



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NUMBER 39 OF 2016

ALLIED EAST AFRICA LIMITED.....1ST PLAINTIFF/ 1ST APPLICANT

MIDLAND ENERGY LIMITED2ND PLAINTIFF/2ND APPLICANT

-VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Application herein is a Notice of Motion dated 18th July 2016. It is brought under Section 1A, 1B & 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 42, Rule 6 and order 51, Rule 1 of the Civil Procedure Rules, 2010. It is supported by the grounds on the face thereof and an Affidavit sworn by **ALI NOOR ABDI**, dated 18th July 2006

2. The Application seeks for orders that:

- **The Application herein be certified as urgent and service of the same be dispensed with in the first instance;**
- **Pending the hearing and determination of this Application there be stay of execution of the Ruling of the Honorable Justice E.K.O Ogola delivered by the Honorable Lady Justice G. Nzioka on 15th July, 2016 (the Ruling) and any Order(s) arising there from.**
- **Pending the hearing and determination of the Plaintiffs'/Applicants' intended Appeal there be a stay of execution of the Ruling and any Order(s) arising there from.**
- **The costs of this Application be in the cause**

3. The Applicant's case is that, the Court delivered a Ruling on the Applicants' Application dated 14th February, 2016 on 15th July, 2016, and dismissed it. Being aggrieved and dissatisfied with the Ruling the Applicant's instructed its Advocates to appeal against the same. The Advocate filed a Notice of Appeal dated 18th July 2016, the same day, and applied for typed certified copies of the proceedings and the Ruling.

4. The current Application is based on apprehension that the Applicant, will be gravely, negatively and highly incapacitated if compelled to pay the impugned amount in excess of Kenya shillings One hundred and Twenty Million(Kshs. 120,000,000) and will be listed with Credit reference Bureau. That it will

suffer enormous financial and reputational loss and damage, if the Defendant/Respondent attach and/or sell its and other third parties assets, and render the intended Appeal nugatory.

5. The Applicant averred that substantial loss will be founded on the reasons *inter alia* that:

- **The Defendant/Respondent created securities over assets that had not been agreed on by the parties which if sold will occasion great injustice as that was not what the parties initially negotiated; and**
- **One of the Securities is a charge created over a property owned by a third Party which when attached and sold it shall be impossible to recover the same and the developments thereto.**

6. The Applicant argued that, the Plaintiffs'/Applicants' equitable Right of Redemption can only be protected by stay of execution pending the hearing and determination of the Application herein and the intended Appeal. That, the Plaintiffs/Applicants are a reputable and financially sound importers, exporters and wholesalers of Liquefied Petroleum Gas (LPG) in bulk and Cylinders by the brand name 'MID GAS' contributing significantly to the economy of this country. Therefore they can settle any decree or Order of this Honorable Court, together with interest as shall have accrued, in the event that their intended Appeal is unsuccessful.

7. As such the Defendant/Respondent will not suffer any prejudice if a stay of execution is granted, because, the impugned amount will in the meantime continue earning it handsome interest, which will become payable by the Plaintiffs/Applicants should they be unsuccessful in the intended Appeal, and that, the Court's interest rate is 12% per annum is way above the current rates that a depositor is likely to get from the local financial market.

8. Therefore, as the Application has been brought without delay, it is in interests of justice and fairness this Honorable Courts grants the Orders sought.

The Application was opposed based on the grounds of opposition dated 2^{1st} July, 2016 and filed in Court on 2^{2nd} July, 2016. The said grounds states that:

- **That the application has no merit and warrants dismissal;**
- **That under the provisions of Order 42 Rule 6, an order for stay is only available where there is a positive Decree or Order issued by the Court and which is capable of execution. In these proceedings, no such order or Decree exists as the order subject of the application is an order of dismissal;**
- **That in effect, the application herein seeks reinstatement of the interim orders of injunction that were predicated on the plaintiffs' application for injunction and which orders were vacated as a matter of course, when the said application was dismissed;**
- **That this Honorable Court has no jurisdiction to stay the exercise of a Bank's Statutory Power of Sale where an application for that purpose has been dismissed and such orders refused;**
- **That in any event, the grant of a stay under Order 42 Rule 6 is conditional upon security being rendered for the due performance of the Decree in issue. The debt amount owing to the defendant is over Kshs. 120 million and no security for payment of the same has been provided in the Application;**
- **That the Defendant/Respondent will be prejudiced by any grant of stay as sought herein, having already advanced the applicants substantial funds which it seeks to recover; and**
- **That there is no basis for the application made.**

9. In response to these grounds, Ali Noor Abdi swore a further affidavit dated 25th July, 2015, reiterating that, the Honorable Court has the jurisdiction to determine the present Application, which has merit and which should be considered it in the interests of justice.

