



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 10 OF 2010

SCHOLARSTICA

NYAGUTHI MUTUR...PLAINTIFF/DECREE HOLDER/ 1ST RESPONDENT

VERSUS

HOUSING FINANCE COMPANY

(K) LTD..... 1ST DEFENDANT/JUDGMENT DEBTOR/APPLICANT

EVANSON KAMAU WAITIKI.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 21st March 2017. It is brought under the Provisions of Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, IB and 3A of the Civil Procedure Act, (Cap 21) Laws of Kenya and all other enabling Provisions of the Law.

2. The Applicant is seeking for orders that:

(i) Spent;

(ii) Spent; and

(iii) That pending the inter parte hearing and final determination of the Appeal against the aforesaid Judgment and Decree in the Court of Appeal, this Court be pleased to grant a stay of execution of the Judgment and Decree of Honourable Mr. Justice E.K.O. Ogola delivered on 17th February, 2017 in this matter.

(iv) That costs of this application be in the cause

3. The Application is based on the grounds on the face of it, supported by the Affidavit sworn by Eunice Kamau, the 1st Respondent's, Assistant Legal Manager, Litigation. She avers that the Court delivered a Judgment in favour of the Decree holder in the sum of Kenya Shillings sixteen million, (Kshs. 16,000,000) with interest thereon at 26% per annum, with effect from the date of Auction of the suit property in 2011 to the date of the aforesaid Judgment together with costs.

4. That on or about 23rd February, 2017, the Court granted a stay of execution of the Judgment and the decree for thirty (30) days, pending the filing of Notice of Appeal or settlement of the decretal sum. That as the stay orders are due to lapse on or about 23rd March, 2017, the Respondent may execute the Judgment at any time thereafter. The Applicant further states that the Notice of Appeal is filed and request made for typed proceedings to enable the filing of the Record of Appeal. Therefore unless this application is heard and determined on an urgent basis, the Applicant is likely to suffer irreparable harm that may not be compensated by damages.

5. She further averred that, being a financial institution, the attachment of its moveable assets in execution of the Judgment and decree, for the colossal sum of Kenya Shillings sixteen million, (Kshs. 16, 000, 000) plus costs, will cripple it and ruin its reputation, the sum paid may become irrecoverable if the Appeal succeeds and the Appeal may also be rendered nugatory. That the Applicant has assets and investments in the country exceeding over Kenya Shillings Ten Billion (Kshs. 10 Billion), and is more than able to satisfy any decree that may arise from the judgment, should the Appeal not succeed. Similarly it is willing to meet such terms as to the deposit of the security, that the Court may impose.

6. The Applicant averred that the Application was filed within a reasonable period of time. It is therefore in the interest of justice that a stay of execution is granted, pending the hearing and determination of the Appeal.

7. The Application was however opposed vide a Replying Affidavit sworn by Scholarstica Nyaguthii Muturi, the Plaintiff/Decree holder. She deposed that, by the time her property was sold, she had full repaid the subject loan. That, indeed the Applicant has admitted that they are holding Kenya shillings six million (Kshs. 6,000,000) million, from the proceeds of sale since 2011 to date, which is due to her. Therefore the Applicant is intent to further keep her out of reach of the money awarded by the Court, and prolong her suffering for as long as it takes. She argued that no irreparable damage will be occasioned to the Applicant since there is a valid judgment which has not been set aside and the fact that it is a money decree, the Applicant will not suffer nor be disentitled to the reliefs sought.

8. That she is equally suffering irreparably, as the action of the Applicant to sell her house for no apparent reason, has occasioned her loss and damage, and in any case she is in a position to refund any sum should the Appeal succeed, which is unlikely. As a successful litigant, she is entitled to the fruits of Judgment and the Court should not protect the Applicant more than her. Therefore the Application dated 21st March 2017 ought to be dismissed with costs.

