



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO 7 OF 2018

KINGS GROUP OF SCHOOLS LTD.....1ST APPLICANT

MARY NYAWIRA CHOMBA..... 2ND APPLICANT

VERSUS

KENYA WOMEN MICROFINANCE BANK...RESPONDENT

RULING

By a Notice of motion dated 23rd October 2018 and filed on the same date, the applicant moved this court under certificate of urgency, seeking the following orders:

- 1. That there be a stay of execution of the judgment delivered on 29th September 2018 pending hearing and determination of this application.**
- 2. That the Honourable court does grant temporary stay of execution of sale of L.R. No. Kajiado/ Kaputei North 22309 and L.R. No. Kajiado/ Kaputei North 22349 pending the hearing and determination of this application inter parties**
- 3. That the Honourable court does grant an order of stay of execution pending the filing and determination of an intended appeal before the court of appeal.**
- 4. That cost of this application be in the cause**

The orders are premised on the following grounds;

- 1. The applicants are amenable to any reasonable conditions of grant of stay orders**
- 2. The L.R. No. Kajiado/ Kaputei North 22309 and L.R. No. Kajiado/ Kaputei North 22349 are at risk of being sold by the respondent before applicants/plaintiffs exercise their right of appeal to the court of appeal.**
- 3. The intended appeal will be rendered nugatory in event stay is not granted in the circumstances**
- 4. The plaintiffs have filed notice of appeal and are pursuing supply of court proceedings in order to mount an appeal**
- 5. Plaintiffs have an arguable appeal with high chances of success as no interest rate reconciliation had been computed by the respondent as per Central Bank of Kenya Regulation on interest rate.**
- 6. The application is filed without unreasonable delay.**

Mary Nyawira Chomba is a director of the first applicant, she sworn a supporting affidavit on 23rd October, 2018 she deposed that the Bank loan advanced by the respondent was utilised in the construction of the institution and if the respondent could agree to engage the applicant on new terms of receivership agreement the matter would be settled amicably without prejudice to any party. She averred that the institution is beneficial to the community in Kajiado and had been offering free education to over 100 students who are orphans and also offered employment to 50 employees who are now jobless due to this suit. That granting the stay orders will not prejudice the respondent in any event at all as securities are in the respondent's custody. The application has been filed without unreasonable delay.

On 23rd October 2018, an order was issued and the matter was certified urgent ex parte in the first instance; the parties were scheduled to

appear for inter parties hearing on 8th November 2018

On 8th November 2018, the matter was adjourned to 13th November 2018. On 13th November 2018, the matter was taken out pending the outcome of proposed mediation by the parties. Both counsels were ordered to file brief submissions in support or opposition of the same. On 10th December 2018, the applicants counsel was given an extension of time to put in brief submissions within 10 days, the respondent counsel was at liberty to tackle any issue arising thereof. The matter was scheduled for a ruling on 25th January, 2019.

Benard Kiprotich is the legal counsel of the respondent, he sworn a replying affidavit in opposition of the application dated 23rd October, 2018. The respondent deposed that the court had already delivered a judgment by which it found that the plaintiffs had not merited the grant of the order of injunction and proceeded to dismiss the claim and the court cannot therefore grant the said order it had previously declined as sought in the application.

The respondent further avers that the applicant's facility is currently in arrears of Kshs.14,679,590.53 against the total outstanding sum of Kshs. 57,628,130.95. The respondent contention is that the debt will out strip the security by the time appeal is heard and determined and the defendant stands to suffer substantial loss under the circumstances. In addition, the respondent deposed that the action sought to be stayed that is the power of sale is a right which is statutory provided for.

APPLICANTS' SUBMISSIONS

Mr. Nairi, learned counsel for the applicants' presented his written submissions dated 23rd October 2018. Submissions were made that This Honourable court made a judgment on 28th September 2018 in favour of the respondent herein for a sum of Kshs. 52,223,530.43 Plus cost and interest, the applicant is seriously aggrieved with the interest accrued levied by the respondent which is extremely high.

Applicant strongly contends that the respondent is a bank and not a micro finance hence ought to have reduced the interest rate to measure up with the interest rate capping further that the valuation was improper as the property was valued in 2015 and such value does not represent the current state of affairs as it is obvious that the said property has appreciated in value.