10. He averred that on a "without prejudice" basis, the parties have engaged in negotiations with a view to reaching an amicable solution. That, the Defendant/Respondent called for a proposal and specifically, an

extra security in the form of an immovable property for the creation of an additional legal charge, (as a further security from the Plaintiffs/Applicants), in order to restructure the facilities. On 19th May 2016, the Plaintiffs/Applicants presented a copy of the Title Deed and the valuation over property Title Number: KJD/LOOARIAK/4656. On 14th June, 2016, the 1st Plaintiff wrote to the defendant proposing to pay the outstanding amount of Kshs. 93,000,000 over a period of 7 years but they are yet to get a response from the said letter.

The Defendants allegedly abandoned the negotiations, on 15th June 2016, upon the Honorable Court dismissing the Plaintiffs' Application and took advantage of the situation and started issuing threats of realizing the securities and listing the plaintiffs and their respective directors with the Credit reference Bureaus. On 20th July 2016, a day after the Plaintiffs/Applicants had filed the present Application on 19th July 2016, the Defendant/Respondent's send Leakey Auctioneer, to proclaim and did proclaim allegedly in an inhuman manner, the 1st Plaintiffs/Applicants various assets for sale by public auction after seven (7) days.

The Application was disposed off through the written and oral submissions ably made by the Parties respective Learned Counsels. In a nutshell they reiterated their respective issues as stated herein above. They both invited the Court to consider the grounds upon which an Application for Stay may be granted under Order 42 Rule 6 of the Civil Procedure Rules, 2010.

11. It was submitted that under that Order, the Applicant has to demonstrate they will suffer substantial loss if the Application is not granted, and that there is no delay in making application. That the Court can exercise discretion and order security for costs. On the issue of security for costs that the Applicant argued that the Defendant holds several securities and in the presence of those securities the plaintiff should not present further securities. That, the proclaimed goods, the gas cylinders, if detained then the Applicant will suffer prejudice and be unable to repay the debts.

Finally, the Applicant invited the Court to look at the consider the material before it independently and find that Ruling by justice E.K. Ogola is not binding on this court.

12. On the other hand, the Respondent's counsel submitted that it Order 42 Rule 6 of the Civil Procedure Rules presupposes there is a positive order being executed. That the Court cannot stay or stop the bank from realizing the security or exercising its Right of sale. It is a right without the need for a Court order and what the Court is being asked to do is to stay it and to reinstate the injunction. That option is not available and all is left for the Applicant is to go to the Court of Appeal. Thus, application is an abuse of Court process and it is important to give justice to both parties given that the plaintiff/applicants have made a representation to pay.

13. The Respondent submitted that payment of an admitted debt cannot constitute substantial loss and that, security for costs, presupposes a judgment, therefore the application is incompetent and grant thereof will be very prejudicial to the Respondent. He referred to the case of *Republic vs The Commissioner for Investigation & Enforcement, Ex parte Wananchi Group Kenya Limited, Miscellaneous Application No. 51 of 2013.*

14. Finally the Applicant reiterated their submission and argued that the purpose of this nature of application is to preserve the rights of the Appellant and the Appeal should not be rendered nugatory. That, they have come to the seat of justice and the court find so.

15. I have considered the Application, the Affidavits and submissions by the Learned Counsels. I find the issues for determination include inter alia whether:

- **the Court has jurisdiction to hear the application;**
- **it falls within the corners of order 42 Rule 6;of Civil Procedure Rules**
- **the Application can be allowed in the terms of prayers sought.**

16. I shall deal with the first issue by considering the provision under which the Application is brought. That is **Section 1A, 1B and 3A** of the **Civil Procedure Act**. I shall reproduce them here for ease of reference.

Section 1A, states that:

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(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 specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”

Section 1B, provides that:

“For the purpose of furthering the overriding objective in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties”and

Section 3A of the Act stipulates that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

17. The other cited provision is Order 42, Rule 6, which states under sub rules (1) (2) and (3) that:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without

formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application”.

