



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 499 OF 2004**

**CO-OPERATIVE BANK OF KENYA.....PLAINTIFF**

**VERSUS**

**PIUS KIMAIYO LANGAT.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Defendant's Notice of Motion dated and filed on 14<sup>th</sup> November 2012 was brought under the provisions of Sections 3A, 75 of the Civil Procedure Act, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. Prayer No (1) was spent. It sought for the following orders:-

1. Spent.
2. **THAT the Honourable Court be pleased to stay execution of judgment and decree dated 4<sup>th</sup> October 2012 in the matter pending hearing and determination of the intended appeal.**
3. **THAT the costs of this application be in the cause.**

**THE DEFENDANT'S CASE**

2. The application was supported by the Defendant's Affidavit that was sworn on 12<sup>th</sup> November 2012. His Written Submissions were dated 3<sup>rd</sup> November 2014 and filed on 5<sup>th</sup> November 2014.
3. The Defendant's stated that he was not in good financial standing and could not provide for security in monetary terms. However, he claimed that the Plaintiff was already holding title documents of various parcels of land belonging to him which were adequate security in the circumstances.
4. He said that his application for stay of execution of the judgment and decree pending an appeal was merited and had a high probability of success. He urged the Court to grant the application on the basis that it was in the interest of justice to do so and that the denial of the same would render the appeal nugatory.

**THE PLAINTIFF'S CASE**

5. In response to the said application, Kimani Waweru, the Plaintiff's Legal Officer, swore a Replying affidavit on 10<sup>th</sup> December 2012. It was filed on even 11<sup>th</sup> December 2012. Its Written

Submissions were dated and filed on 19<sup>th</sup> November 2014.

6. The Plaintiff denied holding any securities on behalf of the Defendant and stated that in any event, there was no documentary evidence to show that it held the Defendant's title documents. It said that the Plaintiff's application was misconceived and premature as the Defendant had not demonstrated that there was any threat of execution as the Bill of Costs had yet to be taxed.
7. It averred that if the court was inclined to grant the orders that had been sought by the Defendant, then he ought to have been ordered to deposit the decretal sum of Kshs 4,706,570.05 in an interest earning account in the joint names of its advocate and those of the Defendant as it was being denied fruits of its judgment that was entered in its favour on 4<sup>th</sup> October 2012.

## **LEGAL ANALYSIS**

8. The Defendant's application was premised on the provisions of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010. The conditions are that a stay of execution order is generally granted if the applicant has successfully demonstrated that he may suffer substantial loss unless the order is made, that the application was made without unreasonable delay and that the applicant has provided sufficient security.
9. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"**. It connotes that all three (3) conditions must be met simultaneously. This was also a holding that was made in the case of **Mukoma vs Abuoga (1988) KLR 645** that was relied upon by the Defendant.
10. As this very court held in the case of **Siegfried Busch vs MCSK [2013]eKLR**

**"A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment..."**

11. In the case of **Kenya Shell Limited vs Kibiru & Another [1986] KLR** in which Platt Ag JA observed as follows:-

**"The application for the stay made before the High Court failed because the first of the conditions set out in... was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to pay the money.."**

12. From the circumstances of the case, it did appear to the court that the application herein was filed timeously. However, the Defendant failed to show what loss he would suffer if the application herein was not granted. In fact he did not address the same in his affidavit. The Defendant emphasised how he had an arguable appeal and how his appeal would be rendered nugatory if the current application was not granted.
13. This had no relation to the issue of whether or not the Defendant would suffer substantial loss. Indeed, it is worthy to note that this court is not concerned with whether or not the Defendant has an arguable appeal. That is within the jurisdiction of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules.
14. The issue of whether or not the Plaintiff was holding the Defendant's title documents was not an issue that this court could address and was best left for determination by the Court of Appeal.
15. Having considered the pleadings, affidavit evidence, written submissions and the case law in support of the respective parties' case, the court came to the conclusion that the Defendant did not meet all the conditions of being granted a stay of execution pending appeal. However, the court was alive to the fact that the superior court could have been wrong and that there was need to give parties time to ventilate their issues before the Court of Appeal.
16. As the Plaintiff cannot also be kept out of the fruits of its judgment, the court must balance the interests of all parties herein which would be that the Defendant ought to deposit the entire sum

pending the hearing and determination of the appeal herein to safeguard the Plaintiff's interests.

**DISPOSITION**

17. In the circumstances foregoing, the upshot of this court's ruling was that the Defendant's Notice of Motion dated 13<sup>th</sup> November 2012 and filed on 14<sup>th</sup> November 2012 was allowed in the following terms:-

- a. **THAT there shall be a stay of execution of judgment and decree dated 4<sup>th</sup> October 2012 pending the hearing and determination of the intended appeal on condition that the Defendant shall deposit into an interest earning account in the joint names of the Plaintiff's and Defendant's advocates the entire decretal sum of Kshs 4,706,570.05 within the next sixty (60) days from the date hereof.**
- b. **THAT the Defendant shall file his Record of Appeal at the Court of Appeal within sixty (60) days from the date of this Ruling as most of the proceedings herein have already been typed.**
- c. **THAT in the event, the Defendant shall default on either on Paragraph 17 (a) and (b) herein, the conditional stay of execution shall automatically lapse.**
- d. **THAT the Deputy Registrar is hereby directed to facilitate the typing of the remainder of the proceedings to enable the Defendant file his Record of Appeal at the Court of Appeal.**
- e. **THAT costs shall be in the cause.**

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of April, 2015**

**J. KAMAU**

**JUDGE**