



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 321 OF 2016

JAMES MUNIU MUCHERU.....APPLICANT

- VERSUS -

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. This dispute started its course within the courts before the Milimani Chief Magistrate's Court, being *CMCC No. 1307 of 2002*. Before the Chief Magistrate's Court, *National Bank of Kenya Limited (NBK)* sued *James Muniu Mucheru (Mucheru)* seeking judgment for *Ksh 357,544.40* plus interests and costs. By the judgment of that court dated *8th March, 2013*, NBK was granted judgment as prayed in the plaint.

2. *Mucheru* being aggrieved of that judgment filed this appeal before this court. The appeal was dismissed by this court on *24th July, 2017*.

3. *Mucheru* has filed a *Notice of Motion* dated *2nd August, 2017* which is under consideration. The application is brought under *Order 42 Rule 6 of the Civil Procedure Rules*. *Mucheru*, by that application seeks an order of stay of execution of the Chief Magistrate's Court decree pending his appeal to the Court of Appeal. The decretal amount, as at *8th March 2013*, payable by *Mucheru* to NBK, was *Ksh 2,395,808.75*. That is the amount, plus interest to date, that *Mucheru* seek a stay of execution.

4. *Mucheru* filed his *Notice of Appeal* on *3rd August, 2017* against this court's judgment.

5. Before considering the parties arguments, for and against the application, it is necessary to state that this court has no standing to consider the merits and demerits of the pending appeal before the court of appeal. The guiding Rule in an application such as this is *Rule 6 under Order 42*. *Under Rule 6 (1)* of that Order the court may for sufficient cause grant stay pending appeal. *Under Rule 6 (2)* of that same Order the court before granting stay of execution pending appeal is required to be satisfied that substantial loss may result to the applicant unless the order is granted; the court shall order such security to be provided by the applicant for the due performance of the decree; the application for stay pending appeal need to have been made without unreasonable delay.

6. The Court of Appeal in the case *Housing Finance Company of Kenya Vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR* discussed those Rules and stated thus:

“....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay...the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

7. *Mucheru* in his affidavit in support of his application deponed that he deposited into this court on *2nd May, 2013 Ksh 349,906* as security pending this appeal. He further deponed that he had lodged his records of Appeal before the Court of Appeal on *30th October, 2017*. Further, he stated that if stay of execution is not granted he will be *“financially crippled and the intended appeal will be rendered nugatory.”*

8. Although NBK made reference to a replying affidavit filed in this matter – I was unable to trace it in the court file and this Ruling is made without the benefit of such affidavit. NBK by its written submissions opposed the application and submitted, therein, that *Mucheru* had failed to show sufficient cause why stay pending appeal should be granted; that the deposit made by *Mucheru* of *Ksh 349,906.75* was pittance compared to the decretal sum due. NBK, by its submissions, also stated that *Mucheru* had failed to show he would suffer substantial loss if stay of execution was not granted.

ANALYSIS AND DETERMINATIONS

9. There is no doubt that when a court is called upon to determine an application for stay pending appeal such a court, on being guided by the **Rule 6 of Order 42**, must balance the interests of the decree holder and that of a judgment debtor. This is what was stated by the Court of Appeal in the case **Oraro & Rachier Advocates Vs Co-operative Bank of Kenya Limited [2000] eKLR**. In that case the Court of Appeal had this to say:

“We must weigh the claims of both sides. If M/S Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the respondent bank is kept out of the sum of Shs. 10,000,000/= it would not be affected. This is in our view, in this case, the position, when we are considering the situation. The balance of convenience overall favours the applicant.”

10. That court also expressed itself in the same vein in the case **Erwen Electronics Limited & 3 Others Vs Radio Africa Limited & Another [2012] eKLR** where the Court of Appeal also held:

“...although we are not oblivious of the fact that the subject matter involves a money decree, we consider it necessary to weigh the claims of hardship of the applicants as against the hardship likely to be suffered by the first respondent.”

11. In previous decisions of the court, there was reluctance to grant stay of execution pending appeal in respect to money decree, such as the one in this matter. The Court of Appeal however in the case **Kenya Hotel Properties Limited Vs Willesden Properties Limited Civil Application Nai No. 322 of 2006 (UR 178/06)** stated thus:-

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory of the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

12. Mucheru, by his affidavit evidence, stated that if stay was not granted he would suffer substantial loss due to the amount, now claimed by NBK, which has increased because of application of interest.

13. Having considered the application and the opposition raised by NBK I am of the view that the interest of Justice will best be served by granting stay of execution as condition. I therefore grant the following orders:

a. There shall be **stay of execution of the decree in Milimani CMCC No. 1307 of 2002 pending appeal at the Court of Appeal on condition that James Muniu Mucheru** does deposit into this court **ksh 300,000** being further security for the execution of the decree. Such deposit shall be made **within 30 days from today**. Failure to make that deposit within the stated period the stay of execution shall be vacated.

b. The **costs of the Notice of Motion** dated **2nd August, 2017** shall abide with the outcome of the appeal before the Court of Appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant