REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 81 OF 2008

MICRO ENTERPRISES SUPPORT PROGRAMME

TRUST REGISTERED TRUSTEES …… PLAINTIFF

VERSUS

MAYFORD SAVINGS & CREDIT

COOPERATIVE SOCIETY LIMITED ……..…….. 1ST DEFENDANT

GEOFFREY WACHIRA MAHINDA ……..…….. 2ND DEFENDANT

BENEDICT KARIUKI NDERITU ……..…….. 3RD DEFENDANT

DR. JOHN KARUNGAI NYAMU ……..…… 4TH DEFENDANT

PETER CIIRA WABERE ……..……. 5TH DEFENDANT

ANDREW MATINDI KAMWAGA ……..……. 6TH DEFENDANT

R U L I N G

1. Before this Court is the 4th Defendant's Notice of Motion dated 18th June 2013. The same was brought under Certificate of Urgency under the provisions of **Order 42 rule 6 and Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application seeks the stay of the execution of the Judgement as against the 4th Defendant, delivered herein on 20th December 2012 by **Mutava J.** The Application is brought and supported on 10 Grounds as follows:

"A. On 20.12.2012 this Honourable Court (Hon. Mr. Justice J. M. Mutava) delivered a judgment allowing the Plaintiff's suit herein.

B. By the said judgment the Defendants were jointly and severally ordered to pay to the Plaintiff the sum of Kshs. 3,312,844.59 together with interest thereon at the rate of 12% p.a. with effect from 1st December 2006 until payment in full and the costs of the suit.

C. The 4th Defendant is dissatisfied with the said judgment and intends to exercise his right

of appeal to appeal to the Court of Appeal against the judgment.

D. Notice of Appeal has already been filed and served and proceedings have been requested for.

E. The 4th Defendant's intended appeal stands high chances of success in the Court of Appeal.

F. The 4th Defendant is anxious that the Plaintiff will commence execution proceedings at any time as it settled the decree with referring the same to the Applicant's advocates for approval and is in the process of taxing costs.

G. The 4th Defendant stands to suffer substantial loss and damage if execution proceeds.

H. This application has been made without delay.

I. The 4th Defendant is ready to abide by any condition that the court may impose for the due performance of the decree.

J. It is the interests of justice that the prayers sought herein be granted".

2. The Application was supported by the Affidavit of the 4th Defendant which repeated the Grounds in support of the Application but also detailed the filing and service of his Notice of Appeal and the request for copies of the proceedings herein. The 4th Defendant had been advised by his advocates on record that the Plaintiff without any reference to them had extracted the Decree herein irregularly and contrary to the provisions of **Order 21 rule 8 (2)** of the *Civil Procedure Rules, 2010*. He also attached to his said Affidavit a copy of his proposed Memorandum of Appeal detailing 13 grounds of Appeal as regards the Judge's judgement delivered on 22nd November 2012.
3. The Plaintiff filed Grounds of Opposition dated 24th June 2013 which detailed as follows:

"1. The Applicant has not demonstrated that he is likely to suffer substantial loss unless the orders of stay are granted as required by Order 42 rule 6 (2) (a) of the Civil Procedure Rules and is therefore undeserving of the order sought.

2. The Applicant cannot in any event suffer substantial loss and damage if the Applicant proceeds to settle the decree herein as the judgment the execution of which is sought to be stayed is a money decree that is quantifiable. The Plaintiff, on the other hand is a money lender of repute capable of readily refunding any monies paid by the Applicant if he succeeds on appeal.

3. The Applicant has not demonstrated that he has given such security as is adequate for the due satisfaction/performance of the decree herein as required by Order 42 rule 6 (2) (b) of the Civil Procedure Rules and is therefore undeserving of the orders sought.

4. The intended appeal is:

a. **A non-starter as no proper Notice of Appeal has been filed; and**

b. **In any event, not arguable and lacks any probability of success and as such the order sought, if granted, would be in vain.**

5. The Applicant is guilty of unreasonable delay as the Judgment was delivered on 20th December 2012. The application is thus a gross abuse of the court process".

