



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 882 OF 2003

SAMUEL MWEHIA GITAU..... PLAINTIFF

VERSUS

ELIJAH KIPNG'ENO ARAP BII..... DEFENDANT

(By the original suit)

AND

ELIJAH KIPNG'ENO ARAP BII.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

SAMUEL MWEHIA GITAU.....2ND DEFENDANT

(By Counterclaim)

RULING

Introduction

1. On 12th May, 2017, this Court delivered a judgement herein in which it granted the following reliefs:

- 1. The Defendant is hereby directed to give vacant possession of the suit premises the Plaintiff.**
- 2. The Defendant to pay the Plaintiff Kshs 155,000.00.**
- 3. The Bank to pay the Defendant Kshs 3,800,000.00**
- 4. There shall be no order as to costs.**

2. This ruling arises from two applications made by **Kenya Commercial Bank** (hereinafter referred to as “the Bank”) and **Elijah Kipng’eno Arap Bii** (hereinafter referred to as “the Defendant”).

The Bank’s Application

3. By an application dated the Kenya Commercial Bank (hereinafter referred to as “the Bank”) seeks the following orders:

- 1. This application be certified as urgent and the same be heard ex-parte in the first instance**
- 2. The court be pleased to stay the execution of the judgment and order of the High Court in Civil Suit No. 882 of 2003 made on 12/5/2017 with regard to payment of Kshs 3,800,000/= by the applicant to the defendant/respondent herein pending the hearing and determination of the Intended Appeal by the applicant in the Court of Appeal.**
- 3. The court be pleased to issue orders as it may deem fit to serve the ends of justice in the circumstances of this case.**
- 4. Costs and incidentals to this application be borne by the respondents**

4. According to the Bank following the judgement in which it was ordered to pay the Defendant/Respondent Kshs. 3,800,000/=, being an offset of the market value of the land of Kshs. 7,600,000/= and the sale of the land by the Applicant of Kshs. 3,800,000/= as a result of the undervaluation of the suit land, it was aggrieved by part of the Judgment, for it to pay the Defendant/Respondent Kshs.3,800,00/= and has preferred an Appeal against the same by filing and serving a Notice of Appeal as well as requesting for copies of the certified typed proceedings.

5. In the Bank’s view, the order for stay is desirable so that it may have its day in the Court of Appeal thus ensuring that the Intended Appeal is not rendered nugatory. To the Bank if stay of execution of the order against the Applicant is not granted, the Defendant /Respondent will proceed to execute the order for payment of Kshs. 3,800,000/= against it as Plaintiff/Respondent have already initiated the process of execution by extracting the decree. This, it contended will render the Intended Appeal nugatory and it will be prejudiced and suffer substantial loss while the Defendant/Respondent will be unjustly enriched.

6. The Bank contended that there is no guarantee that if the decretal amount was to be released to the decree-holder, the same would be recoverable upon successful appeal by the Bank as the decree holder was in the first instance unable to service his loan with the Bank, yet the security held has been surrendered to the Plaintiff in the main suit.

7. It was its case that the other parties in this matter will not be prejudiced by this Honourable Court granting stay of execution of the Order for the Applicant to pay the Defendant Respondent Kshs.3,800,000/= as the said Order does not affect the Plaintiff/Respondent in any way and the Defendant /Respondent in whose favour it is made, has requested for stay of the same under its Notice of Motion dated 30/5/2017 and filed and served a Notice of Appeal with a view of challenging the entire Judgment delivered on 12th May 2017 by this Honourable Court in the Court of Appeal.

The Defendant’s Application

8. On its part the Defendant seeks the following orders:

- 1. That this application be certified urgent and the same be heard exparte at the 1st instance.**
- 2. That the honourable court be pleased to order that there be a stay of execution of the judgement and/or decree of this honourable court issued on the 12th May 2017 pending the hearing and determination of the appeal filed by the defendant/Applicant in the court of appeal.**
- 3. That the respondents in this application be condemned to pay the costs of this application.**

9. According to the Defendant, being aggrieved by the said judgement, he filed a notice of appeal on 22nd

May 2017 with a view to filing an appeal in the court of appeal to challenge the said decision. He disclosed that the Bank has also since filed a notice of appeal with the intention of challenging the same decision.

10. The Defendant therefore prayed that there be a stay of execution of the judgement/decree therein pending the hearing and determination of his appeal in the court of appeal as the same may be rendered irrelevant, inconsequential and may be overtaken by events should a stay of execution order not be granted.

