



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 125 OF 2015

BARCLAYS BANK OF KENYA.....APPELLANT

VERSUS

MERCY WANJIRU MAINA.....RESPONDENT

*(An appeal against the judgment and decree of Hon. Ms. Chepseba in Milimani Commercial Court
CMCC No. 3509 of 2013 delivered on 26th February, 2015)*

RULING

1. This is a ruling on the notice of motion dated 27th March, 2015. The Appellant seeks for an order of stay of execution of the judgment entered against it on 26th February, 2015 in Milimani CMCC No. 3509 of 2013 pending hearing and determination of this appeal. The motion is premised on the grounds set out on the body of the application and the facts deponed in the supporting affidavit of Nereah Okanga who is the legal officer of the Appellant. She stated that the decretal amount is substantial and the thirty (30) days stay of execution granted by the trial court on 26th March, 2015 has since lapsed. That the Appellant is apprehensive that the Respondent is likely to commence execution since there are no orders of stay pending appeal. She stated that if the Respondent proceeds with execution, the Appellant shall incur more costs. That this appeal has overwhelming chances of success and that it shall suffer irreparable loss if execution proceeds and the intended appeal succeeds. She pointed out that the Appellant's advocates wrote to the executive officer Milimani Law Courts seeking to be supplied with certified copies of the proceedings and the judgment for purposes of lodging this appeal but that the Appellant has not been supplied with the same and it is apprehensive that it will take a while before the Appellant gets hold of the said typed proceedings and judgment.
2. In response thereto, the Respondent filed a replying affidavit on 16th April, 2015. She contended that the Respondent's statement of defence was struck out by the trial court for raising no triable issues and judgment was entered in her favour. That the Respondent did not appeal against that decision. That the trial court in entering that judgment exercised its discretion and awarded damages. She contended that the appeal is not merited since the Appellant is trying to re-litigate issues that have already been fully and finally determined in Milimani CMCC No. 3509 of 2013. She contested that the Appellant has not demonstrated that it will suffer irreparable loss and that the decretal sum is beyond her reach. The Respondent attached her payslip for the month of February, 2015 to demonstrate that she is in employment. The Respondent contended that the Appellant has not satisfied the requirements for granting an order for stay. She particularly stated that this application was filed a month after the delivery of the judgment sought to be appealed against, that the Appellant stated that the decretal amount is pecuniary in nature and the appeal shall be rendered nugatory if the orders of stay are not granted yet she is financially capable and that the Appellant has not given evidence of substantial loss which would result if the stay is not

granted and that no evidence was furnished to show that execution has commenced or is about to commence. The Respondent in the alternative stated that the Appellant should deposit the decretal sum plus interest as stated at paragraph 6 of the supporting affidavit in a joint interest earning account in the names of the parties' advocates' firm names within 14 days from the date of the grant of the orders.

3. The Appellant filed the further replying affidavit sworn by Nereah Okanga. She contested that the mistake was on the Respondent that the alleged misfortune befell her and should not put all blame to the Appellant. That the appeal raises triable issues, that the Appellant is apprehensive that by the time the appeal is heard and determined, the Respondent will have retired or will be about to retire and since she has no further income, it would be difficult to recover the money. It was stated that it is the right of a party to appeal the decision if the lower court and the High Court has discretion to stay execution of the judgment and decree on conditions it may deem fit, that the Appellant has demonstrated willingness to furnish security and that it stands to suffer irreparable loss if the orders sought are not granted.
4. This application proceeded ex parte as there was no appearance for the Respondent. Learned Counsel Mr. Mare for the Appellant made oral submissions. He relied on the grounds set out on the face of the application and the facts deponed in the supporting and further affidavit and cited **Juma Ali Mbwana & another v. Umi Omar Musa (2014) eKLR.**
5. I have considered the depositions and submissions tendered in respect of the application. This being an application for stay of execution three conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 have to be met by an applicant thus:-

- i. that the application has been brought timeously;
- ii. that if the stay orders are not granted he/she will suffer substantial loss; and
- iii. must give security of costs.

6. An application for stay should be filed within the statutory time given for lodging an appeal in the High Court, that is, within thirty (30) days from the date of delivery of judgment. The ruling that the Appellant intends to appeal against was delivered on 26th February, 2015. This application was filed on 27th March, 2015. Clearly, the application herein was filed without delay.
7. On substantial loss, the Appellant stated that the Respondent's means are meagre and it is apprehensive that the Respondent may not be able to recover the sums paid if the appeal succeeds. In response thereto the Respondent annexed her payslip. The Appellant in response argued that by the time the appeal is heard and determined, the Respondent will have retired or will be about to retire and since she has no further income, it would be difficult to recover the money. The payslip produced by the Respondent is for the month of February, 2015. It indicates that the Respondent earns a net salary of KShs. 41,078.80 and shall retire on 31st August, 2020. That is to say the Respondent has five (5) more years to go. Although, the Respondent has furnished evidence of her financial capability, I am not convinced that with her net income, she would be able to refund the decretal sum in the event the appeal succeeds for the reason that the decretal sum is a colossal sum of KShs. 1,056,963/= and she must be having other responsibilities too. I find that the Appellant has satisfied the second requirement.
8. The Appellant expressed willingness to furnish security and has satisfied the third condition. In the circumstances, I find and hold that the Appellant has satisfied the essentials for grant of stay of execution pending appeal. Accordingly, the application is allowed in the following terms:-
 - a. The Appellant is hereby granted stay of execution of the judgment entered against it on 26th February, 2015 in Milimani CMCC No. 3509 of 2013 pending hearing and determination of this appeal.
 - b. The Appellant to deposit the decretal sum of KShs. 1,056,963/= in a joint interest earning account in the names of the parties' firm of advocates within the next thirty (30) days from the date of this ruling failure to which the orders herein shall stand vacated.
 - c. **Costs shall abide the outcome of the appeal.**

Date Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Mukasa for the Appellant

N/A for Lempaa for the Respondent