4. The 4th Defendant filed his submissions herein on 12th of July 2013 in which he expressed the view that his intended appeal stood high chances of success and that he was anxious that the Plaintiff herein could commence execution at any time. He had reached this collusion as a result of the Plaintiff extracting the Decree arising out of the judgement herein in an irregular manner contrary to the provisions of **Order 21 rule 8 (2)** of the *Civil Procedure Rules* as the Plaintiff's advocates had not referred the draft Decree to the 4th Defendant's advocates for approval. The 4th Defendant then summed up the Grounds of Opposition filed by the Plaintiff and went on to quote **Order 42 rule 6 (1) and (2)**. Thereafter the 4th Defendant referred the Court to the following authorities – **Butt v Rent Restriction Tribunal (1982) KLR 417, Wilson v Church (No. 2) 12 ChD (1879) 454, Oraro & Rachier v Cooperative Bank of Kenya Ltd (1999) 1 EA 236, Nduhiu Gitahi & Anor. v Ann Wambui Warugongo (1982) 2 KAR 100, Omar Shariff Abdalla v Corporate Insurance Co. Ltd (2006) eKLR** and finally as regards delay in the presentation of the Application to Court **Harit Sheth Advocate v Shamas Charania (2010) eKLR**. The 4th Defendant emphasised that the discretion of this Court to grant a stay of execution should only be exercised for "sufficient cause". It was not disputed that he had decided to exercise his undoubted right of appeal. On the submission of the Plaintiff that the Notice of Appeal was not proper, the 4th Defendant maintained that such was for the Court of Appeal to determine. He also maintained that if execution was levied in the Judgement amount plus interest thereon at 12% per annum from 1st December 2006 plus costs would amount to a very substantial sum. He maintained that such would cripple him both in his life and his business. The 4th Defendant submitted that the likelihood of sustaining serious loss amounted to "sufficient cause" within the meaning of the Rules. The 4th Defendant maintained that he was ready to abide by any condition that this Court may impose for the grant of the requested stay. The Court, in ordering security to be given, should bear in mind that the 4th Defendant should be allowed to proceed with his appeal but should not make it difficult for him to do so. Further, the 4th Defendant maintained that the draft Memorandum of Appeal annexed to the Supporting Affidavit herein showed that some serious issues will be raised in the intended appeal. Finally, on the question of unreasonable delay, the 4th Defendant submitted that Judgement had been delivered on 20th December 2012 and this Application was filed on 20th June 2013. However, at the time of filing, the process for the execution of the Decree had not been commenced. He submitted that his said Application had been made timeously.
5. In its said submissions filed herein on 19th July 2013, the Plaintiff summed up the Application before Court and set out in full its Grounds of Opposition thereto as above. With regard to the applicable law, the Plaintiff submitted that the Notice of Appeal was defective in that it was unclear therefrom which party was evincing an intention to appeal. It maintained that in the case of **Pepco Construction Company Ltd v Carter & Sons Civil Application No. 80 of 1999 (unreported)** the Court of Appeal had held *inter-alia* that an error in the Notice of Appeal rendered the same incurably defective and invalid. Thereafter, the Plaintiff referred the Court to the authorities of **Halai & Anor. v Thornton & Turpin (1963) Ltd (1990) KLR 365, Ochwanyi & 20 Ors v Board of Trustees Church of God in The East Africa (2008) eKLR, Kenya Shell Ltd v Kibiru & Anor. (1986) KLR 410** and **Equity Bank Ltd v Taiga Adams Company Ltd (2006) e KLR**. Apart from the point as regards the Notice of Appeal being deficient, the Plaintiff pointed to the fact that neither the 4th Defendant nor indeed any of the other Defendants had offered any evidence to rebut the Plaintiff's evidence at the trial. Without its own evidence on record, the 4th Defendant's intended Appeal could not, in the Plaintiff's opinion, be said to be arguable in the circumstances. It also maintained that the 4th Defendant had not demonstrated that he would suffer any loss if a stay of execution was not granted. In the Plaintiff's view, the onus that fell upon the 4th Defendant was that he was expected to demonstrate that if a stay of execution was denied and his appeal is successful, he would be unable to refund/pay the decretal amount.
6. **Order 22 rule 22** of the *Civil Procedure Rules, 2010* reads as follows:

"22. 22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to

stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from; or impose such conditions upon, the judgment-debtor as it thinks fit".

Of course, the principal authority as to the granting of a stay of execution pending Appeal is the Ruling of **Madan JA** (as he then was) in the case of **Butt v Rent Restriction Tribunal** where the learned Judge found:

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at page 459. In the same case, Cotton LJ said at page 458:

'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory'.

Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Chesire County Council [1974] 2 All ER 448 at page 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the Attorney General v Emerson and Others 24 QBD (1889) 56 at 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal".

