



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 158 OF 2005

DR ZULFIQUAR ALI JAFFERY.....PLAINTIFF

VERSUS

ABC BANK LIMITED..... DEFENDANT

RULING

1. The Defendants' Notice of Motion application dated 16th April 2013 and filed on 17th April 2013 was brought under the provisions of Section 1A & 1B of the Civil Procedure Act, Cap 21 and Oder 42 Rule 6 (2) and all other enabling provisions of the law. The said application sought a stay of execution of the judgment delivered on 4th October 2012 by Musinga J (as he then was) pending the filing and determination of the intended appeal.
2. The said application was supported by the Affidavit of Gregory Omusolo which was sworn on 16th April 2013. The Defendant's case was that it was in the interests of justice that the said stay of execution be allowed because the decretal amount of Kshs 22,014,459.55 was colossal and that if it succeeded on appeal, it would not be able to recover the monies from the Plaintiff thus rendering its appeal nugatory. The Defendant indicated that it was ready and willing to offer such security as the court would order.
3. It is not clear when his Further Affidavit filed on 10th May 2013 was sworn as the same was undated and it did not bear a stamp for the Commissioner for Oaths to confirm that indeed it had been sworn before a Commissioner for Oaths. For all purposes and intents, it does not have any probative or evidentiary value and I will therefore not consider the same or the submissions in respect of the said Further Affidavit.
4. On his part, the Plaintiff swore a Replying Affidavit on 2nd May 2013. He deponed that the judgment herein was entered after the learned judge evaluated the evidence tendered by both parties. Further, he stated that the Defendant duly approved the decree herein. He asked that he should be paid the monies which the Defendant had failed to pay him since diverse dates in 2000, 2004 and 2005.
5. It was his case that he was financially capable of repaying the decretal sum in the event the Defendant succeeded in its appeal. He contended that the stay of execution should not be granted as the Defendant had not demonstrated what substantial loss it would suffer. In support thereof, on 2nd May 2013, Lilian Jaffery, the Plaintiff's wife swore an Affidavit confirming that the Matrimonial Property she owned together with the Plaintiff would be sufficient proof that the

- Plaintiff would be able to refund the decretal sum in the event the Defendant succeeded in its appeal.
6. In its written submissions dated and filed on 15th May 2013, the Defendant argued that it had brought the application herein timeously. Judgment was delivered on 4th October 2012, the Notice of Appeal was filed on 9th October 2012 while the present application was filed on 17th April 2013.
 7. It relied on the case of **Kampala in Tropical Commodities & others vs International Credit Bank Limited (in liquidation) EALR (2004) 2 331** where the court stated that substantial loss did not represent any particular amount or size but rather it was a qualitative concept.
 8. In further support of its submission on the likelihood of it suffering substantial loss, the Defendant cited **Mulla on Civil Procedure Code Vol III on page 2570** and submitted that the court should not accept a security whose enforcement could lead to protracted litigation.
 9. The Defendant also argued that any security to be offered was not intended to stifle an appellant but rather the same was to ensure that the appeal was not prejudiced in any way but it was for the sole purpose of demonstrating that the decretal sum would be available as at time the same would be required. It proposed to give a bank guarantee as security. It relied on the case of **Rosengrens Limited vs Safe Deposit Centres Limited [1984] 3 All ER** in which the holding was that the deposit of such security was to be given in a way that was least disadvantageous to the person giving it.
 10. The Defendant acknowledged its right to appeal and the Plaintiff's right to access the proceeds of the judgment. It said that this was a position that was considered and acknowledged by the court in **Bungoma HC Misc Appl No 42 of 2011 James Wangalwa & Another vs Agnes Naliaka Cheseto**.
 11. On 21st May 2013, the Plaintiff filed his written submissions on the same date. He argued that the security offered by his wife was recognised by Section 92 of the Civil Procedure Act Cap 21 (laws of Kenya) and should therefore be accepted by the court. The said Section provides as follows:-

“Where any person has become liable as surety:-

- a. **for the performance of any decree or any part thereof;**
- b. **for the restitution of any property taken in execution of a decree; or**
- c. **for the payment of any money, or for the fulfillment of any condition imposed on any person, under an obligation on any person, under an order of the court in any suit or any proceeding consequent thereon,**

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall for the purposes of appeal be deemed to be a party within the meaning of Section 34.”

