



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 521 OF 2018

STEPHEN GAKERE MACHARIA.....APPELLANT

VERSUS

NIC BANK LIMITED.....RESPONDENT

RULING

1. In the Notice of Motion dated 4th April 2019, *Stephen Gakere Macharia*, the applicant, mainly seeks an order of stay of execution of the judgment on admission entered by *Hon. P. N. Gesora (CM)* in Nairobi CMCC No. 695 of 2016 pending the hearing and disposal of his appeal filed on 1st November 2018.

2. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant on 4th April 2019. The applicant contends that he filed this appeal as he was aggrieved by the trial court's ruling dated 24th October 2018 which entered judgment on admission in favour of the respondent in the sum of KShs.3,174,817 together with interest; that upon his application, the trial court on 24th October 2018 granted him orders of stay of execution pending determination of his appeal on condition that he pays the respondent KShs.1,000,000 and posts a personal bank guarantee of the balance within 21 days of the date of the ruling; that on 6th March 2019, he paid the respondent KShs.500,000 and applied to have the conditions for stay reviewed as he was unable to obtain any bank guarantee given that the respondent had caused him to be listed as a defaulter with the Credit Reference Bureau. His application for review was dismissed on 1st April 2019.

3. It is the applicant's case that if stay is not granted and execution proceeded, he will suffer substantial loss as he will have paid a total of KShs.9,366,544.21 having already paid KShs.3,600,000 in satisfaction of the loan and KShs.500,000 as security. He urged the court to note that the respondent was demanding KShs.5,266,544.21 in the draft decree which was triple the amount he had borrowed.

4. The applicant further asserted that he is deserving of the order sought as the application had been filed timeously and he is ready and willing to offer security for the performance of the decree but urged the court to consider that he had already paid the respondent KShs.500,000 as security and he was still listed with the Credit Reference Bureau. He requested the court to consider ordering the deposit of his motor vehicle logbook as security for the performance of the decree.

5. The application is opposed. *Stephen Atenya*, the respondent's Senior Manager, Legal Services swore a replying affidavit in which he narrated the respondent's case in the lower court and the circumstances under which the trial court entered judgment on admission in favour of the respondent against the applicant.

6. The deponent claimed that the applicant was underserving of the orders sought as he had admitted his indebtedness to the respondent and he had not demonstrated that if the application was rejected and execution was levied, he would suffer substantial loss. He further stated that the respondent is a stable financial institution which was able to reconstitute the decretal sum in the event that the appeal was successful.

7. When the application came up for hearing, the parties consented to having it prosecuted by way of written submissions. Those of the applicant were filed on 18th June 2019 while those of the respondent were filed on 1st July 2019.

8. I have carefully considered the application, the affidavits on record as well as the party's rival written submissions together with the authorities cited.

9. The law governing grant of orders of stay of execution pending appeal is set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. The provision makes it clear that for an applicant to be entitled to grant of stay pending appeal, he must satisfy three conditions namely:

- i. That the application was filed timeously;
- ii. That he is likely to suffer substantial loss if the orders sought are not granted; and

iii. That he is ready and willing to offer such security as the court may ultimately order for the due performance of the decree.

10. Starting with the first condition, the material presented before me reveals that the judgment appealed against was delivered on 24th October 2018 and being aggrieved by the same, the applicant filed his appeal on 1st November 2018. He then approached the trial court seeking stay of execution of the judgment pending determination of his appeal and on 28th February 2019, the trial court delivered its ruling and granted the applicant conditional stay on terms that he was to pay the respondents KShs.1,000,000 and post a bank guarantee for the balance of the decretal amount within 21 days of the date of the ruling failing which the stay orders would stand vacated. As the applicant was unable to comply with those terms, he filed an application for variation of the same which was dismissed by the trial court on 1st April 2019. On 4th April 2019, the applicant filed the instant application.

11. Given the foregoing, it is clear that the applicant could not have filed the instant application earlier than he did since he had to wait for the proceedings before the trial court to come to an end.

In the circumstances, I am satisfied that the application was filed without unreasonable delay.

12. I now turn to consider whether the applicant has satisfied the second condition which requires an applicant to demonstrate occurrence of substantial loss if stay orders were not granted. There is a plethora of judicial authorities which establish that the demonstration of substantial loss is the cornerstone of the jurisdiction of the court to grant stay pending appeal and if the same is not proved to the satisfaction of the court, the court ought to decline the exercise of its discretion in the applicant's favour.

13. The rationale for this requirement is simple. If the applicant is unable to demonstrate substantial loss in the sense that he was likely to suffer irreparable injury or loss or that if stay is not granted his appeal would be rendered nugatory, the court would not have any justification for suspending the respondent's right to enjoy the fruits of his or her judgment.

14. The onus of proving substantial loss lies squarely on the applicant because it is a settled principle of the law of evidence that he who alleges must prove. In money decrees like the one sought to be stayed in this case, substantial loss is proved by presenting clear and tangible evidence to show that the respondent will be unable to refund the decretal amount if the appeal is successful. This position was brought home by *Gikonyo J* in *Antoine Ndiaye v African Virtual University*, [2015] eKLR where he held as follows:

"... The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown."

