



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 1175 OF 2002

**NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES.....PLAINTIFF**

VERSUS

CENTRAL BANK OF KENYA1ST DEFENDANT
SHAH MUNGE & PARTNERS LIMITED.....2ND DEFENDANT
BEN MTUWETA.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Notice of Motion dated and filed on 17th September 2014 was brought under the provisions of Sections 3A, 75 of the Civil Procedure Act, Order 22 Rule 5, Order 42 Rule 13(4), Order 51 of the Civil Procedure Rules and all enabling provisions of the law. Prayer No (1) was spent. It sought for the following orders:-
 1. **Spent.**
 2. **THAT the Court do stay execution of the Decree dated 26th June 2014 pending hearing and determination of the intended appeal.**
 3. **THAT the costs of this application be provided for.**

THE 2ND DEFENDANT'S CASE

2. The application was supported by the Affidavit of John Munge that was sworn on 17th September 2015. The 2nd Defendant's Written and Further Written Submissions dated 22nd April 2015 and 3rd July 2015 were filed on 24th April 2015 and 3rd July 2015 respectively.
3. On 27th October 2009, Judgment was entered against the 2nd Defendant herein for the sum of Kshs 258,133,333/= together with interest thereon at twelve (12%) per cent from November 2002 and costs. The Decree was issued on 26th June 2014. Being dissatisfied with the said Judgment, the 2nd Defendant HAD filed a Notice of Appeal dated 28th October 2009 and applied for certified copies of the proceedings herein on the same date.

4. It was the 2nd Defendant's averment that its appeal had reasonable chance of success and that the Plaintiff would not be prejudiced if a stay of execution was granted. It stated that there had been no inordinate delay in bringing its present application and contended that it was ready and willing to abide by any conditions
5. It was apprehensive that the Plaintiff would execute against it by attaching its shares/assets in the Nairobi Security Exchange (NSE)Limited and therefore urged the court to grant it a stay of execution pending its intended appeal as it would be prejudiced if the said stay was not granted and its appeal rendered academic.

THE PLAINTIFF'S CASE

6. In response to the said application, Hellen Chepkorir Koech, the Plaintiff's Legal Officer, swore a Replying Affidavit on 1st October 2014. It was filed on 2nd October 2014. The Plaintiff's Grounds of Opposition were also dated 1st October 2014 and filed on 2nd October 2014. Its Written Submissions were dated and filed on 18th May 2015.
7. The Plaintiff contended that there had been inordinate delay in filing the present application, judgment having been delivered on 23rd October 2009. It pointed out that five (5) years had since lapsed before filing of the present application for which the 2nd Defendant had not given any explanation for the said delay.
8. It also contended that the 2nd Defendant was deemed to have withdrawn the appeal having failed to take any further action after filing the said Notice of Appeal on 28th October 2009 and also failing to follow up the typing of the proceedings it applied for on the same date only doing so five (5) years later, on 3rd June 2014 when it was in the process of extracting a decree for purposes of commencing execution proceedings.
9. It was its further averment that the 2nd Defendant had been involved in transactions to sell its only known asset at the NSE which it said was not even sufficient to satisfy its decretal sum, with a view to denying it a right to recover the said decretal sum.
10. It was emphatic that the present application was meant to steal a match against it and obstruct justice and therefore urged the court to dismiss the same with costs to it.
11. Its Grounds of Opposition were generally as follows:-
 - a. **There had been inordinate delay in lodging the appeal and the said appeal was deemed to have been withdrawn.**
 - b. **The application was an abuse of the court process.**
 - c. **By selling and disposing of its only asset before settling the decretal sum, the 2nd Defendant was attempting to steal a match and therefore obstruct justice in the case herein.**

LEGAL ANALYSIS

12. The 2nd Defendant's application was not 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.
13. 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.
14. Instead, it premised its application under the provisions of Section 3A and 75 of the Civil Procedure Act, Order 22 Rule 5 and Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 that had absolutely nothing to do with an application for a stay of execution of appeal pending appeal.
15. Section 75 of the Civil Procedure Rules deals with orders from which appeals lie. Order 22 Rule 5 of the Civil Procedure Rules deals with the court receiving copies of a decree to file the same without proof while Order 42 Rule 13 (4) of the said Rules concerns itself with documents a judge should satisfy himself to be in the court record before giving directions for the hearing of an

- appeal.
16. Similarly, Section 3A of the Civil Procedure Act gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In this regard, the 2nd Defendant referred the court to the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263** where the court invoked its jurisdiction and ordered the preservation of the status quo pending the hearing and determination of the appeal.
17. A perusal of this case shows that the granting of such an order is not a matter of course. It is granted upon certain conditions pre-existing. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

