



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO.E003 OF 2018**

**EAST AFRICAN DATA HANDLERS LIMITED.....APPELLANT**

**VERSUS**

**CHAI CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....RESPONDENT**

**JOVAN KARIUKI T/A MORAN AUCTIONEERS.....AUCTIONEER/2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion dated **14<sup>th</sup> September 2018** by which **EAST AFRICA DATA HANDLERS LIMITED**, (the Appellant herein) sought the following orders:-

**“1. SPENT**

**2. SPENT**

**3. SPENT**

**4. The Applicants be granted stay of proceeding in the lower court pending the hearing and determination of the intended appeal.**

**5. The costs of this Application be provided for”**

2. The application which was premised upon **Section 3, 3A, 75(1) and 75(a)** of the **Civil Procedure Act 2010, Order 42,43 and 51** of the **Civil Procedure Rules 2010** and all other enabling provisions of law, was supported by the Affidavit sworn on even date by **GEORGE NJOROGE**, the Chief Executive Officer of the Appellant.

3. In opposition to the Application the 1<sup>st</sup> Respondent filed the Replying Affidavit dated **2<sup>nd</sup> October 2018**, sworn by **FESTUS MWAMBUINGU MWATEE**, the Chief Executive Officer of the 1<sup>st</sup> Respondent.

4. Pursuant to the directions of the Court, the application was canvassed by way of written submissions. The Appellant filed their written submissions on **13<sup>th</sup> November 2018** whilst the 1<sup>st</sup> Respondent filed its submissions on **12<sup>th</sup> November 2018**.

5. The genesis of this Appeal is the ruling delivered by **Hon P.N Gesora** Chief Magistrate on **13<sup>th</sup> September 2018** in which he declined to grant leave to the Defendant in **Milimani CMCC No.4666 of 2013** to file their defence out of time. The Defendant being aggrieved by that decision of the Chief Magistrate filed the Memorandum of Appeal dated **14<sup>th</sup> September 2018**.

**BACKGROUND**

6. The Respondent herein (the Plaintiff in **Milimani CMCC No.4666 of 2013**) had filed in the lower Court the Plaint dated **31<sup>st</sup> July 2013** in which they sought for judgment against the Appellant (the Defendant in **Milimani CMCC No.4666 of 2013**) as follows:-

**“(a) The sum of Kenya shillings Six Hundred Thousand (Kshs.600,000/=) as at January 2013 plus interest accruing thereon at court rates from January 2013 till payment in full.**

(b) The Defendant be compelled to return to the Plaintiff Microsoft SQL data base obtained by the Defendant in respect of the agreement dated 24<sup>th</sup> January 2013.

(c) General and exemplary damages for breach of contract.

(d) Costs of suits plus interest on (a) and (c) hereinabove at court rates.

(e) such further or other relief as this Honourable court may deem fit to grant.”

7. The Appellants failed to file a defence in the matter. The lower court entered judgment in default of defence and the matter proceeded for formal proof hearing on 27<sup>th</sup> November 2017. Judgment was thereafter delivered in favour of the Respondent. The Appellant then filed an application before the lower court seeking to set aside the judgment in default of defence and decree and prayed to be allowed to file its defence out of time. By the ruling delivered on 13<sup>th</sup> September 2018, that application was dismissed by the Hon Chief Magistrate.

8. The Applicant then filed this present application in the High court seeking a stay pending appeal. The Appellant submitted that if the orders for stay of execution pending appeal were not granted it stood to suffer substantial loss and prejudice.

9. On their part the Respondent opposed any stay of execution arguing that the Appellant had deliberately failed to file a defence to the suit within the prescribed period therefore the judgment entered in default was proper. They submitted the Respondent has failed to offer any security for the decretal sum of **Kshs.1,168,559.30**. Finally the Respondent submits that the present application is frivolous, vexatious, and amounts to an abuse of court process. They pray that the same be dismissed with costs.

