



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.70 OF 2010

GEORGE NDEGE OKELLO.....APPELLANT

-VERSUS-

K-REP BANK LIMITED.....1ST RESPONDENT/APPLICANT

HENRY OWUOR T/A

BOMAS PROPERTY MANGMNT SERVICES.....2ND RESPONDENT

(Appeal against the decision of Hon. M. N. Gicheru, C.M. delivered on 1.4.2010 in the original Civil Case No. 728 of 2008 in the

Chief Magistrate's Court Kisii)

RULING

The Application

1. The application for determination is the Notice of Motion dated the 7/03/2013 brought pursuant to **Orders 42, Orders 51 (1) Rule 6 Civil Procedure Rules 2010 and Section 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya**. It was certified urgent on the 7/03/2013 and interim orders granted in terms of prayer 2 of the application subject to the applicant depositing the sum of Ksh.150,000/=(Kenya Shillings One Hundred and Fifty Thousand only) to court which has been done . What the court is to determine is prayers (3), (4) and (5) of the application where the applicant seeks orders as follows:

*·Pending hearing and determination of the Appeal to the court of Appeal against the Judgment/Decree herein , there be a **stay of execution of the Judgment/Decree herein** and in Kisii CMCC No. 728 of 2008 on consequential orders and/or warrants.*

*·There be **stay of sale of the attached goods**, pending the hearing and determination of the appeal to the court of appeal against the judgment /decree herein.*

·Costs of this application be provided for.

2. The application is based on the grounds set out on the face of it and supported by the annexed affidavit of **ERIC ONDIMU MATOKE** the Manager K-Rep Bank Limited Kisii Branch sworn on the same date. Briefly he states that the Applicant (K-Rep Bank Kisii Branch) filed an appeal having been dissatisfied with the judgment herein dated 22nd November 2012 as shown by the Notice of Appeal "EOM1". Their Advocates on record then applied for certified copies of the proceedings and the

judgment to enable them prepare the Memorandum and Record of Appeal which have been delayed.

3. Meanwhile the decree-holder went ahead and commenced the process of execution in a bid to recover the costs of the counter claim in the lower court and has in the process proclaimed the Bank's property. He claims that they were never served with the appellant's tabulation of the costs which amount to Kshs. 127,798/= neither was there a formal demand for payment of the same nor notice of intention to execute given.

4. He further depones that the court in its judgment found that the Appellant's owed the applicant money but proceeded to dismiss the Counterclaim and in view of that he believes that the appeal has overwhelming chances of success. He adds that the items proclaimed are the ones used for the day to day running of the Bank and if attached the banks operations will be brought to a standstill. He states that the Bank is willing to give such security as may be ordered.

Response to the Application

5. The application is opposed by the appellant's who have filed grounds of opposition dated the 8th March 2013 as provided for under Order 51 Rules 15 and 16 of the Civil Procedure Rules 2010.

6. Parties agreed to canvass the application herein by way of written submissions which they have filed and exchanged in compliance with this court orders dated the 22nd March 2013.

7. From the applicants submissions it is apparent that the applicant abandoned prayer (4) since there was no attachment after issuance of an order of stay of execution. This court has carefully considered the opposing arguments by both Counsel on the subject in issue which is whether the court can now grant the stay of execution pending appeal.

8. The conditions for granting stay are set out under Order 42 Rule 6(2),(1),(a) and (b) of the Civil Procedure Rules which provides:-

(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.

9. The issue for determination by this court is whether the Appellant has made a case for this court to stay the execution of the order that he wishes to appeal against to the Court of Appeal. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** above requires any applicant who wishes to have an order or decree stayed pending the hearing of the intended appeal to establish that he would suffer substantial loss if stay is not granted. Such applicant must also be prepared to provide security for the due performance of the decree. Finally, the application for stay must be made without undue delay. In **Butt -vs- Rent Restriction Tribunal [1982] KLR 417** at page 419, Madan JA (as he then was) held thus:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No.2) 12 Ch D (1879) 454 at p.459. In the same case, Cotton LJ said at p.458:

“I will state my opinion that when a party is appealing, exercising his undoubted

right of appeal, this court ought to see that the appeal, if successful, is not nugatory.””

10. The fear that the applicant has that the appellant may not refund is well founded especially taking into account the fact that the appellant herein defaulted in paying his loan prompting them (Applicants) to move for recovery proceedings which led to the appeal herein. I find that from that point of view substantial loss need not be proved by evidence per se but the past action of the appellant himself of not repaying his loan is evidence that if the execution proceeds and the applicant's appeal succeeds then it would be difficult to recover from the appellant the decretal sum. Secondly it is this court's considered opinion that it is necessary to grant the orders sought in order not to render the appeal nugatory if successful. For the above reasons this court exercises its discretion and grants stay pending the hearing and determination of the appeal. However, the Applicant, as security for the due performance of the order, shall pay into court a sum of Kshs.200,000/= being security for costs pending the hearing and determination of the appeal or until further orders of the court.

Ruling written and signed by

RUTH N. SITATI

J U D G E

Ruling delivered dated and countersigned in open court at Kisii this 9th day of January 2015 by

C. NAGILLAH

J U D G E

In the presence of

Abobo h/b for Asati for Applicant/1st Respondent

Ochwangi for Respondent/Appellant

Edwin Mong'are Court Assistant