



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 484 OF 2015

BERNARD MUIA and BEATRICE NDUME NTHUKU

T/A AS TRINARDIN INVESTMENTS.....APPELLANT/APPLICANT

VERSUS

AFRICAN BANKING CORPORATION.....RESPONDENT

RULING

1. By a Notice of Motion dated 1st October, 2015 and filed herein on 2nd October, 2015 by the Appellant/Applicant, the Applicant seeks an Order of Stay of Execution pending the hearing and determination of the appeal. The application is premised on the grounds set out therein, that the intended appeal is arguable with overwhelming prospects of success, and that if the stay is not granted the Respondent threatens to levy execution against the Applicant.
2. The Applicant has attached the decree which is sought to be executed. It is for a sum of Kshs.1,329,349.40/= plus costs and interest amounting to Kshs.142,413.74/=.
3. The application is supported by affidavit of **BERNARD MUHIA NTHUKU** sworn and filed herein on 2nd October, 2015.
4. The application is opposed through the **Replying Affidavit of BRENDA MARANGU** sworn and filed herein on 12th October, 2015.
5. In opposition to the application, the Respondent states that the Applicant ought to have applied for stay in the trial court. That failure notwithstanding, the Respondent states further that the application is filed after inordinate delay. In any event, the Respondent's case is that the Applicant has not disclosed the prejudice it stands to suffer if the stay is not granted. The Respondent states that the Applicant has not satisfied the conditions under Order 42 upon which a Stay of Execution pending hearing and determination of appeal may be granted. Such conditions included the issuance of security.
6. Parties made oral submissions in court which I have considered together with this application. The only issue I raise for determination is whether this court can under Order 42 grant stay.
7. It is trite law that a Judgement Creditor has the right to enjoy the fruits of his or her judgment and should not be unduly fettered in such enjoyment. Where that right is to be interfered with, the Applicant must show that he or she is likely to suffer loss if the application is not granted. Further, the court may issue such an Order and at the same time direct that the Applicant provides such security as may be necessary in the circumstances.
8. I have considered the decree herein. It is a money decree which the Respondent bank can repay

should the intended appeal succeed. So there should be no argument that the Applicant will suffer any loss. However, even banks go under, and in Kenya we have living testimonies of that fact.

9. At the end, the decision to grant stay of execution and on what terms is at the discretion of the court. I have considered the circumstances of this case. I will allow this application on the condition that security for the decree is provided in an amount which is reasonable. Accordingly, I make the following orders.

- a. **A Stay of Execution of the Chief's Magistrate's Court's Decree made on 21st August 2015 is hereby issued pending the hearing and determination of the Applicant's High Court Appeal No.448 of 2015.**
- b. **Order (a) above shall take effect subject to the Applicant paying to the Respondent a sum of Kshs.500,000/= being part of the aforesaid decree, within 10 days from the date hereof.**
- c. **The costs of this application shall be for the Respondent.**

Orders accordingly.

SIGNED,

E. K. O. OGOLA

JUDGE

READ, DELIVERED AND DATED AT NAIROBI

THIS 11th DAY OF DECEMBER 2015.

C. KARIUKI

JUDGE

PRESENT:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent

Teresia - Court Clerk