### **Analysis and Determination**

10. **Order 42 Rule 6** of the Civil Procedure Rules which deals with stay pending Appeal provide as follows:-

**“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(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 and that the application has been made without unreasonable delay: and**

**b. 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.**

**(3) Notwithstanding anything contained in sub rule (2) the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of the formal application.**

**(4) For the purpose of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.**

11. Therefore **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** provides that an Applicant who is seeking a stay of execution pending appeal must demonstrate that:-

i. The application was made without unreasonable delay; and

ii. Substantial loss may result to the applicant unless the order was made:

iii. 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.

### **DELAY**

12. The first question the court needs to consider is whether the present application was filed in a timeous manner. The **Hon Chief Magistrate** delivered his ruling on **13<sup>th</sup> September 2018**. This application for stay was filed on **14<sup>th</sup> September 2018** the very next day. It is clear that there was no delay at all in bringing this application. I note also that the Appellant has annexed the Memorandum of Appeal dated **14<sup>th</sup> September 2018** which was filed on even date therefore there is in existence an appeal pending in this matter.

### **SUBSTANTIAL LOSS**

13. In order to merit the orders sought the appellant must satisfy the court that it stands to suffer substantial loss if the stay sought is not granted. The decretal amount in this case is **Kshs.1,168,559.30**. That is not an amount to be sneezed at. The decretal sum need not be a colossal sum in order to satisfy proof of substantial loss. The Court has the duty to weigh the likely consequences of granting the stay against the likely consequences of not granting the stay and opt for the lower risk.

14. In **SAMVIR TRUSTEE LIMITED –VS – GUARDIAN BANK LIMITED Nairobi HCCC 795 of 1997**, **Hon Justice Warsame** (as he then was) held follows:-

**“The Court is considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yard stick is for the court to balance or weigh the scale of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion....”**[own emphasis]

15. The Applicant contends that it stands to suffer substantial loss should the appeal be successful. The Respondent counters that it would be in a position to refund the decretal sum should the appeal succeed. The Respondent is a financial institution. I have no doubt that it would be in a position to refund the decretal sum if and when ordered to do so. In the case of **PETER NDUNGU MBAE & 2 OTHERS –VS- JOHN MUGANE KAROMO [2015]eKLR**, it was held:-

**“To prove substantial loss the applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the court will therefrom determine whether such loss will ensue and if it does, that the Applicant is likely to suffer substantial injury pending the hearing of the appeal.”**

The Appellant here has merely claimed that it may suffer **“substantial loss”** – details and particulars of such loss have not been provided.

16. It is a hallowed principle in law that a successful litigant is entitled to the fruits of his judgment. The Courts ought only to deny the successful litigant this right when cogent and concrete reasons have been advanced to persuade the court so.

17. In **MACHIRA T/A MACHIRA & CO. ADVOCATES –VS- EAST AFRICAN STANDARD [2002] 2KLR 63** the Court held as follows:-

**“.....to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way application for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the court process.”** [own emphasis]

18. The burden lies on the Appellant to prove that the Respondent would not be in a position to refund the decretal amount should the appeal be successful. The Appellant herein has not discharged that burden.

19. This Court is also guided by the decision of **Hon Justice Gikonyo in ANTONE NDIAYE –VS- AFRICAN VIRTUAL UNIVERSITY [2015] eKLR** where he held as follows:-

**“The Applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospect of recovering this money should the appeal succeed. Therefore in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. 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; following 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...”** [emphasis mine].

20. The present case also involves a money-decree. As stated earlier the Respondent would, all things being equal, be in a position to refund the decretal sum if the appeal succeeds. On this limb of substantial loss the Appellant has not persuaded the court on a balance of probability that it stands to suffer substantial loss if no stay is granted.

21. Lastly on the issue of security the Appellant made no offer to deposit any type of security to cushion the Respondent in case their appeal failed.

22. On the whole I find that the Appellant has not met the threshold for the grant of a stay. Accordingly I decline to grant this application.

Costs will be in the cause.

Dated in **Nairobi** this 25<sup>th</sup> day of **July 2019**.

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**Justice Maureen A. Odero**