15. In *Machira T/A Machira & Company Advocates V East African Standard, (No 2) (2002) KLR 63* which was also cited by *Gikonyo J* in *Antoine Ndiaye v African Virtual University (Supra)*, the court in emphasizing the need for proof of substantial loss by credible evidence stated as follows:

"...It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do."

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal)...."

16. Applying the above principles to the present case, I now proceed to examine whether the applicant has demonstrated that he will suffer substantial loss if stay is not granted as prayed.

In his supporting affidavit, the applicant claimed that he will suffer substantial loss if stay was not granted because if execution was carried out, he will pay a total of KShs.9,366,544.21 as he had already paid KShs.3,600,000 in satisfaction of the loan obtained from the respondent and a further KShs.500,000 as part payment of the security ordered by the court; that despite those payments, the respondent was still demanding KShs.5,266,544.21 as per the draft decree. He claimed that if stay was not granted, he will suffer prejudice as his appeal will be rendered nugatory.

17. Relying on the court of appeal decision in *Butt V Rent Restriction Tribunal, [1982] KLR 419* and *Reliance Bank Limited V Norlake Investments Limited, [2002] 1EA 227*, the applicant urged the court to find that ability of the respondent to refund the decretal amount if the appeal was successful should not be the only consideration in deciding whether or not to grant stay but that the court in the exercise of its discretion should consider the unique circumstances of each case.

18. He in addition claimed that though the respondent is a financial institution and it may be capable of refunding the decretal amount, it had not demonstrated its ability to do so and in any event even seemingly strong financial institutions have been known to collapse without notice. He also claimed that he will be committed to civil jail in execution of the decree and that loss of liberty by itself has been held to constitute substantial loss.

19. The respondent on its part submitted that the applicant has not demonstrated what loss he was going to suffer if stay was denied or that he

will not be able to recover the decretal sum if paid. The respondent submitted that it is a stable financial institution and it is able to restate the decretal sum if need be.

20. Having analysed the material presented before me, I concur with the applicant's submission that the decision on whether to grant or refuse stay is wholly dependent on the exercise of the court's discretion. However, that discretion like any other judicial discretion must be exercised in accordance with the law after taking into account all the circumstances of the case under consideration.

21. As stated earlier, the demonstration of substantial loss is a key determinant in the exercise of the court's discretion in deciding whether or not to grant stay pending appeal and for an applicant to establish the likelihood of suffering substantial loss if stay is denied, he must avail specific and credible evidence to that effect as mere averments will not suffice.

22. In this case, the applicant has not adduced any evidence to show or demonstrate what loss, substantial or otherwise he was likely to suffer if stay orders were denied. He just alleged that if execution proceeded, he will suffer loss as he will end up paying amounts that were way beyond the sums he had borrowed from the respondent.

23. Having admitted that the respondent is a financial institution which is capable of refunding the decretal sum if his appeal was successful, the applicant cannot be heard to say that if stay is refused, his appeal will be rendered nugatory. His claim that even strong financial institutions can collapse without notice is not evidence that the respondent's financial position is shaky or unsound and just because other financial institutions have fallen in the past is not evidence that the same fate will befall the respondent in future. This claim in my view is based on mere speculation.

24. The applicant has also not availed any evidence to demonstrate that any special circumstances exist in his case to justify the exercise of the court's discretion in his favour. The claim that he was going to be committed to civil jail in execution of the decree was only made in his submissions and was not part of the averments in his supporting affidavit. And even if it was, it would have been another unfounded claim since the respondent had not commenced the execution process by the time the application was filed and nobody including the applicant can be able to tell at this point in time what the respondent's preferred mode of execution will be when the time comes.

25. It must be remembered that execution of decrees is a lawful process and the threat of execution per se cannot be a basis for the court to order stay pending appeal. This is so because both the applicant and the respondent have rights and they are both equally entitled to the protection of the law. In as much as the applicant has a right to exercise his right of appeal, the respondent has a corresponding right to enjoy the fruits of its judgment without undue restrictions.

26. Having found that the applicant has failed to prove by evidence that he will suffer substantial loss and that his appeal will be rendered nugatory if orders of stay are denied and having not established that any special circumstances exist in his case that would warrant the exercise of the court's discretion in his favour, I find that the applicant has failed to demonstrate that he is deserving of the orders sought.

27. Having arrived at the above conclusion, I do not find it necessary to inquire into the sufficiency or otherwise of the security the applicant had offered for the due performance of the decree.

28. For all the foregoing reasons, I do not find merit in the applicant's Notice of Motion dated 4th April 2019. The same is hereby dismissed but with no orders as to costs.

29. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Karwithia holding brief for Mr. Makumi for the Applicant

Ms Cheruiyot for the Respondent

Mr. Salach: Court Assistant