



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO 193 OF 2018

IKECHUKWU ANOKE.....APPELLANT

VERSUS

CFC STANBIC BANK LIMITED.....RESPONDENT

**(Being an appeal from the Ruling of the Hon P. Muholi (Mr), Senior Resident Magistrate delivered
on 11th April 2018 in CMCC 982 of 2016)**

BETWEEN

CFC STANBIC BANK LIMITED.....PLAINTIFF

VERSUS

IKECHUKWU ANOKE.....DEFENDANT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 9th May 2018 and filed on 16th May 2018 was filed pursuant to the provisions under Section 1A and 3A of the Civil Procedure Act, Order 42 Rules 1 and 6 of the Civil Procedure Rules 2010. Prayers No (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this Honourable court be pleased to make such directions as may be necessary to ensure that justice is done by giving the Appellant a chance to be heard such as an order for the stay of any subsequent proceedings in the Subordinate Court.

4. THAT there be ordered a stay of execution of the decree issued by the Subordinate Court in Milimani CMCC 982 of 2016 between the parties herein court pending the hearing and determination of this appeal.

5. THAT costs of this application be provided for.

2. The Appellant's Written Submissions were dated 6th July 2018 and filed on 9th July 2018 while those of the Respondent were dated 16th July 2018 and filed on 17th July 2018.

3. When the matter came before the court on 31st July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's case was that he was never given a chance to present his case as the lower court refused to set aside the interlocutory judgment that was entered against him despite him having demonstrated that he had a good defence. He stated that if the Notice to Show Cause (NTSC) on why he should not be committed to civil jail was not set aside, he would suffer irreparable loss.

5. His contention was that he had made several payments to the Defendant in respect of a loan that had been advanced to him by the Defendant and for the credit card that he was operating and had requested for statements but that the Defendant refused his requests and instead sought and obtained *ex parte* judgment against him behind his back.

6. He therefore urged this court to allow his application to enable him Appeal against the Decree that was issued by the lower court.

THE RESPONDENT'S CASE

7. In response to the Appellant's application, Stella Orengo, the Respondent's Recoveries Officer swore the Replying Affidavit on 7th June 2018. The same was filed on even date.

8. The Respondent stated that the Appellant had not offered any security for the due performance of the Decree and that the present application was aimed at obstructing justice as payment of the decretal sum would not in any way cause him any irreparable loss.

9. It was categorical that it was a very liquid and solvent financial institution and would be able to pay back the decretal sum if the Appellant were to be successful in his Appeal.

10. It contended that after judgment was entered in its favour against him for the sum of Khs 2,768,178.16/= together with interest thereon and costs as prayed in the Plaint on 28th April 2016, he engaged it with a view to resolving the matter out of court and undertook to pay monthly instalments in the sum of Kshs 500,000/=.

11. It stated that he defaulted in the payment of the said sum and that the sum of Kshs 2,768,178.16/= continued to accrue interest. It urged this court to disregard the Interest Rate Advisory Report as the same was a mere opinion of the maker and had no force of law.

12. It therefore asked this court to dismiss his application with costs to it.

LEGAL SUBMISSIONS

13. The Appellant pointed out that he had made his application for a stay of execution without unreasonable delay, the decision of the lower court having been made on 11th April 2018. He also submitted that he was likely to suffer substantial loss because the lower court had completely refused to give him a chance to be heard. He contended that he was willing to abide by any conditions that were imposed by the court.

14. He relied on the cases of Trust Bank Ltd vs Amalo Company Ltd [2002] eKLR and Kiai Mbaki & 2 Others vs Gichuki Macharia & Another [2005] eKLR where the common thread was that every party ought to be given an opportunity to be heard.

15. He also referred this court to the case of Butt vs Rent Restriction Tribunal [1982] KLR 417 where it was held that in exercising the discretion of whether or not to grant an order of stay of execution, a court must consider if an appeal will be rendered nugatory if a stay was not granted.

16. It was therefore his argument that because he had satisfied all the conditions under Order 42 Rule 6 of the Civil Procedure Rules, then he ought to be granted a stay of execution pending appeal.

17. On its part, the Respondent submitted that the Appellant had not demonstrated that it would not be able to refund him the decretal sum in the event his Appeal was successful. It was emphatic that it was a very solvent financial institution of good repute and was able to repay him in the event he succeeded on his Appeal.

18. It placed reliance on the case of Port Reitz Maternity vs James Karanga Kabi Civil Appeal No 63 of 2017 that was quoted in the case of Equitorial Commercial Bank Ltd & 2 Others vs Robert Villas Ltd [2008] eKLR where it was held that the right of appeal should be weighed against an equally weighty right of a plaintiff to enjoy the fruits of his judgment.

