



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.A NO. 25 OF 2014

THE CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

JOSPHAT KIRIGIA ABURI.....RESPONDENT

RULING

1. The appellant/applicant through an application brought pursuant to Order 51 Rule 1, Order 42 Rule 6, Order 22, Rule 22 of the Civil Procedure Rules, Section 1A, 1B, 3A and 79G of the Civil Procedure Act, Section 62 of the Land Registration Act, and any other enabling provisions of the law sought the following orders:-
 - i. *That this application be certified urgent and be heard ex parte in the first instance.*
 - ii. *That there be a stay of execution of the judgment/Decree in Meru CMCC No. 940 of 2003(Josphat Kirigia Vs Co-operative Bank of Kenya Ltd) pending the inter-partes hearing and determination of this application.*
 - iii. *That there be stay of execution of the judgment/Decree in MERU CMCC NO. 940 OF 2003(Josphat Kirigia Vs Co-operative Bank of Kenya Ltd) pending the hearing and determination of the Appeal.*
 - iv. *That the Honourable court be pleased to issue an order of inhibition inhibiting the registration of any dealings with land parcels Nos. NYAKI/THUURA/1457 and NTIMA/IGOKI/4279 pending the inter-partes hearing and determination of this application.*
 - v. *That the honourable court be pleased to issue an order of inhibition inhibiting the registration of any dealings with land parcels Nos. NYAKI/THUURA/1457 and NTIMA/IGOKI/4279 pending hearing and determination of the appeal.*
 - vi. *That costs of this application be provided for.*
2. The application is based on six grounds on the face of the application; inter alia; that the applicant has a good chance of success on appeal being Meru HCCA NO. 25 of 2014; that if stay of execution is not granted the appeal will be rendered nugatory; that the applicant will suffer substantial loss and damage if stay is not granted as there is likelihood that the respondent will dispose of the suit land once discharged and fail to repay his financial obligations owed to the applicant if the appeal succeeds, that the application is made timeously without undue delay, that it is only fair, apt and in the interest of justice that this application be allowed.
3. The application is further supported by supportive affidavit of Richard Kiriinya Muriungi a Branch Manager of the applicant's Bank dated 19th August, 2014.

4. The applicant contend that the respondent has already extracted a decree ready for execution, a copy whereof is annexed and marked as "RKM2". The applicant further contend that in the event the decree is executed it shall loose the only security to the outstanding loans owed by the respondent to the applicant and shall not be able to recover the sum from the respondent in the event the appeal is successful since the present pecuniary capacity of the respondent is not known and as a result the applicant stand to suffer substantial loss.
5. The applicant further contend the respondent is a witty and cunning fellow who is most likely to dispose of the securities once are discharged leaving the applicant with no recourse and rendering the appeal nugatory. The applicant is further contending that it is willing to provide security pending hearing and determination of the appeal as may be required by this Honourable Court.
6. The respondent is opposed to this application. He filed replying affidavit dated 8th October, 2014 admitting that there is pending appeal but contends the same has no chance of success. He further contended he is not indebted to the appellant/applicant as during the trial there was no counterclaim.
7. The respondent has contended that he is of ill-health, of advanced age and may not live to enjoy the fruits of his judgment if execution of the decree is delayed and as such prayed for the application to be dismissed.
8. That court gave directions that the application herein be determined by way of written submissions. The applicant filed its submissions on 22nd December, 2014 and the respondent filed his submissions on 19th January, 2015. I have carefully considered the application and supportive affidavit as well as the replying affidavit and varying submissions by both counsel. The issues for consideration is whether the applicant has satisfied the conditions to warrant stay of execution of the decree herein being granted.
9. Under Order 42 Rule 6(2) of the Civil Procedure Rules the conditions under which stay of execution of a decree can be granted are set out as follows:-

(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.

10. In the case of **NEW STANLEY HOTEL LIMITED V ARCADE TOBACCONIST LIMITED(1986) KLR 757** Hon. Justice Porter,(as he then was) dealing with application of stay of judgment pending the appeal held:-

“Before making an order staying the execution of the judgment, the court has to be satisfied that substantial loss may result to the applicant unless an order was made and that the application was made without unreasonable delay.”

11. I have very carefully considered the averments by both the applicant and the respondent in their respective affidavits. I have also considered the conditions upon which an order of stay of execution of judgment pending the appeal may be issued as spelled out under Order 42 Rule 6(2) of the Civil Procedure Rules.
12. I have also considered the authorities relied upon by the both parties.

13. The applicant has contended that it would suffer substantial loss unless the orders sought are granted, and that the application was made timeously and without undue delay. It has further been contended if the application is not granted the applicant's appeal will be rendered nugatory and that in event the decree is executed the applicant would lose the only *securities* to the outstanding loans owned by the respondent to the applicant and shall not be able to recover the same in the event the appeal is successful since the present pecuniary capacity of the respondent is not known and as a result the applicant stands to suffer substantial loss. The respondent on his part did not controvert the applicant's contention as stated herein above but stated the appellants appeal has no chance of success, which assertion in my view cannot be determined at this interlocutory stage without hearing the appeal.

14. In view of the above I am satisfied that substantial loss may result to the applicant unless the orders sought are made as the application has been made without unreasonable delay.

15. This court has on the other hand a responsibility to balance the varying interest of both parties in a litigation. The respondent avers that he is of ill-health and of advanced age, and may not live to enjoy the fruits of the judgment if the execution is delayed. The applicant has offered to give security and in the interest of justice the applicant is directed to deposit with court a security of Kshs.300,000/- within the next 30 days from the date of this ruling which as a condition for granting a stay of execution stay is limited to a period of 1 year from today within which period the applicant is required to prepare and serve the record of Appeal and prosecute the appeal.

16. The upshot is that the applicants application is granted as follows:-

- i. ***There be a stay of execution of the judgment/decreed in Meru CMCC No. 940 of 2003 pending hearing and determination of the appeal which appeal ought be heard and determined within a year from today in default execution do issue.***
- ii. ***That the applicant do deposit with court within 30 days from the date of this ruling Kshs.300,000/- as security for stay of execution in default whereof execution do issue.***
- iii. ***Costs of the application be in the cause.***

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF MARCH, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. M/S M. Thibaru for applicant
2. Mr. Mutwiri h/b for Kimathi Arimi for respondent
3. C/clerk Peninah/Mwenda

J. A. MAKAU

JUDGE