9. However, the Applicant filed a further affidavit averring that since the 28th November 2011, the Respondent has failed to collect the refundable balance of Kshs. 3,894,206.35 and the Applicant is willing to deposit such security as the Court may direct, pending full hearing of the Appeal. That the amounts may be placed in an interest earning account in the names of the Advocates of the parties or deposited in Court or as the Court shall direct. In any case the proceedings are ready for collection, and payment thereof made. The Applicant is in the process of compiling the record of Appeal for filing the Appeal which has high chances of success.

10. The Parties agreed to dispose of the Application by filing submissions. The Applicant cited and relied on the case of; **Bernard Kyalo Nzioka v Agricultural Finance Corporation 2017 e KLR**, to argue that they have complied with the conditions to be satisfied before an order for stay of execution can be granted and reiterated that they are ready to comply with any terms imposed by the Court regarding provision of security.

11. However, the Respondent argued that the grounds of Appeal stated are frivolous, lack in merit and are not arguable at all, as the Applicant has failed to state the errors in the holding of the judgment. Reliance was placed on the case of; **Kulonya Auctioners v Maurice O.Odhiambo & Another (2003), eKLR** . Finally the Respondent relied on the case of; **Corporate Insurance Company Limited v Emmy Cheptoo Letting & Another (2015) eKLR**, to submit that the Court should not protect interests of the Applicant as against those of the Respondent, reiterating that she is in a position to refund the subject sum should the Appeal succeed.

12. I have considered the submissions tendered by the respective Learned Counsels in relation to the subject matter herein. I find that the issue that requires determination is, whether the Applicant has made out a case to warrant the grant of a stay of execution of the judgment and decree pending determination of appeal by the Court of Appeal.

13. The conditions for grant of stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, which provides that:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 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 (emphasis mine).

14. It is therefore clear that, an order of stay of execution pending appeal will be granted at the discretion of the Court and on sufficient cause being established by the Applicant. Hence the Applicant bears burden of proof on the matters relied on, as held in the case of; **Tropical Commodities Suppliers Ltd & Others versus International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331.**

15. In the same vein, the Halsbury's Law of England, volume 17, Paragraph 14, while dealing with the issue of the burden of proof, stipulates that:

".....in respect of particular allegation, the burden lies upon the Party for whom the submission of the particular allegation is an essential of his case".

16. The Court of Appeal also pronounced itself on this issue of discretion of the Court to order for stay of execution, in the case of **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979,** where Madan, Miller and Porter, JJA held that:

a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should however be exercised in such a way as not to prevent an appeal.

b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

d) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

17. As stated above Order 42 Rule 6(2) of the Civil Procedure Rules, requires the Applicant to satisfy certain conditions. I shall first deal with the issue of whether the Applicant filed this Application without

undue delay. I note from the submissions of the parties that, this issue is not contested, therefore I hold the application was made without undue delay and the notice of appeal lodged within time.

18. The other issue relates to security for due performance. The Applicant states that it is ready to abide by any orders the Court may make regarding provision of security, therefore this issue is not contested.

19. However the main issue that the Applicant has to establish is that it will suffer substantial loss if the orders sought are not granted. In the case of; **James Wangalwa & another Versus Agnes Naliaka Cheseto, 2012 e KLR**, the Court observed that:

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful Party in the appeal. This is what substantial loss would entail....”

20. And in the case of; **Antoine Ndiaye versus African Virtual University [2015] e KLR**, the Court held that substantial loss is the cornerstone of granting orders for stay of execution, and observed that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....”

21. On the same issue, the Court of Appeal, in the case of; **National Enterprise Corporation versus Mukisa Foods Miscellaneous Application No. 7 of 1998**, Kampala, Uganda held that:-

“The Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo.

As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed.”(Emphasis added)

22. Finally in the case of **Equity Bank Ltd vs Taiga Adams Company Ltd (2006) eKLR** the Court held that:-

“The only way of showing or establishing substantial loss is by showing that, if the decretal sum is paid to the respondent, that is execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse-, she or he, is a person of no means.”