7. Apart from the **Butt** authority, the 4th Defendant has detailed in the authorities that he has quoted before Court a number of Court of Appeal decisions as regards stay of execution pending Appeal. All recognise the principles upon which that Court grants a stay are different to what this Court may consider. I concur with the finding of **Njagi J.** in the **Omar Shariff Abdalla** case when he found:

"That line of argument endears itself to the Court of Appeal pursuant to the Rules of that court. It is within the province of the Court of Appeal to pronounce whether an intended appeal raises arguable points. For the purpose of Order XLI rule 4 (1) with which this court is concerned, the court has jurisdiction to grant a stay of execution for 'sufficient cause'".

Similarly, the Court of Appeal's finding in the **Halai & Anor** case (supra) is indicative when in reference to the case of **Rasiklal S. Patel v Parklands Properties Ltd Civil Appl. No. NAI 38 of 1980** it found:

"…. it must have regard to the requirements of Order XLI rule 4 (2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters. Firstly, that substantial loss may result to the applicant unless the application is granted, which *prima facie* means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order."

8. I have perused the Notice of Appeal dated 24th January 2013. It is stated to be in respect of the 5th

Defendant herein but does specify the name of **Dr. John Karungai Nyamu** who is listed as the 4th Defendant. His advocates did write to the Deputy Registrar of this Court regretting the error in that the Notice in that it should have specified dissatisfaction (with the said Judgment) on the part of the 4th Defendant not the 5th Defendant. Does this make the Notice defective? In this regard, I agree with the submission of the 4th Defendant that such is not for this Court to decide upon but for the Court of Appeal to whom the Appeal is proferred. Reverting therefore to the 2 requirements as per the **Halai & Anor.** case (supra), it was the Plaintiff's submission that the 4th Defendant had not demonstrated before Court that he was likely to suffer substantial loss unless the orders of stay were granted. All that the 4th Defendant has stated in this regard was at paragraph 15 of the Supporting Affidavit which reads:

"THAT if the Plaintiff proceeds with the execution of the decree herein I will suffer substantial loss as the decretal amount with interest and costs is quite substantial as deponed in paragraph 5 herein above."

In my view, just because the Judgement sum amounts to Shs. 3,312,844.59 (together with interest at 12 percent per annum thereon since 1st of December 2006 plus costs) is considered by the 4th Defendant as substantial, does not indicate that he would not be in a position to pay should the Appeal go against him. (See the observation of **Mutungi J.** in the **Equity Bank** case (supra) in which the learned Judge stated:

"The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay – reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant."

9. Further, apart from the 2 conditions set out in the **Halai & Anor** case, I take cognizance of the finding in the **Carter & Sons Ltd v Deposit Protection Fund Board & 2 Ors Civil Appeal No. 291 of 1997 (unreported)** as referred to in the **Equity Bank** case in which the Court of Appeal detailed:

"…… the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

The 4th Defendant has given no details as to what security he would be prepared to put up as a condition of the stay Order being granted. Indeed, his submission is merely that the advocates for the Plaintiff did not follow the correct procedure under the provisions of **Order 21 rule 8 (2)** of the *Civil Procedure Rules* when extracting the Decree herein. That rule is not mandatory. It is the registrar that has to be satisfied that the Decree is drawn up in accordance with the Judgement.

10. The Plaintiff has complained in its submissions, that the Application for stay made by the 4th Defendant herein has been made with unreasonable delay. The Notice of Appeal was filed on 25th January 2013 and the present Application was filed on 20th June 2013, six months after the Judgement was delivered herein. The Plaintiff submitted that this was an inordinately long time, an afterthought and a move meant to deny the Plaintiff the fruits of the litigation. The Plaintiff maintained that no explanation had been tendered for the time taken for the 4th Defendant's Application to be filed. In his turn, the 4th Defendant put forward the excuse before Court that he was not guilty of unreasonable delay as, by the time his Application was filed herein, the process for the execution of the Decree had not commenced. With due respect, I do not think that this is the point. The real question is whether the 4th Defendant is guilty of inordinate delay in presenting his Application before this Court? Further, I do not consider that the point that the 4th Defendant has raised as to this Court "striving to do justice between the parties" has any bearing on the question of inordinate delay.
11. As a consequence and in summary, I find that the 4th Defendant has not established sufficient cause or that he will suffer substantial loss from a refusal by this Court to grant a stay.

Furthermore, he has not put forward any real offer of security. Finally, I do consider that the filing of this Application almost 6 months after the filing of the Notice of Appeal to the Court of Appeal amounts to inordinate delay. I therefore dismiss the 4th Defendant's Notice of Motion dated 18th June 2013 with costs to the Plaintiff.

DATED and delivered at Nairobi this 11th day of December, 2013.

J. B. HAVELOCK

JUDGE