11. The Defendant averred that he stood to suffer irreparable/substantial loss in the circumstances as he may be evicted from the suit premises by the Plaintiff/Respondent who has initiated the process of extracting a decree with a view to executing against him. According to him, the subject matter involves a valuable lifetime investment that is a developed property/land within a prime area in Nairobi which the Plaintiff/Respondent who has title to the said property may utilize contrary to his interest inclusive of transferring the same to a 3rd party.

12. The Defendant averred that though the title is not in his name he had sought nullification of the same from this Court so that the maintenance of status quo in terms of a stay of execution order would be the prudent order to grant in the circumstances pending the hearing and determination of appeal.

13. The Defendant disclosed that he was ready to offer security in terms of the liquidated sum of **Kshs.155,000/=** as awarded to the Plaintiff/Respondent which liquidated amount can be deposited in a joint interest earning account of all the parties in this matter pending the hearing and determination of the appeal since the suit premises itself as stated, is a developed land that he cannot take away as it is, in any case registered in the name of the Plaintiff/Respondent and it is already developed.

14. The Defendant prayed that his application be allowed so that he can expedite and concentrate on the hearing of the appeal in the Court of Appeal which he was informed by his advocate on record are nowadays heard and determined in record time unlike the previous years.

Determinations

15. I have considered the applications herein.

16. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules** provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for 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.

17. However, in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer restricted in any matter brought under the **Civil Procedure Act** and the Rules made thereunder to the “traditional” pre-overriding objective guidelines. The courts, to the contrary, are

now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective.

18. The first issue for determination is whether the applicants stand to suffer substantial loss if the Court declines to grant the stay sought. It is clear that the effect of the judgement herein is that the Defendant is required to part with possession of the suit property. In **Nyals (K) Ltd. vs. United Housing Estate Ltd. Civil Application No. 129 of 1995**, the Court of Appeal followed the position in **Chogley vs. Bains Civil Appeal No. 67 of 1952** and held that:

“...in such cases, where the subject matter is simply the right to possess... it is difficult to see how this can be preserved, unless the status quo is maintained pending the determination of the appeal. Certainly we know of no local case of this nature where a stay pending appeal has been refused...If we were to refuse a stay of execution of the decree in the Nairobi High Court civil case no. 2137 of 1983, the applicant’s power to possess the suit premises may be removed beyond recall with the result that its intended appeal will, if successful, be rendered nugatory. To avoid such an eventuality, we think that the applicant’s application in this motion should be granted.”

19. In **M.M. Butt vs. R R Tribunal & Z. N. Shah Civil Application No. Nai. 6 of 1979** the Court followed **Wilson vs. Church (No. 2) 12 CH.D. (1879) 454** at 459 and held that if there is no other overwhelming hindrance, a stay ought to be granted so that the appeal, if successful may not be rendered nugatory.

20. I therefore have no doubt in my mind that the Defendant has shown that unless the stay sought is granted substantial loss may result if the suit property changes hands to third parties.

21. With respect to the Bank’s application its only apprehension is that if the stay is not granted it may not be able to recover the sum due to it from the Defendant. Whereas ordinarily the Court only grants stay of monetary decrees in exceptional circumstances, here it is clear that such circumstances exist since the party entitled to the said sum from the Bank is himself intending to appeal against the decision.

22. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

23. Still on the issue of the overriding objective, the principle of proportionality requires the Court to take into account the amount of money involved; the importance of the case; the complexity of the issues; and the financial position of each party. See **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.**

24. It is with this in mind that the Court of Appeal in **Job Kilach vs. Nation Media Group & 2 Others**

Civil Application No. Nai. 168 of 2005 while citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. Therefore where there is a large sum of money involved the Court may take that in consideration in an application for stay of execution. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a central issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.**

25. It is therefore my view that in so far as the Defendant and the Bank are concerned no prejudice would be caused to either of them if the stay is granted. However the same cannot be said of the Plaintiff who is entitled according to the judgement of this Court to possession of the suit property. It is obvious that if the said appeals fail, the Plaintiff shall have lost income that would ordinarily have accrued to him. It is trite that the grant of stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.**

26. In the premises it is my view that the stay ought to be granted but on conditions. In the result there shall be a stay of execution pending the intended appeals on condition that the Bank and the Defendant deposit the sums of Kshs 3,800,000.00 and Kshs 500,000.00 respectively within 30 days from the date of this ruling in an interest earning account in the joint names of all the parties in a reputable bank. In default of compliance the stay will automatically lapse.

27. The costs of this application are awarded to the Plaintiff in any event.

28. It is so ordered.

Dated at Nairobi this 25th day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngugi for the Plaintiff

Miss Gatuhi for Mr Njagi for the 1st Defendant in the counterclaim

Miss Nakhungu for Mr Sumba for the Defendant

CA Mwangi