19. It also referred to the case of Kenya Shell Ltd vs Kibiru & Another [1986] KLR 410 where it was held that an applicant had to show what damages he would suffer if the order for a stay of execution pending appeal was not granted and that it was not normal in money decrees for the Appeal to be rendered nugatory, if payment of the decretal sum was made.

20. It contended that the Appellant had not offered any security and added that in normal practise, the applicant would be required to deposit the decretal sum in a joint interest earning account. In this regard, it relied on the case of Richard Otieno & Another vs Susan Wanjiru Mwaura [2006] eKLR.

21. It was its further submission that the Appellant had no good grounds of Appeal. It referred this court to the case of Carter & Sons Ltd vs Deposit Protection Fund & 2 Others Civil Appeal No 291 of 1997 quoted in Joseph Rading Wasambo vs Standard Ltd to buttress its argument that an order for stay of execution ought not to be given where an appellant had no good grounds of Appeal.

22. Order 46 Rule 6 (2) of the Civil Procedure Rules, therefore provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

23. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

24. It was the considered view of this court that substantial loss did not have to be a colossal amount of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would go through hardship such as instituting legal proceedings to recover the decretal sum it paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

25. In this case, the Respondent was a financial institution and the Appellant did not demonstrate that it

would not be in a position to refund him the decretal sum if he succeeded on Appeal.

26. Be that as it may, this court noted that the execution proceedings emanated from an interlocutory judgment that was entered in favour of the Respondent against the Appellant. In fact his application seeking to set aside the *ex parte* judgment was dismissed. It was therefore clear to this court that the Appellant never had a chance to present his case.

27. On this ground, this court found that paying the decretal sum to the Respondent pending the Appeal would be inequitable and unfair as the matter from which the Appeal herein had been preferred was not heard *inter partes* and in that regard, the Appellant had demonstrated that he had met the condition of him suffering substantial loss if the order for stay of execution was not granted and his Appeal was successful. In any event, the mere fact of demanding for a refund of decretal sum from the Respondent if his appeal was successful could also be deemed to be hardship.

28. The lower court dismissed his application to set aside the *ex parte* judgment against him on 11th April 2018. He filed the present application on 16th May 2018. This court was satisfied that he had fulfilled the second condition of making his application without unreasonable delay.

29. Although the Respondent had argued that the Appellant had not provided any security, this court noted that it had indicated that the normal practise in applications for stay of execution pending appeal is for decretal sums to be deposited in interest earning accounts in the joint names of advocates. The Appellant had confirmed that he was willing to abide by any conditions the court would impose. It was not necessary that he furnish the security at the time of filing and hearing his application. Rather, the security had to be furnished for him to enjoy an order for stay of execution pending appeal.

30. Appreciably, in the case of Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

31. As this very court held in the case of Siegfried Busch vs MCSK [2013]eKLR:-

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

32. Accordingly, having considered the affidavit evidence, Written Submissions and the case law the parties herein relied in support of their respective cases and having weighed the rights of the Appellant to appeal and the Respondent's rights to enjoy its fruits of judgment, it was the considered view of this court that, it was in the interests of justice that an order for stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate's Ruling be granted so as not to render the Appellant's appeal nugatory.

33. A perusal of the emails that had been exchanged between the Appellant and the Respondent showed that the outstanding amount was Kshs 2,700,000/= and Kshs 3,265,227.70/= according to the Appellant and Respondent respectively. It had been agreed that the Appellant would pay a sum of Kshs 500,000/= every month towards the settlement of the loan. It was not clear how much the Appellant paid. There was therefore need to cut a balance not to fetter his right of appeal and not to make a mockery of the payments he was to make.

DISPOSITION

34. Accordingly, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated 9th May 2018 and filed on 16th May 2018 was merited and the same is hereby allowed in the following terms:-

1. THAT there shall be a stay of decree issued by the Subordinate Court in Milimani that was delivered on 11th April 2018 by Hon. P. Muholi (Mr), Senior Resident Magistrate in Nairobi CMCC No 982 of 2016 between the parties pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the sum of Kshs 3,000,000/= within the sixty (60) days from the date hereof i.e. by 1st February 2019.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 34 (1) hereinabove, the conditional stay of execution shall automatically lapse.

35. As the Appellant filed his Record of Appeal dated 19th June 2018 on 22nd June 2018, the Deputy Registrar of High Court of Kenya Milimani Law Courts Civil Division is hereby directed to take all the prerequisite steps to ensure the speedy disposal of the Appeal.

36. Costs of the application herein shall be in the cause.

37. Either party is at liberty to apply.

38. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of November 2018

J. KAMAU

JUDGE