



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 504 OF 2012

FAMILY BANK LIMITED.....APPELLANT

V E R S U S

MARTIN KIMEU.....1ST RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LIMITED..... 2ND RESPONDENT

*(Being an appeal from the ruling/order of the Honourable Senior Principal Magistrate Oganyo (Mrs)
delivered on 17th September, 2012)*

RULING

1) Family Bank Limited, the Appellant herein, took out the motion dated 23rd July 2015, in which it sought for inter alia an order for stay of further proceedings in the Milimani Commercial Court C.M.C.C no. 4783 of 2011 pending the hearing and determination of this appeal. The motion is supported by the supporting affidavit of Elvis Mungai. When served, Martin Kimeu and Credit Reference Bureau Africa Ltd, the 1st and 2nd Respondents respectively filed a replying affidavit to oppose the same. When the motion came up for inter partes hearing, learned advocates appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have further considered the rival submissions. It is the submission of the Appellant that he has a strong arguable appeal against the ruling of Hon. Oganyo, learned Senior Principal Magistrate delivered on 17.9.2012 hence unless the order for stay of further proceedings is given his appeal will be rendered nugatory. It is argued that the sum demanded by the Respondent is of such a magnitude that if paid over to both parties it would adversely affect the applicant's operations, image and standing. The Appellant is apprehensive that the 1st Respondent would not be in a position to refund the monies if the intended appeal is successful owing from the fact he had previously been listed by the 2nd defendant as a loan defaulter.

3) The Respondents are of the view that granting the order for stay of proceedings is meant to delay the expeditious conclusion of this dispute thus denying for example, the 1st Respondent his right to a hearing and a fair trial. It was also pointed out that the Appellant's appeal is not arguable and does not stand any chance of succeeding since the Appellant had expressly admitted the claim.

4) The history behind this motion appears to be short. The 1st Respondent filed a suit before the Milimani chief Magistrate's Court against the Appellant and the 2nd Respondent herein vide the plaint dated 10.10.2011. In the aforesaid plaint the 1st Respondent sought for damages for embarrassment, malicious

listing, defamation plus costs. When served, the Appellant and the 2nd Respondent filed their respective defences to resist the 1st Respondent's action. On 1st December 2011, the 1st Respondent took out an application to strike out the Appellant's statement of defence. On 17.9.2012 Hon. R. A. Oganyo, learned Senior Principal Magistrate, proceeded to strike out the Appellant's defence. Being dissatisfied with the aforesaid decision, the Appellant preferred this appeal to challenge the decision. He has now taken out the current application seeking to stay further proceedings in the case before the trial court. I have already enumerated the grounds in which the Appellant put forward to stay further proceedings. The principles to be considered in deciding such applications were restated in **Halbury's Law of England 4th Edition vol. 37 at pages 330 and 332** in part as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the 1st Respondent might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

5) Applying the above principles to this application can it be said that the applicant merits the grant of the orders? What is clear in my mind is that if the order is granted, the hearing of the suit before the Chief Magistrate's court will proceed for hearing as undefended since the Appellant's defence was struck out. This fact is not in dispute. It is the submission of the Respondents that the Appellant's appeal has no chance at all to succeed since the Appellant admitted the claim. The Respondent pointed out that the gist of the ruling is that the Appellant had expressly admitted that it listed the 1st Respondent on inaccurate information at the time. The Appellant's defence was struck out on the basis that it disclosed no reasonable defence. The trial magistrate also entered judgment on admission. On appeal, the Appellant has stated that it will propose to argue inter alia that it was not given a right of hearing yet its defence raised triable issues. It is also stated that the Appellant will show on appeal that the trial magistrate disregarded its submissions and the authorities cited. In my humble view, it cannot be said that the appeal has no arguable grounds. I am satisfied that the appeal raises very serious points of law. The question as to whether or not the Appellant was given a right of hearing is an important ground which needs to be determined on appeal. If the order for stay is denied, the case against the Appellant will proceed to hearing as a formal proof since judgment has been entered.

6) This is one of those cases which this court must preserve the appeal from being rendered nugatory by granting the order for stay of proceedings pending appeal.

7) In the end, I find the motion dated 23.7.2015 to be meritorious. It is allowed as prayed.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent