



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 307 OF 2010

NDUNG’U GATHINJIPLAINTIFF

VERSUS

M. ORIENTAL COMMERCIAL BANK LTD.

(formerly The Delphis Bank Ltd).....DEFENDANT

RULING

1. I have considered the notice of motion application dated 11th July 2019. I have also considered the prayers therein and indeed the main prayer is for the court to grant a stay of execution of the judgment entered herein and the resultant award as stated under prayer (2) of the application.

2. The grounds in support of that application and the affidavit of Wilfred Machiri dated 11th July 2019 is also considered. The main reason advanced is that, the Applicant has preferred an Appeal against the Judgment of the court. However, they are apprehensive that the plaintiff may move any time to recover the sum awarded. The Applicant avers that, it is willing to secure the disputed award by issuance of a bank guarantee, within fourteen (14) days of the order of the court.

3. The application was opposed by the grounds of opposition filed on 5th August 2019. In a nutshell, the Respondent argued that the application is intended to delay the plaintiff’s right to enjoy the fruits of judgment that it is premature as no decree has been applied for nor issued herein. That the mandatory provisions of law for grant of stay have not been satisfied and the Applicant has not demonstrated the Respondent will be unable to repay the awarded sum if the appeal succeeds. Further, if the court were to allow the orders sought, the decretal amount should be deposited in an interest earning account in the names of the lawyers of both parties.

4. The parties disposed of the application vide filing of written submissions which I have considered. The procedural provisions that govern the prayers for stay of execution are stipulated under order 42 Rule 6(2) of the Civil Procedure Rules which states:-

(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

5. In that regard, the Applicant submits that the money is substantial and the Respondent will not be able to repay the same as a result it will suffer substantial loss. That substantial loss does not necessarily have to be in form of money but can be in hardship in litigating to recover the money. Further, the Applicant has not filed an affidavit of means to prove ability to pay, yet it is the Respondent who has evidential burden to prove the same.

6. Secondly, judgment was delivered on 27th May 2019, the application was filed on 11th July 2019. Therefore, no inordinate delay has been occasioned. Finally, the security has been offered as stated in the affidavit in support of the application.

8. However, the defendant’s submissions filed on 15th November 2019 avers no interest will be earned on the bank guarantee security

offered. That the Applicant has had a history of changing its legal status including being under statutory management and that the practice has been deposit of the amount in court.

9. In conclusion, I find that the threshold for grant of orders of stay are well settled under Order 42 Rule 6 of the Civil Procedure Rules. In this matter, I find the application was brought timeously. Further the Applicant will not suffer any irreparable or substantial loss if the sum sought is deposited in an interest earning account. In fact, it will earn interest. To balance the interest of justice, I shall allow a stay of execution of judgment on condition the Applicant deposits the judgment sum in an interest earning account in the joint names of the parties lawyers within fourteen (14) days of the date of this orders. In default, the stay order will stand discharged after fourteen (14) days. No orders as to costs.

10. Those then are the orders of the court.

Dated, delivered and signed in an open court this 27th day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mrs. Muhuri for the Defendant/Applicant

Mr. Munyao holding brief for Mrs. Mwangangi for the Plaintiff/Respondent

Dennis -----Court Assistant