



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA

CIVIL CASE NO. 17 OF 2015

(Formerly NAKURU HCCC 297 OF 2009)

SHALIMAR FLOWERS SELF HELP GROUP.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

R U L I N G

1. Before me is a Notice of Motion brought by the Defendants herein, seeking stay of execution of this court's judgment delivered on 18th March 2016, pending appeal. The application was filed on 14/4/16 and is expressed to be brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

2. Grounds cited on the face of the Motion are as follows:

“a) That the Applicant has preferred an appeal by lodging the requisite Notice of Appeal from the judgment/Decree herein to the Court of Appeal and which appeal is competent and has appreciable chances of success.

b. That if execution of the said Judgment/Decree is not stayed, the aforesaid appeal will be rendered nugatory and would thereby occasion substantial loss to the Appellant/Applicant as the Respondent would be unable to pay back the substantial sum in question paid to him should the appeal be successful.

c. That the Respondent is at liberty and may proceed to execute the Decree subject of the preferred appeal once stay orders lapse on 18th April 2016.

d. That in the premises it is only fair and just that there be stay of execution of the Judgment/Decree subject herein pending the *inter-partes* hearing and determination of the instant application and/or the hearing and determination of the preferred appeal, as the case would be.

e. That the Appellant/Applicant is amenable to furnishing security pending appeal as may be directed.”

3. The Motion is supported by the affidavit of **Bonnie Okumu**, Head of Legal Services in the Defendant. The main grounds canvassed through the Applicants' filings and oral submissions are that the Applicant

will suffer substantial loss as the amounts in the decree are “colossal” and the Respondent may be unable to refund payments to them should the intended appeal succeed.

4. The Applicants also affirmed their willingness to deposit the entire decretal sum in a joint interest earning account during the pendency of the appeal, as security for the performance of the decree in the event that the appeal fails. The Applicants assert that they have moved timeously in making the present application.

5. Through a Replying Affidavit and oral submissions, the Respondents opposed the Motion pointing to the delay in concluding the suit, and contending that further delay will prejudice them by withholding the judgment sum. The Respondents dispute the allegation that they do not have the capacity to pay back the decretal sum if paid to them in the event of the appeal succeeding. They challenge the Applicants’ failure to prove this claim. The Respondents assert that they maintain bank accounts with the Applicants that hold substantial sums of money.

6. I have considered the material placed before me and the uncontested background to the application. The requirement under **Order 42 Rule 6 (2) of the Civil Procedure Rules** is that an applicant satisfies the court that:

“a) ...substantial loss may result to the applicant unless the order (for stay) 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.”

7. Both limbs of **Order 42 Rule 6 (2) of the Civil Procedure Rules** are essential so that an applicant who demonstrates, for instance, ability and readiness to deposit the decretal sum, while not establishing likelihood of substantial loss cannot hope to succeed in an application for stay of execution pending appeal.

8. In the Court of Appeal decision in **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR** Platt Ag Judge observed inter alia;-

“...the test would be whether the appeal would be rendered nugatory, unless payment of the decretal were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be rendered nugatory.....no reasons given why the appeal will be rendered nugatory. The court inquired into the Respondent’s circumstances but the information that was forthcoming did not confirm the applicant’s misgivings.

It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

9. The present Applicants have deponed in the supporting affidavit that their intended appeal in the Court of Appeal has high chances of success (**paragraph 6**) and affirmed the Applicants’ willingness to deposit the decretal sum as security (**paragraph 7**). However, with regard to substantial loss, **paragraph 8** merely states:

“THAT considering the substantial sum in the decretal amount, the Appellant/Applicant believes the Respondent will not be able to repay such amounts if paid out, in the event the appeal is successful and as such the Applicant will have suffered substantial loss.”

10. Responding to this deposition, the Respondents deponed at **paragraph 10** of the Replying Affidavit as follows:

“THAT it’s not true that we shall not be able to repay the large amount in case the appeal is to succeed. Our record with the defendant (Applicant) as at 2008 to date our accounts with the defendant/applicant are healthy having about 5 million a fact within the defendant’s/applicant’s knowledge which they conveniently wish to ignore to defeat the judgment.” sic

11. The affidavit goes on to emphasise the applicants’ failure to demonstrate that the Respondent is a “man of straw.” It is significant that the suit between the parties in the High Court arose from a contractual relationship between the Applicant as a banker and the Respondent as a customer holding several accounts in the Applicant bank. The suit was occasioned by the withdrawal of funds from the said accounts without due authorization by the Respondents. There is no evidence by the Applicants that the Respondents’ said accounts are dormant or no longer hold monies even though such evidence would naturally be in the Applicant’s custody.