12. The Plaintiff also submitted that there was a difference between substantial and irreparable loss and in any event, the Defendant had not demonstrated how it would suffer substantial loss. To support its argument, he relied on the case of **Andrew Kuria Njuguna vs Rose Kuria [2010] eKLR** and **Carilus Amuono & Another vs Godfrey Nyagindi [2008] eKLR**.
13. It was also his contention that there was undue delay in filing the application herein as the execution process had commenced and that the Defendant had not shown that he would be incapable of refunding the decretal sum in the event it succeeded in its appeal.
14. The Plaintiff was apprehensive that the ordering by the court for the monies to be put in an Escrow Account would cause him to lose on capital gains which he could have made if he had invested the same in immovable property or shares. He distinguished the case of **Gitahi & Another vs Waruongo [1988] KLR 621** which had a similar holding as in **Rosengrens Ltd vs Safe Deposit Centres Ltd (Supra)** also cited by the Defendant and pointed out that it did not address the issue of loss of opportunity to invest and capital gains. He averred that this was a crucial factor for consideration in today's economic factors. He relied on the cases of **Gitahi & Another vs Waruongo (Supra)** and **Tabro Transporters Limited vs Absalom Lumbasi [2012] eKLR** where the courts ordered that half the decretal sum be paid within fourteen (14)

days and the balance secured by bank guarantee. He therefore prayed for the dismissal of the Defendant's application.

15. This was an observation the court made in the case of **James Wangalwa & Another vs Agnes Naliaka (2012) eKLR** when it stated as follows:-

“...the process of execution...by itself does not amount to substantial loss.... This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party.”

16. I have carefully analysed the parties' submissions and wish to point out right at the outset that the process of execution does not by itself amount to substantial loss. It must always be stopped once it is commenced to give the judgment debtor his right to go on appeal. If that were so, delay of realising the fruits of judgment of a decree holders would discourage parties from engaging in meaningful business transactions. An order for stay of execution pending appeal therefore is not automatic and must therefore be granted in the clearest of the cases.

17. Both parties were in agreement that the threshold requirements to be satisfied for an application under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 are that:-

- a. **Substantial loss may result to the applicant unless the order was made;**
- b. **The application was made without unreasonable delay; and**
- c. **Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

18. These ingredients are inseparable and an applying party must satisfy all of them before he can be granted a stay of execution pending appeal. I will therefore look at each ingredient to establish whether or not the Defendant has satisfied the same. The non-severability of the three (3) conditions aforesaid were reinforced in the case of **Mukuma vs Abuoga [1988] KLR 645** which I entirely agree with.

19. I have considered the Plaintiff's argument that although he is an individual, he was a person of means. While his wife could be deemed as a surety within the meaning of Section 92 of the Civil Procedure Act, I must take cognisance of the fact that the property that the Plaintiff is offering as security is a matrimonial home. Realisation of matrimonial property is a complex matter bearing in mind the provisions of the land law legislation and the impending Matrimonial Bill. If the said Bill was to be passed, the court is of the view that it would elongate the Defendant's process of realising the said property in the event it were to succeed on appeal as such sale would be subject to other laws. This may be speculative at this stage but it can by no means be ignored. The court therefore finds that security of a matrimonial home would not be sufficient proof that the Plaintiff would be able to refund the decretal sum in the event the Defendant was to succeed on it appeal.

20. I have borne in mind the holding 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..”

21. In that regard, I wish to associate myself with the holding in the case of **Royal Reserve Management Company & Another vs Gerald Mahinda & Another eKLR [2008]** where Okwengu J (as she then was) affirmed that a sum of Kshs 1,000,000/= was not a small amount having noted that the Respondents therein had not indicated their means so as to justify their contention that they were in a position to refund the money and **Trustees Catholic Diocese of Murang'a & Another vs Rev. Samuel Ngugu & Another eKLR [2008]** where the court found that a sum of Kshs 2,500,000/= was rather a substantial amount for an individual.

