



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 37 OF 2018**

**KENYA WOMEN MICROFINANCE BANK LIMITED.....APPLICANT**

**VERSUS**

**RUTH NDUNGE MUTULU.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTISO NZANGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**[APPLICANT'S NOTICE OF MOTION DATED 14<sup>TH</sup> NOVEMBER, 2018]**

1. The Applicant, Kenya Women Microfinance Bank Limited has taken out the notice of motion application dated 14<sup>th</sup> November, 2018 seeking for stay of execution of the orders and proceedings in Malindi Chief Magistrate's Court Civil Suit No. 15 of 2018 pending the hearing and determination of its appeal. The application is supported by the grounds on its face and the supporting and supplementary affidavits sworn by Umazi Benson Chakah, the Applicant's Malindi Branch Manager.

2. In brief, the Applicant's case is that its credit managers were arrested and arraigned in court on 9<sup>th</sup> November, 2018 for committal to civil jail for contempt notwithstanding the interim orders secured staying the orders for which they were being committed and the fact that the respondents, Ruth Ndunge Mutulu and Joseph Mutiso Nzangi had duly been served with the orders. It is the Applicant's case that the trial court entertained both the Applicant's application for stay and the respondents' application for committal of the Applicant's employees to civil jail and delivered a ruling which was erroneous and a contradiction in law for the reasons that the stay orders were already in place and duly served upon the respondents, that there was no breach of orders capable of giving rise to contempt of court proceedings, and that an arguable appeal had been filed hence the magistrate's court contradicted itself by issuing the orders.

3. It is further averred that the respondents intend to execute the orders of the lower court which will render the intended appeal nugatory. Also, that the Applicant stands to suffer substantial and irreversible loss and the respondents will not suffer any prejudice if the application is allowed.

4. It is further the Applicant's case that it has filed an appeal against the order issued by the trial court on 1<sup>st</sup> August, 2018 releasing motor vehicle registration number KAX 205J to the respondents who were loan defaulters and had admitted their indebtedness. The loan now stands at Kshs.2,638,110.24 and interest is still accruing. The vehicle is jointly registered in the names of the parties, the vehicle being the security offered for the loan. According to the Applicant, the lower court failed to consider the terms of the loan and effectively re-wrote the loan agreement through the orders issued. Additionally, the Applicant avers that the trial court misapprehended the law on securities when it ordered the release exposing the Applicant to a real danger of losing the only security to a loan defaulter. The Applicant offers to pay the respondents damages for any loss they may incur if this appeal fails.

5. In response, the respondents filed a replying affidavit sworn by the 1<sup>st</sup> Respondent on 16<sup>th</sup> November, 2018 praying for the application to be disallowed. It is averred that the ruling was balanced as it ordered for the release of the vehicle as they continued repaying the loan pending the hearing of the lower court case. It is the respondents' case that the Applicant failed to obey the court order issued on 1<sup>st</sup> August, 2018 and instead filed an application for stay seven days later hence the contempt of court application was filed. It is averred that the Applicant failed to disclose to the court that the contempt matter was to be mentioned on 26<sup>th</sup> August, 2018 as the Applicant had asked for more time to comply. According to the respondents, the contempt has not been purged. Further, that the motor vehicle is the only source of income they have to service the loan and they had informed the Applicant that they can only manage to pay Kshs. 70,000 per month once the motor vehicle is released.

6. The application was ventilated through written submissions. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 (CPR) is clear that the filing of an appeal, even an arguable one as claimed by the Applicant, does not act as stay of execution pending appeal. In other words stay

of execution is not automatic as the same is granted at the discretion of the court, of course acting judiciously.

7. Where the court decides to grant stay of execution such stay shall be premised on the conditions enunciated by Sub-Rule (2) of the said Rule which states:

**“No order of stay of execution shall be made under subrule (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.”**

8. For an applicant to earn a stay of execution of a decree it must bring the application for stay without unreasonable delay and must demonstrate that it will suffer substantial loss if the order of stay is not granted. It should also be willing to provide security which will cushion the other party were the appeal to fail.

9. The Applicant has urged that it will suffer irreparable loss as the respondents have barely serviced the loan and the vehicle will, if released, depreciate in value to its detriment. It is the Applicant's assertion that the vehicle being the security offered for the loan and as the respondents have defaulted in repayment of the same, the vehicle ought to be preserved pending the hearing and determination of the appeal. Further, that the officers of the Applicant may lose their constitutional right to liberty if stay is not granted. The Applicant has urged that such will be its loss.

10. Substantial loss is a loss whether great or small that is of real worth to the applicant. If it is demonstrated that a respondent may not be able to refund the decretal sum were the appeal to succeed then substantial loss will have been established. In the instant case, the inability of the respondents to service the loan and the vehicle depreciating in value due to wear and tear once released qualifies as a substantial loss. There is also the likelihood that the Applicant's officers may lose their constitutional right to liberty if stay is not granted. In **Kenya Power and Lighting Co. Ltd v Khan Nassir Rustam [2013] eKLR**, Kasango, J held that **“financial loss is not the only loss that can be categorized as substantial loss.”** The loss of freedom is actually a substantial loss which is more severe even than financial loss.

11. The respondents are of the view that the contempt must first be purged. In **Michira T.A as Michira & Co. Advocates v East African Standard (No. 2) (2002) KLR 63**, Kuloba, J emphasized that the ordinary principle is that the successful party is entitled to the fruits of judgement but there ought to be a balancing of the interests of the parties. The orders said to have been defied directed the release of the motor vehicle to the respondents. Purging the contempt will in essence mean the release of the motor vehicle and this will render the appeal nugatory as the vehicle is the main subject of the appeal. The Applicant has stated its willingness to pay damages for any loss sustained by the respondents if the appeal fails. It is a banking institution in operation and the offer it has made is sufficient as security in this matter. On their part, the respondents have averred that the motor vehicle is their only source of income meaning that if the motor vehicle is lost then the Applicant may have to write off the loan advanced to the respondents as a bad debt. Taking into account all the stated factors, it is apparent that releasing the motor vehicle will render the appeal nugatory.

12. A perusal of the facts of this case tilts the balance in favour of granting stay. In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR; Civil Application Nai 238 of 2005** the Court of Appeal stressed that:

**“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

13. The Applicant has discharged its duty and demonstrated that the only security for the loan is the vehicle and they may not be able to recover the monies advanced to the respondents if the vehicle is released to them. In my view, the Applicant has met all the conditions for the grant of a stay order.

14. The Applicant also prayed that the proceedings before the trial court should also be stayed. This is a self-defeatist strategy for the Applicant has not challenged the legality of those proceedings. Indeed those proceedings should be heard and concluded speedily so that it can be known whether the respondents have a case against the Applicant or not.

15. In conclusion, I stay the trial court's order dated 1<sup>st</sup> August, 2018 and all the subsequent orders issued in respect of that order pending the hearing and determination of the Applicant's appeal. Considering that a motor vehicle is a depreciable item, I direct that the Applicant who has already filed the record of appeal lists this matter for mention on priority basis for directions on the hearing of the appeal. For avoidance of doubt, the proceedings before the trial court have not been stayed.

16. The costs of this application shall abide the outcome of the appeal.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**