12. Equally, the assertion that the Respondents have in their accounts with the Applicants funds amounting to Shs 5million has not been controverted by the Applicants. The Respondent is a registered self-help group with elected officials, hence enjoys some sort of corporate status unlike an individual decree holder. The group is funded through commissions under the Fair Trade to workers of Shalimar Flowers Limited.

13. The fact that the decretal sum is large, without more, is not sufficient proof of possible substantial loss being suffered by the Applicant.

14. The Court of Appeal while dealing with a similar application in **Gladwell Wangechi Kibiru -Vs- Lord Melvin John Blackburn & 4 Others (2015) eKLR** had this to say regarding substantial loss:-

“Will the intended appeal be rendered nugatory if stay of execution is denied? The purpose of stay of execution orders is to preserve the substratum of an appeal or intended appeal. (See Chairman Board of Governors Ng’iya Girls High School -Vs- Meshack Ochieng T/A Mecko Enterprises & 4 Others (2015) eKLR). In our view, it is for all interest and purposes granted to give the concerned party an opportunity to be heard. The constitution champions fair hearing which must also include preservation of the substratum of an appeal or intended appeal in appropriate case.

However, the Applicant must aptly demonstrate this limb (substantial loss). The colossal sum involved notwithstanding, it would be an insufficient ground, at least on its own, to sustain a claim that an appeal would thereby be rendered nugatory..... The 2nd Respondent (decree holder) may be a foreigner but the law applies to all equally..... After all she has a judgment in her favor. In other words, the 2nd respondent had gained fruits of her legal labour.....

Finally, the Applicant has not countered the 2nd Respondent’s assertion that she possesses wealth enough to refund the decretal sum in the event that the Applicant is successful in her appeal. We must also not lose sight of the fact that this is a money decree. As a general rule, an appeal arising out of a money decree cannot be rendered nugatory if stay is refused. (See Kenya Shell Ltd -Vs- Benjamin Kibiru and Another (1982-88) IKAR). It is absolutely necessary that the Applicant demonstrates that if stay is not granted and execution issues, the Respondent will be unable to repay the amount should he succeed in the appeal.

It has not been demonstrated to our satisfaction that the 2nd Respondent is incapable of repaying the amount in the event that the appeal is successful. Indeed, the 2nd Respondent is categorical that she has the means to repay. We have no reason to doubt that assertion.”

15. The application was disallowed on the failure by the Applicant to prove that the appeal would be rendered nugatory if the stay orders were denied. And so it is in this case which also involves a money decree. In my considered view, the Applicants have been casual in their attempt to demonstrate the likelihood of suffering substantial loss even in the face of categorical and credible assertions that the Respondents have the wherewithall to refund any payments to them under the decree, in the event of the intended appeal succeeding.

16. I have no reason to doubt that the Respondents hold accounts with sums of money, with the Applicant bank. It is facetious for the Respondents to plead restrictions based on the client/bank relationship as the reason for not supplying material controverting the Respondents' claims.

17. The sums which were found in the judgment of the court to have been spirited away from the Respondents' accounts are large lending credence to the Respondents' claim to financial capacity. The Respondents have a judgment in their favour, some 8 or so years since the monies were unlawfully removed from their accounts.

18. The court cannot be moved to grant an order staying execution in these circumstances without justifiable cause. In this regard, the Applicants have failed to satisfy the court that it will suffer substantial loss in the event that the orders sought are denied and if subsequently their intended appeal succeeds.

19. Conversely, I am persuaded that the Respondents have the means to refund any payments made on the decree, in such eventuality. In the circumstances, I find no merit in the application for stay of execution pending appeal and dismiss it with costs to the Respondents.

Delivered and signed at Naivasha on this **23rd** day of **June, 2016**.

In the presence of:-

For the Applicant : Mr. Terer N/A

For the Respondents : Mr. Mburu

Court Clerk : Barasa

C. MEOLI

JUDGE