23. Thus the Applicant herein must establish and or prove substantial loss if the orders sought are not granted. I note that the instant matter involves a money decree. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the Court of Appeal in the case of; **Kenya Hotel Properties Ltd vs. Willesden Properties Ltd Civil Application number NAI 322 of 2006 (UR)**, held that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in 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. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

24. Having taken regard to the above legal principle, I find that the Applicant is duly bound to place before the Court specific material or information, particulars or detailed evidence, to enable the Court appreciate and assess the loss he stands to suffer if the stay sought is not granted. I have considered the

averments in the Affidavit sworn by the Applicant in support of the Application and find that under paragraph 9 thereof, the Applicant deposes that, being a financial institution, it is likely to suffer irreparable harm which may not be compensated by damages and the attachment of its movable assets will cripple it and ruin its reputation. However the Respondent equally submitted that she is suffering irreparably as the action of the Applicant to sell her house for no apparent reason has occasioned her loss and damage.

25. From the fore going, it is clear that the key issue is the balancing exercise, in which the Court has to recognize a successful claimant right to collect her judgment, while at the same time give effect to the important consideration that the Applicant with some prospects of success of an Appeal shall not have his Appeal rendered nugatory, by the refusal of a stay.

26. As observed the decree herein is a money decree, therefore the Applicant and the Respondent must demonstrate the financial ability to refund the decretal sum if the appeal fails or succeeds. In the instant case, it is clearly discernable from the averments that the Applicant is a bank with capacity to repay the judgment sum if the Appeal fails. However there is no evidence that the Respondent is a person of straw and cannot repay the sum if the Appeal succeeds. In fact each party herein, claims that they have the financial ability to repay the subject sum if the appeal succeeds, although that ability is based on their current financial status which unfortunately is capable of changing depending on inter alia the duration of the Appeal proceedings.

27. In relation to the same, Oguntade JCA, in the case of, ***Sen (Nig) plc versus Oparubi (2000) 2 NWLR page 647***, observed as follows:

“The Applicant has deposed that the Respondent is unable to refund the judgment debt if paid to the Respondent in the event the appeal succeeds. The Respondent on the other hand deposes that he is a man of substance and can refund the judgment debt, if the appeal succeeds. Both parties would appear to have based their assessment of their ability of the Respondent to refund the judgment debt, on the Respondents means as at this time. It seems to me, however, guided by the time within which appeals are disposed off at the Supreme Court this appeal may, if it takes normal turn, cannot be determined earlier than five years from now. I cannot speculate what the Respondents means will be by that time”

28. The facts herein reveal that the sale of the subject matter took place in the year 2011 and the Court has upheld the transfer thereof to the 2nd Respondent. That position is not under challenge. Based on the above stated legal principles, I hold that the best way to resolve the issue is by the Applicant paying the judgment sum into an interest yielding account, in a reputable bank, so that whoever will win the appeal should claim the sum and interest.

29. However before I make the final orders, I note that it is alleged in the tabulated grounds of Appeal, that the Applicant is holding a sum of Kshs 3,894,206.45 from the proceeds of sale of the suit property, which has been available to the Respondent since 2011 but the Respondent has “refused to collect” it.

30 . That notwithstanding, I think it will be in the interest of justice and of both parties, if I order and I hereby order that, within **fifteen (15) days** of this order, the Applicant pays the judgment sum in the following manner:

a) Kshs 8,000,000 to the Respondent; and

b) Kshs 8, 000, 000 into a joint interest earning account in a reputable Bank, in the names of the Advocates of the Applicant and the Respondent,

c) I make no orders as to costs. The same to abide the outcome of the appeal.

31. The upshot of all this is that the Application is allowed in terms stated above.

32. Those then are the orders of the Court

Dated, delivered and signed on this 21st day of September, 2017 in an open Court at Nairobi.

G. L. NZIOKA

JUDGE

Delivered in an open Court before:

Mr. Wafula for the Applicant

N/A for the 1st Respondent

N/A for the 2nd Respondent

Teresia-----Court Assistance