22. In the circumstances foregoing, in the absence of any other sufficient proof, I find the sum of Kshs 22,014,459.55 to be colossal and that the Defendant was likely to suffer substantial loss in the event it was to succeed on appeal. Accordingly, I find that the Defendant has succeeded in proving

- the first condition under Order 42 Rules 6 of the Civil Procedure Rules, 2010.
23. On the issue of the timeous filing of the application herein, I have noted, as was correctly stated by the Plaintiff, that the Defendant filed the application herein after execution had commenced. While it was not necessary for the Defendant to have waited for the taxation of the costs before it could file the present application, it would be important to consider the chronological events leading to the filing of the said application to establish whether or not there was any delay as has been alleged by the Plaintiff or at all.
 24. The Defendant filed a Notice of Appeal on 11th October 2012 which was seven (7) days after the judgment was delivered by the learned judge. The Plaintiff's Bill of Costs was lodged on 22nd November 2012 and the ruling delivered on 19th March 2013. The present application was filed on 17th April 2013. The Defendant submitted that it could not have filed application earlier than that time because the file was under the custody of Hon Nyakundi who was the taxing master in the matter. In view of the fact that this was a fact that was not rebutted by the Plaintiff, I find that there was no undue delay in the Defendant filing the said application and the Defendant has thus satisfied the second condition under Order 42 Rule 6 of the Civil Procedure Rules.
 25. In respect of the third condition aforesaid, I have had due regard to Paragraph 16 (a) of the Defendant's Supporting Affidavit in which it had Defendant attached a summary of its audited financials as at 31st December 2012 showing that it had made a profit of Kshs 557,000,000/= and that it would be more than able to satisfy the decretal sum in the event it succeeded on appeal. The Plaintiff submitted that it had been kept away from fruits of judgment for over twelve (12) years which had breached his constitutional right to property and that if the decretal sum was not paid to him, he would continue to suffer loss by being kept away from the fruits of his judgment.
 26. This is not sitting on appeal to decide whether or not the Defendant's appeal was merited or not. That is clearly within the jurisdiction of the Court of Appeal to consider and determine. However, 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.
 27. In cases such as this, the court is called upon to ensure that no party suffers prejudice. Bearing in mind that the Defendant posted huge profit as seen hereinabove, I find that it would suffer no loss by depositing the entire decretal amount in an interest earning account as it is a sound financial institution. I therefore find that the proposed security of a bank guarantee would not be adequate security in the circumstances herein. As the Plaintiff is of the view that he would have been entitled to his monies over twelve (12) years ago, it is only just and fair that such monies start are accruing interest while the Defendant is exercising its constitutional right to appeal against the judgment of Musunga J (as he then was) so as to safeguard his interests in the event the Defendant does not to succeed in its appeal.
 28. After considering the circumstances of this case, I find that this is a suitable case where I should grant a stay of execution pending appeal as the Defendant has demonstrated that it has met all the three (3) conditions for the granting of a stay of execution pending appeal under Order 42 Rule of the Civil Procedure Rules, 2010.
 29. Accordingly, I hereby grant Prayer 3 of the Defendant's Notice of Motion application dated 16th April 2013 and filed on 17th April 2013 on condition that the Defendant shall deposit into a joint interest earning account in its advocates' name and that of Walker Kontos Advocates for the Plaintiff the sum of Kshs 24,112,313.50 comprising of Kshs 22,014, 459.55 and costs of Kshs 2,097, 853.95 as per the Decree and Certificate of Costs issued and dated 4th October 2012 and 27th March 2013 respectively. I hereby direct that the said sum shall be deposited as aforesaid, in a reputable bank other than the Defendant bank, within thirty (30) days from the date of this ruling failing which the stay of execution pending the filing and determination of the intended appeal in the Court of Appeal will automatically lapse.
 30. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of August 2013

J. KAMAU

JUDGE