18. In addition, the conditions for granting a stay of execution in the Court of Appeal are also clearly different from those required by the High Court. As could be seen in the cases of **Chris Munga N Bichage vs Richard Nyagaka Tongi & 2 Others [2013] eKLR** and **Kenya Kazi Security Services Limited vs Kenya National Privates Security Workers Union [2013] eKLR** that were relied upon by the 2nd Defendant, conditions for a stay of execution pending appeal are that the Court of Appeal must be satisfied that the intended appeal is arguable and that if a stay is not granted, it will render the appeal nugatory.
19. The case of **Republic vs The Commissioner for Investigations & Enforcement Ex parte Wananchi Group Kenya Limited [2014] eKLR** also relied upon by the 2nd Defendant was distinguishable from the facts of this case as the same was a Judicial review matter where the circumstances for granting a stay in respect of administrative decisions and the conditions of a stay thereof, are clearly distinct and separate from those in commercial or civil cases.
20. The 2nd Defendant's submissions that it filed its present application timeously as the Decree was issued on 26th June 2014 does appear far-fetched bearing in mind that it did not have to await the drawing of a decree in June 2014 before seeking a stay of execution. Indeed, under Order 42 Rule 6(5) of the Civil Procedure Rules, an application for stay of execution may be made informally immediately following the delivery of the judgment or ruling, a position that was correctly articulated by the Plaintiff herein.
21. The 2nd Defendant's reliance on the case of **Utalii Transport Company & 3 Others vs NIC Bank [2014] eKLR** would not assist it as it did not even remotely demonstrate the cause of the delay. Again as was rightly argued by the Plaintiff, the 2nd Defendant did not furnish this court with any plausible explanation to demonstrate why it did not file the present application timeously.
22. Indeed, the court saw no sufficient reason or cause that prevented or would have prevented the 2nd Defendant from filing its present application during the five (5) year period that the Plaintiff did not execute its judgment even if it did not informally apply for a stay of execution pending appeal at the time judgment was delivered in 2009.
23. The questions of whether or not the delay herein was intentional, whether or not the present application was an abuse of the court process, whether or not the delay would dictate in the circumstances, lenient exercise of the court's discretion, would therefore not arise as had been suggested by the 2nd Defendant. Clearly, the delay herein was unexplained, inordinate and in the circumstances unjustifiable and prejudicial to the Plaintiff.
24. Although a superior court must always recognise and acknowledge possibility that its decision for a stay of execution could be reversed on appeal as was held in case of **Siegfried Busch vs MCSK [2013] eKLR**, the court should also weigh this against the success of a litigant who should not be kept away from the fruits of his judgment.
25. In the case of **Kenya Shell Limited vs Kibiru & Another [1986] KLR**, Platt Ag JA did also make similar observations when he stated 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..”

26. For the foregoing reasons, having considered the pleadings, the affidavit evident, written submissions and the case law that was relied upon by the parties herein, the court found that the 2nd Defendant had not met the threshold of being granted a stay of execution pending the hearing and determination of appeal.
27. From the circumstances of the case, it was clear that the 2nd Defendant did not demonstrate that the Plaintiff would not be able to repay the decretal sum if its appeal was successful. Save for contending that the decretal sum was colossal, it also failed to show what loss it would suffer if the application herein was not granted. In fact, it did not address the said issue in its Supporting Affidavit.
28. As the Plaintiff cannot also be kept out of the fruits of its judgment and the court must balance the interests of all parties herein, it found that this was not a suitable case for it to exercise its discretion and to grant the orders the 2nd Defendant had sought.
29. Having said so, even without considering other factors, the mere fact that there was inordinate delay of about five (5) years in filing the application herein was sufficient reason to dissuade this court from granting the 2nd Defendant the orders it had sought herein.
30. The 2nd Defendant is, however, at liberty to make its application for a stay of execution pending appeal at the Court of Appeal. The question of whether or not the 2nd Defendant could be deemed to have withdrawn the appeal for failure to file a Record of Appeal was an issue to be addressed by the Court of Appeal and not by this court.
31. The court did not also want to enter into the discourse as to whether or not the 2nd Defendant had tried to dispose of its assets for the reason that the Plaintiff did not furnish the court with any evidence to prove the same.

DISPOSITION

32. In the circumstances foregoing, the upshot of this court's ruling was that the 2nd Defendant's Notice of Motion dated and filed on 17th September 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff.
33. It is so ordered.

DATED and SIGNED at NAIROBI this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED AT NAIROBI this 25th day of September 2015

F. AMIN

JUDGE