18. The last citation which is Order 51 Rule merely gives procedure of dealings with Applications before the Court.

19. I find that based on the inherent powers of the Court under Section 3A of the Civil Procedure Act, the Court has jurisdiction to hear this Application. However the informing argument for lack of jurisdiction was based on the fact that the Applicant Application dated 14th February, 2016 was dismissed and the only avenue left to the Applicant is file an Appeal. I have taken liberty to revisit the prayers in the said Application and find that the Applicant sought for mainly injunctive orders in fifteen (15) prayers. They also sought to stop the listing of the Applicants with the Credit Reference Bureau and to compel the Parties to negotiate and reach a settlement. All those prayers were not granted as that Application was dismissed.

20. The question is this, what would legal consequences of granting the Prayers sought for herein? Will it amount to reviving the dismissed Application or will it amount to sitting on Appeal over the Orders given herein or even giving the Applicant what they did not get in that Application.

21. According to the Respondent it will amount to reinstatement of the injunctive orders and/or the stay of the Respondent’s statutory Power of sale, which will then be prejudicial to the Applicant.

22. I now wish to consider some salient issue raised by Applicant. The first issue is that negotiations were on going until the Ruling in issue was delivered, whereupon the Respondents stalled on the same. In my opinion that issue was deliberated on in the last Application and determined therefore it cannot form a subject of determination herein. It can now only find audience before the Court of Appeal.

23. Secondly, the Applicant has raised the issue of rescheduling the loan facility and an offer to repay the same in installments. Two things puzzle me. Why haven’t the Applicant made even a single installment payment? Firstly I associate with Hon Justice Ogolla’s ruling that “the alleged offer of installments payments is naked”. It not evidenced and or supported by any visible action of a single payment, secondly I am also puzzled by their submissions that,

“the Plaintiffs/Applicants being reputable and financially sound importers, exporters and wholesalers of Liquefied Petroleum Gas (LPG) in bulk and Cylinders by the brand name ‘MID GAS’ contributing significantly to the economy of this country and can therefore settle any decree or Order of this Honorable Court, together with interest as shall have accrued, in the event that their intended Appeal is unsuccessful”. If that is so, why haven’t they paid what is even admitted as owing or even any part thereof and leave the disputed amount or any other disputed issues to await the main trial. Are the Applicants really serious?

24. As much as I hear their lamentations as to how rigid the Respondents are, their lack of cooperation on negotiation and request for additional securities to allow rescheduling of the loan facilities, but that is unfortunately the nature of commercial transactions. They wear commercial faces. They are devoid of any moral considerations.

25. In deed the chargee’s power of sale is a statutory right this is based on the fact that traditionally the business of banking is for a banker to earn money by lending to dependable people in return for the satisfactory security and by charging them interest. Thus the money has to be recovered back to be available to the depositors.

26. Similarly every decision by the Court must balance the scale of Justice. In the case of **Equity Bank v West Link MBO limited CA No. 78 of 2011, Musinga, JA** held that,

“Court of law exist to administer justice and in so doing they must balance between competing rights of different parties but within the confines of the law to ensure ends of

justice is met.”

27. In the case of *Machira & Company Advocates v East African Standard (No.2) (2002)*, it was held that:

“ to be obsessed with the protection of an appellant or intending appellant in total disregard of fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principles of a judicial discretion”.

28. In the instant case the Respondent is merely exercising its contractual and legal right. The Applicants have admitted indebtedness of atleast Kshs 98 Million. On what ground shall they suffer prejudice if the securities charged for the debt are realized.

29. Their conduct and or utterance to the effect that they are financially stable and then pleadings hard business time and inability to pay even the installments, disentitle them from Court’s mercy. Be it as it were, the offer of payments of the sum due of about Kshs 93,000,000 as per the Applicant in seven years cannot be forced on the Respondents if the Court were to Order so, that may amount to Court re writing the contract between the Parties.

30. In summation I find that, whereas the Applicant fears may be real, eminent or well founded, that they will be prejudice if the Appeal is rendered nugatory. They have not satisfied the Court on the loss they will suffer if the Respondent realized the securities properly charged. The claim that third parties securities are under attach cannot be canvassed through such forum as herein and in the absence of evidence from such third parties.

31. All in all, I find that and Notice Of Motion dated 18/7/16 Lacks merit and I dismiss it with costs to the Respondents,

It is so ordered.

Dated and delivered on this 18th day of August 2016 at Nairobi

G L NZIOKA

JUDGE

Before:

-----for the Applicant

-----for the Respondent

Teresia -----Court Clerk