The property being Kajiado/Kaputei - North 23249 and 23309 has in an institution which (Kings Group of Schools) is beneficial to the community of Kajiado is in the verge of being sold by the respondent as a result over 30 employees will lose jobs, over 100 students right to education curtailed. The applicant relied on the case of Masisi Mwita vs Damaris Wanjiku (2016)Eklr

On the premise of the ruling delivering on 29th September 2018 this honourable court had granted the applicants herein leave to appeal, it is their humble submissions that the appeal would be rendered nugatory if the respondent is allowed to proceed with the execution.

The application was filed without undue delay. Judgment delivered on 28th September 2018 and the applicant filed the application of stay on 23rd October 2018 exactly one month later thus the application was made without unreasonable delay.

RESPONDENT'S SUBMISSIONS

Learned counsel for the respondent submitted on the issue of whether the order of dismissal as granted is incapable of being stayed, the respondent relied on the case of George Ole Sangui and 12 others vs. Kedong Ranch Limited 2015 eklr the court held that: ***"a dismissal order is a negative order not capable of being stayed. A dismissal order cannot be enforced and is incapable of execution and as such the applicant's first prayer and entire application must fail."***

THE LAW AND DETERMINATION

A stay of execution under order 42 of the Civil Procedure Rules is an interim order to suspend the rights of one party who is aggrieved with the judgment of the trial; court or tribunal and wishes to exercise his or her right of appeal. Its main objective is to protect the substratum of the suit by delaying the execution process like attachment until the determination of the appeal. Being a discretionally remedy the applicant must demonstrate that he or she has approached the court of equity with clean hands as succinctly stated in the case of Jajbhay v Cassim 1939 AD 537-551 the court held on this maxim that:

"All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice."

The general principle of law is that the successful litigant in possession of a valid court judgement is entitled to the fruits of judgement unless there exist exceptional circumstances to deny him or her that right. For purposes of preserving the decree which has been passed against a party stay gives room for maintenance of status quo pending the outcome of the appeal. This principle was stated in the **Nigeria Case of SPDC v Amadi 2011 INLR** where the court held:

"If stay of execution is not granted the beneficiaries of the judgment would go into the shell Residential Area (the Res) driven by all kinds of desires and the end is best imagined. The Res may be destroyed before the appeal is determined. A return to the status quo ante bellum in the event the appellants wins and that will be bad for the stream of justice which must be kept pure at all times. The court would be presented with a fait accompli before its judgement is delivered."

The governing procedural law to satisfy an application for stay of execution is provided under order 42 rule 6 of the Civil Procedure Rules, 2010 which states as follows;

(a) That the application for stay has been made without unreasonable delay

(b) That substantial loss may result to the applicant unless an order is made.

(c) That such security as the court may order for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.

It is clear from the above principles that the burden of proof rests with the applicant to demonstrate existence of a right capable of being protected by the law in granting or refusing stay of execution more specifically where it involves judgment on a mortgage contract. I would accept what was said by the court in the persuasive authority of *Lonotype-Hell Finance Limited v Baker [1992] 4 ALL 887*, stating the principles then operating to be:

“If defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution.

The proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is not ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice-----”.

Applying this principles to the instant case with regard to the specific exercise of discretion to grant stay the test laid down in the rule making of this case has not been met by the applicant.

It is discernible from the above observations to consider the singular elements under Order 42 Rule 6 of the Civil Procedure Rules.

Unreasonable delay in filing the application

The first limb of consideration is whether there was unreasonable delay in filing the application for stay of execution. Judgment was delivered in the High court of Kenya at Kajiado on 28th September 2018 and the applicant filed their notice of motion under certificate of urgency on 23rd October 2018, this was less than a month from the date judgment was delivered. This principle is undisputed by the respondent and I concur with the applicants’ submissions that the application was filed in a timely manner hence there was no unreasonable delay.

Substantial loss

Substantial loss is provided under Order 42 Rule 6(b) of the Civil Procedure Rules, 2010. Our first step is to define substantial loss, substantial loss is not defined in statute; a dearth of judicial decisions have embarked on defining what substantial loss entails. In the case of *Antoine Ndiaye vs Africa Virtual University 2015* the learned judge Gikonyo. J. Cited the case of *Sewankambo versus Ziwa Abby HCT-00-CCMA0178 of 2005* where it was 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...insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals..”

