



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 11 OF 2019

BETWEEN

EQUITY BANK.....APPELLANT/APPLICANT

AND

ROMANUS OKENO.....RESPONDENT

RULING

1. By a notice of motion dated 14th May, 2019; brought under Order 51 Rule 1 and Order 42 Rule 6 and of the Civil Procedure Rules; Section 1A, 1 B and 3A of the Civil Procedure Act and all enabling provisions of the law, the Appellant/Applicant pray for orders **THAT**:

1) **This Honorable Court be pleased to issue stay of execution order staying the judgment delivered in Kisumu CMCC NO. 230 OF 2008 Romanus Okeno v Equity Bank pending the hearing and determination of this Appeal**

2) **Costs of be application be awarded to the Appellant**

2. The application is based on the grounds among others that the applicant is aggrieved the judgment dated 18th December, 2018 and that this appeal is arguable with high chances of success.

3. The application is also supported by an affidavit sworn on 14th May, 2019 by KARIUKI KINGÓRI who describes himself as Appellant/Applicant's Manager Legal Services in which he reiterates the grounds on the face of the application. The deponent avers a similar application dated 07th February, 2019 before the trial court was disallowed by a ruling delivered on 06th May, 2019

4. The application is opposed by was of a replying affidavit sworn on 25th June, 2019 by S.O. Odumbe, advocate for the Respondent He avers that the Applicant made a similar application dated 07th February, 2019 before the trial court and it was disallowed.

Analysis and Determination

5. I have carefully considered the notice of motion *vis a vis* the affidavits on record and the submissions filed on behalf of both parties.

6. Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule

(1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; and

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

i. Unreasonable delay

7. The impugned judgment was delivered on 18th December, 2018. The notice of motion herein was filed on 03rd April, 2019 which was about 4 months after the judgment sought to be stayed was delivered. It is my considered view that the application was filed with unexplained delay.

ii. Substantial loss

8. There are a myriad of cases on what constitutes substantial loss. In *Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu* the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. Similarly in *Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd* the Court stated-

“If 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 suits.”

10. The applicant holds the view that the Respondent has not demonstrated that he is in a position to refund the decretal sum in the event that the appeal succeeds. Reliance was placed on *ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002* where the court held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11. The foregoing holding was reiterated in *Kenya Orient Insurance Co. Ltd vs Mohamed Dulo Dima Alias Moh'd Omar Dima & 2 others [2013] eKLR* where the court held that it would be wrong for the Respondents to state that the burden to prove that they would not be able to repay the decretal sum was on the Appellant.

12. The judgment in favour of the Respondent is for Kshs. 1,290,000/- Clearly this is a substantial sum. The Respondent has not sworn an affidavit to demonstrate that he can be trusted with the money in

question and that he is unlikely to squander the same before the appeal is heard and determined. (See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**).

13. From the affidavit evidence, I am convinced that the Applicant has demonstrated that it is likely to suffer substantial loss if the order of stay of execution is not granted.

iii. Security

14. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. It has been averred that the appellant is ready and willing to furnish security for due performance of the decree herein, pending the hearing and determination of the appeal. The respondent on the other hand urges the court to order that the other half be paid to her but fails to demonstrate that she would be in a position to refund the same in the event that the appeal succeeds.

15. Although I have found the applicant was filed about 4 months after the impugned judgment was delivered, I find that the delay though unexplained, is not inordinate.

16. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

17. The upshot of the foregoing is that the notice of motion dated 14th May, 2019 is considered and the court makes the following order:

a. There be a stay of execution order staying the judgment dated 18th December, 2018 delivered in Kisumu CMCC NO. 230 OF 2008 Romanus Okeno v Equity Bank pending the hearing and determination of this Appeal on condition that total decretal sum be deposited into an interest earning account in the names of advocates for both parties within 30 days from today's date

b. Costs shall be in costs in the appeal

DELIVERED AND SIGNED IN KISUMU THIS 31st DAY OF July 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant/Applicant -N/A

For the Respondent - N/A