



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 153 OF 2003

EAST AFRICAN DEVELOPMENT BANK LIMITED.....PLAINTIFF

VERSUS

1. MUJTABA JAFFER

2. MINOJ SHAH

3. AMRITLAL DEVANI.....DEFENDANTS

R U L I N G

1. This court is called upon to decide the plaintiff's/judgment debtor's application brought by Notice of Motion dated 8/11/2019 seeking orders that there be granted to the plaintiff, as the judgment debtor, an order of stay against execution to recover the costs of the suit taxed in the sum of Kshs.11,585,691.00 and that it be ordered that no enforcement action be taken against the plaintiff pending the hearing and determination in Civil Appeal No. 33 of 2017 between the parties.

2. The grounds disclosed to found the application are that the plaintiffs suit having been struck out with costs to the defendant, the defendants have had their bill of costs taxed in the sum of Kshs.11,585,691.00 which sum the said Defendants have threatened to execute for contrary to Section 3 of the East African Development Bank Act, and while an appeal pends determination by the Court of Appeal. It was then added that the defendants means and assets are unknown hence there was a risk that if paid the sum, the plaintiff would be unable to get a refund and therefore the appeal would be rendered nugatory on the appeal succeeding with a rider that the plaintiff applicant is ready and prepared to abide by any order on security as the court may impose.

3. The application was supported by the Affidavit sworn by one Robert Muriithi, the principal investments officer of the plaintiff which gives the history of the litigation culminating in the appeal and taxed costs and then delves into the merits of the appeal to show that the same is arguable.

4. The application was opposed by the defendant decree-holder on

the basis of the Grounds of Opposition dated 19/11/2018 and filed in court on 23/11/2018. The gist of the opposition is that the application discloses no ground to merit grant of orders sought; that the stay sought would have the effect of staying the order dismissing the suit and thus does not lie in law; that the plaintiff had failed to demonstrate that the defendants are incapable of refunding the sum of taxed costs if paid out to them and that the arguability of the appeal is a consideration before the Court of Appeal considering an application under Rule 5(2)b of that court's rules and not due for consideration before this court.

5. In support of its application, the plaintiff filed written submissions as well as a bundle of list of authorities. The submissions as supported by the authorities cited were to the effect that the statutory immunity enjoyed by the plaintiff encompasses and extends to all legal processes and include execution and enforcement of decrees. That submission was made to bolster the plaintiff's position that there is no liberty upon the defendants to take out or insist on any enforcement or any execution proceeding against the plaintiff because that would run a foul the statute and the treaty establishing the plaintiff. Citing to court a plethora of authorities from the Kenyan courts spanning from the High Court to the Supreme Court as well as courts of the east African Community partner states of Tanzania and Uganda, the Applicant asserted that the fact of immunity establishes a sufficient cause and therefore the first pre-requisite of grant of stay had been met.

6. On the risk of suffering a substantial loss the plaintiff made submissions that the means and assets of the defendant as decree holders, being unknown, it was difficult to be sure if a refund would be possible in the event of appeal succeeding and that it having expressed doubt as to the ability of the defendants to effect a refund, the burden then shifted upon the defendants to prove their means and assets to effect a refund. That onus the plaintiff rightly pointed out had not been discharged because the defendant preferred not to file any affidavit to demonstrate their ability in that regard. The decision in *Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR* and *National*

Industrial Credit Ltd vs Acquivas Francis Wasike [2006] eKR were then cited for that proposition as to who was to demonstrate ability and inability to effect a refund.

7. On security the Appellant contended that even though whether or not to grant stay is a discretion on the court, the Applicant is a well-established multinational bank with sufficient assets to meet the Respondents costs as taxed in the event the appeal fails. It was however conceded that if the court was to be inclined to order payment of security the Applicant was prepared to comply with such an Order for deposit. Such submissions were reiterated orally before court.

8. For the defendants, no written submissions were ever file nor was my authority cited in opposition to the application for stay. In fact not even an attempt was made to distinguish the decisions cited by the plaintiff. That could be explicable on the basis of the submission made by counsel that the stay was not opposed but a deposit of security should be ordered. I do consider and appreciate that submission to concede that sufficient cause had been shown to grant stay and that the only determination the court is to make is what security is to be imposed as a condition for stay.

9. There being a concession by the defendant that stay may be granted on terms, all other considerations become moot for the court need not engage in an agreed matter as if it were a disputed fact. Had there been no such concession this court would have endeavoured to determine how the statutory immunity in favour of the plaintiff sits with the constitutional ethos of Equality before the law as well as the right to property not to be deprived arbitrarily.

10. I understand the law on stay to demand that no stay can be granted if no security is given for the due performance of the decree in the event the appeal fails. The purpose of stay is to preserve the litigation in the appeal so that at the end the appellant gets the real fruits of his endeavours on appeal as a way of being vindicated that he was entitled to challenge the decision of the trial court [1]. However the law under Order 42 Rule 6 also appreciates that the decree-holder has a right to the property in the decree that a stay would shield it from accessing hence to put both parties at par it is demanded that there be security for the due performance of the decree should the appeal fail. I consider the drafters of the rule to have intended that the two parties be put at equal footing as they battle over the competing interests in the appeal. The rule merely call upon the court that in exercising the discretion to grant stay it balances the interests of the parties with a view so securing both sides. In **Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**, in allowing the application for stay pending appeal, the Court Of Appeal observed as follows:-

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.”

11. Here the sum in dispute is known to be **Kshs 11,585,691**. That sum if put at the disposal of both parties will adequately secure both and give them the assurance that once the appeal is disposed of the person entitled will access same with considerable ease. It is that sum I direct the Plaintiff/Judgment debtor shall deposit into an interest bearing account in the joint names of the advocate for the parties, at a bank mutually agreed upon, within 30 days from the date of this decision.

12. On costs, I appreciate the concession made by the defendants/ Respondents and order that the cost shall follow the outcome of the appeal.

Dated, signed and delivered this 15th day of March, 2019.

P J O OTIENO

JUDGE

[1] *Butt V Rent Restriction Tribunal [1982] KLR 419, Per Madam JA*