



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 214 OF 2019

EUNICE CHERUGUT SUDI KIBULE.....APPELLANT

VERSUS

NAWAL FOREX BUREAU LIMITED.....RESPONDENT

RULING

1. The application for determination before me is the Notice of Motion dated 4th June 2019 in which the appellant, *Eunice Cherugut Sudi Kibule* (the applicant) seeks stay of execution of the decree and all consequential orders issued by the subordinate court in CMCC No. 6132 of 2015 pending the hearing and determination of her appeal.
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 June 2019. The applicant contends that she has filed an appeal against the orders made in the ruling delivered by the trial court on 22nd March 2019. It is apparent from the ruling which is annexed to the supporting affidavit that the ruling was delivered pursuant to an application the applicant had made seeking to set aside a default judgment entered in favour of the respondent for failure of the applicant to file a defence. The application was dismissed on grounds that the judgment was regularly entered as the applicant had been properly served with summons to enter appearance and that her intended defence did not raise any triable issues.
3. It is the applicant's case that if the stay sought was not granted, she will suffer substantial loss as the respondent was now at liberty to execute the decree issued pursuant to the default judgement yet her appeal challenging the dismissal of her application to set aside that judgement was pending; that if execution proceeded, her appeal will be rendered nugatory.
4. The applicant also asserts that if the application was allowed, the respondent will not suffer any prejudice that cannot be compensated by way of costs or damages as the principal sum borrowed had been paid and what the respondent sought to recover in the suit in the lower court was interest which in her view was not sanctioned by the law.
5. The application is opposed. *Winfred Nyawira Maina*, one of the respondent's directors swore a replying affidavit and urged the court to dismiss the application. She averred that the applicant has failed to show what substantial loss she is likely to suffer if the orders of stay are not granted; that the respondent runs a forex bureau and owns properties and has ability to refund the entire decretal amount if the applicant succeeds in her appeal.
6. The application was argued by way of oral submissions. Learned counsel *Mr. Ndege* represented the applicant while learned counsel *Ms Nyakundi* appeared for the respondent. *Ms Nyakundi* argued that the application ought to be dismissed as it was seeking stay of the orders that dismissed the applicant's application with costs to the respondent; that therefore the application sought stay of a negative order which was incapable of being stayed. In rejoinder, *Mr. Ndege* clarified that the application was seeking stay of the interlocutory judgment entered against the applicant pending the outcome of the appeal challenging the lower court's refusal to set it aside.
7. I have considered the application, the affidavits on record, the submissions by the parties and the authorities cited. The parameters within which applications for stay of execution pending appeal are granted are set out in *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. The applicant is required to demonstrate that if stay is not granted, she was likely to suffer substantial loss; that the application was filed timeously and that she was willing and ready to offer security for the performance of the decree.
8. Though it is trite that all the above conditions must be complied with before an applicant becomes entitled to orders of stay, the key all-encompassing consideration that courts lay special emphasis on is whether the applicant had demonstrated that if stay was not granted, he or she was likely to suffer substantial loss. This is so because if there is no likelihood of substantial loss occurring if stay is not granted, then there would be no justification for denying the respondent the right to immediately enjoy the fruits of his or her judgment.
9. The above proposition was well articulated by the Court of Appeal in *Shell Limited V Kibiru & Another, [1986] KLR 410* when it stated as follows:

“... 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 event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay. That is what has to be prevented. Therefore without this evidence, it’s difficult to see why the respondents should be kept out of their money. ...”

10. The applicant has contended that if stay was not granted, her appeal will be rendered nugatory since execution will be levied on the basis of the default judgment when her appeal challenging the validity of the trial court’s decision to dismiss her application seeking to set aside the said judgment and to defend the suit was pending hearing.

11. I have considered the respondent’s claim that the stay sought was in respect of negative orders which were incapable of being stayed. With this in mind, I have carefully perused prayer (b) of the application which is the prayer that sought stay of execution pending appeal. For the avoidance of doubt, I think it is important to reproduce the prayer verbatim. It is in the following terms:

“That there be stay of execution of the decree and all consequential orders issued by the subordinate court in CMCC No. 6132 of 2015 pending the hearing and determination of the applicant’s appeal filed herein arising from the ruling and orders of the subordinate court given on 22nd March 2019 on the notice of motion dated 13th July 2018.”

12. It is clear from the above prayer that the applicant is seeking stay of the decree issued pursuant to the entry of the default judgment and all consequential orders. The respondents claim that the applicant was seeking stay of the trial court’s orders dismissing her application which were in effect negative orders is incorrect and without foundation.

13. In my view, the applicant’s claim that she will suffer substantial loss if stay is not granted is well founded considering that if the application is dismissed, the respondent will move to execute the decree before this court has had an opportunity to determine whether her application for leave to defend the suit was correctly or wrongly dismissed. She will effectively be driven off the seat of justice before her appeal is heard and determined on merit. Her constitutional right of access to justice and the right to be heard will definitely be at stake. To this extent, I am satisfied that the applicant stands to suffer substantial loss if the orders of stay were not granted.

14. Applications such as the one before me calls upon the court to balance the rights and interests of the parties. The applicant has a right to appeal and to have that right safeguarded but the respondent also has a right to enjoy the fruits of its judgement. If the application is dismissed, the applicant will suffer great prejudice as she will have to contend with execution before her appeal is heard on merit. If on the other hand the application is allowed, the only prejudice the respondent is likely to suffer is delay in realization of the fruits of the default judgment which can be adequately compensated by way of costs.

15. I have considered the security offered by the applicant in the form of land located in Kitale. Though the land is valued at KShs.4,000,000, I am not satisfied that it is suitable as security in this matter given that it is not a liquid asset and in the event that the appeal is successful, the respondent might have to undertake some lengthy processes before its value is realized.

16. Having weighted the competing interests of the parties, I find that the interests of justice require that the application be allowed but on condition which will secure the decretal amount so that if the appeal is unsuccessful, the respondent will not have much difficulty in accessing the same.

17. For all the foregoing reasons, I find merit in the Notice of Motion dated 4th June 2019. Stay of execution of the decree in Milimani CMCC No. 6132 of 2015 and all consequential orders is hereby granted pending disposal of the applicant’s appeal on condition that the applicant deposits either in court or in a joint interest earning account operated by counsel for both parties the entire decretal amount within the next 60 days failing which the orders of stay will automatically lapse.

18. Costs of the application to abide outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Njeri Ngugi holding brief for Mr. Ndege for the applicant

Mr. Manyara for the respondent

Mr. Salach: Court Assistant