In the case of *Bungoma HC miscellaneous application no 42 of 2011 James Wangalwa and another Vs. Agnes Naliaka Cheseto* the court further discussed what substantial loss entails: *“The application 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. This is what substantial loss would entail.”*

On substantial loss, the borne of contention is whether the applicant will stand to suffer substantial loss when the application is declined hence the appeal will be rendered nugatory or the applicant will not recover the decretal amount if the appeal succeeds which is substantial. The guiding case law, which has been quoted in various judicial decisions is the case of *Kenya shell limited vs. Benjamin Karuga Kibiru and another 1986 eklr* where the judge observed inter alia that;

“The test would be whether the appeal would be rendered nugatory unless payments of the decretal were stayed. It is not normal in many decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be rendered nugatory... no reasons given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances but the information that was forthcoming did not confirm the applicant’s misgivings.

[I]f there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

The applicants’ are of the view that they have an arguable case premised on prima facie merits such that their appeal would be rendered

nugatory if the stay is declined. To support this notion, the applicant in his application stated that interest rate has not been computed by the respondent as per central bank regulations on interest rate. The 2nd applicant in her supporting affidavit deponed that the valuation submitted to the court undervalued the subject land which is more than 120 million Kenya shillings. Further in paragraph 8 the institution is beneficial to the community in Kajiado and had been offering free education to over 100 students who are orphans and also offered employment to 50 employed who are jobless due to this suit.

I am inclined to agree that the applicants have an arguable case on appeal, but having an arguable case does not mean it will succeed. Granting a stay of execution based on the applicant's assertion that they have an arguable appeal would be precarious; we cannot forecast the outcome of the appeal.

The next step is to balance the rights of the parties; on the appeal and judgment held by the applicant and the respondent respectively. Nobody comes to court with superior rights; the applicants' rights are not greater or lesser than the respondent's rights, so the court should not prefer one over the other. Granting stay of execution connotes that the status quo is preserved and the applicant and respondent will remain in the same position before judgment. The respondent's rights to the fruits of her judgment will be postponed but it will be on just terms and secured by provisions of security which is sufficient to guarantee performance of the decree which will be binding on the applicant.

To expand on the above, I will quote the case of *Absalom Doya vs. Tarbo Transporters (2013) eKLR that:*

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefit under the decree. The court in balancing the 2 competing rights focuses on their reconciliation which is not a question of discrimination.”

The subject matter at hand is a money decree; judgment was delivered on 28th September 2018, the applicant's initial suit was dismissed. Money owed to the respondent's was calculated to the tune of 52,223,550.43 plus interest. The applicant's took issue with the respondent that they will move to execute the judgment if the stay of execution is not granted. I disagree with the applicants because the respondent is entitled to the fruits of the judgment and executing the judgment is a legal process which does not constitute substantial loss.

The next issue to be solved is whether the respondent can pay back the decretal sum should the appeal succeed. There are two burdens to be discharged; these are the legal burden and the evidential burden. The legal burden of proof lies with the applicant who has to prove that the respondent is unable to pay back the decretal sum in the event his appeal succeeds. The applicant should adduce evidence that the respondent has the inability or lack of finances to refund the decretal sum. Prima facie evidence should be established by the applicant and then the evidential burden will shift to the respondent.

The applicants' have failed to discharge the initial burden of proving that the applicant is unable to refund the decretal sum if the appeal succeeds. The applicant should substantiate the claim by proving that the respondent does not have sufficient assets to refund the decretal sum. In my opinion the applicant will not suffer substantial loss if the order for stay is declined by this court.

SECURITY FOR PERFORMANCE

Thirdly, the court must take into consideration the provision of security for the due performance of the decree as provided under Order 42 Rule 6(c) of the Civil Procedure Rules, 2010. On this principle, the applicants have not mentioned nor proved their readiness to deposit security for performance.

DECISION

These factors are of importance to this litigation even though I am not sitting as an appellate court it is my view that the appeal indeed would not be rendered nugatory. Why do I say so, in the event the proceedings challenging the judgement of this court succeeds the defendant has the ability to pay the decretal amount to the applicant. The three conditions provided in the civil procedure rules ought to be met simultaneously. The applicant has failed to prove the tests on substantial loss and security for performance to persuade this court to exercise discretion to grant stay of execution pending the outcome of the appeal.

This application is wholly without merit and must fail with costs to the defendant.

Dated, signed and delivered in open court at Kajiado this 30th day of January, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Nairi for the appellant

Ms. Wanjiku holding brief for Serem for the respondent