to issuance of the following orders:

**a) There be a stay of execution of the ruling delivered on 28<sup>th</sup> April, 2020 on condition that the applicant deposit the sum of Kshs.100,000/= in court within 30 days from today's date, failing which the order for stay shall automatically lapse.**

**b) Costs of the Motion to abide the outcome of the appeal.**

Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of November, 2020.

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant/Applicant