



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 544 OF 2011

PICKWELL PROPERTIES LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

R U L I N G

1. Before me is the Defendant's **Notice of Motion Application** dated **16th April 2013** and filed in Court on even date. The Application is brought under Order 42 Rule 6 (1) of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. The Application seeks the following orders:-
 1. *Spent.*
 2. *Spent.*
 3. *That there be a stay of execution of the Judgment of the Court in this case delivered on 20th March 2013, and any Decree arising there from, pending the hearing and final determination of the Defendant's intended appeal.*
 4. *The costs of this Application be provided for.*
2. The Application is supported by the affidavit of **GEORGE S. KENGA**, a Senior manager in the Finance Department of the Defendant, sworn on **16th April 2013** and is based on the grounds stated therein.
3. The Plaintiff has opposed the said Application vide the Replying Affidavit of **WAHEED SHEIKH**, a Director of the Plaintiff Company sworn on **26th April 2013** as well as a Grounds of Opposition filed on even date.
4. In brief, on **20th March 2013**, this Court entered judgment in favour of the Plaintiff against the Defendant. According to the Defendant, the Judgment against them is for a sum of more than **Kshs. 121,000,000/=**, exclusive of the costs of the suit. On **21st March 2013**, the Defendant's Advocates lodged a Notice of Appeal and also applied to be supplied with a copy of the Proceedings, Judgment and the Decree of the Court for the purpose of lodging an appeal. It is for this reason that the Defendant has filed the current Application seeking for a stay of execution pending the intended Appeal.
5. It is the Defendant's case that if compelled to settle the Decretal amount that will arise from the Judgment of this Court, it will suffer opportunity cost, enormous loss and financial damage. It is also the Defendant's case that its liquidity ratio will be gravely and negatively affected.
6. It is further the Defendant's case that if the huge amount of money is paid to the Plaintiff, it may become difficult for the Defendant to recover the same from the Plaintiff in the event that the intended appeal is successful. The Defendant avers that it is a reputable and financially sound

Public Financial Institution, whose shares are quoted on the Nairobi Securities Exchange, and will be able to settle any Decree of this Court, together with accrued interest, in the event that the intended appeal is unsuccessful.

7. It is further averred for the Defendant that it is ready and willing to give such security as the Court may direct, preferably a Bank guarantee for the due performance of such decree as may ultimately become binding upon it. It is also averred for the Defendant that this Court's interest rate of 12% per annum is way above the rates that a depositor is likely to get from the local financial market. Therefore, according to the Defendant, the Plaintiff would not suffer any prejudice if a stay of execution is granted, because the decretal sum will continue earning interest, which will become payable if the intended appeal is unsuccessful.
8. In opposition to the said Application, it is averred for the Plaintiff that an application for stay of execution made under **Order 42 rule 6** of the **Civil Procedure Rules**, requires the applicant to demonstrate the existence of sufficient cause. According to the Plaintiff 'sufficient cause' means the existence of, at the very least, an arguable appeal. The Plaintiff avers that it is not possible for this Court to determine whether sufficient cause exists since neither the application nor the supporting affidavit gives any indication of the intended grounds of appeal.
9. It is the Plaintiff's case that an applicant for stay of execution must show that it will suffer substantial loss if stay is not granted. According to the Plaintiff, substantial loss means that if the appeal succeeds, the Plaintiff will not be in a position to make full restitution. The Plaintiff avers that the Defendant has not adduced any evidence to the effect that the Plaintiff will not be able to repay the decretal amount should the appeal succeed. In this regard, the Plaintiff has attached its financial statements for the year ending **June 2012** and marked as '**WS1**' to demonstrate that it would have no difficulty refunding the decretal amount should the appeal succeed. It is the Plaintiff's case that no plausible evidence has been adduced in support of the claim for substantial loss.
10. The Plaintiff has gone ahead to illustrate that in the event that the Defendant is to pay the decretal amount, its liquidity ratio would not be adversely affected. Subsequently, the Defendant would not suffer enormous loss and damage. The Plaintiff avers that the Defendant's liquidity ratio was at **35.5%** as shown in its 2012 Annual Report and Financial Statements. *To this end the Plaintiff attached a document marked as 'WS2'*. Therefore, according to the Plaintiff, in the event that the Defendant pays the decretal amount approximated at the sum of **121 million shillings**, the liquidity ratio would be changed to **35.45%**.
11. The application was prosecuted by way of written submissions. The Defendant/Applicant filed its submissions on **22nd May 2013** while the Plaintiff/Respondent filed its reply on **24th May 2013**.
12. I have considered the affidavits, the grounds of opposition as well as the submissions.
13. I would like to state that this Court has no authority to determine whether or not there is an arguable appeal in order to grant a stay of execution pending appeal. This test is applicable where the Court of Appeal is exercising its appellate jurisdiction and is considering an application for stay of execution filed under rule 5 of the Court of Appeal Rules.
14. The granting of stay of execution pending appeal by the High Court is governed by **Order 42 Rule 6** of the **Civil Procedure Rules**. It is granted at the discretion of the court when sufficient cause has been established by the Applicant that:-
 - a. ***Substantial loss may result to the Applicant unless the order is made;***
 - b. ***The application has been made without unreasonable delay and***
 - c. ***Such security as the court orders for the due performance of the decree has been given by the Applicant.***
15. It is common knowledge that the Defendant's net worth is in term of billions as illustrated in its Annual Report and Financial Statements of 2012 which has not been disputed. It is therefore inconceivable that an amount of Kshs. 121 million if paid out would cause the Defendant substantial loss and damage. Further, there is no substantial proof to the effect that the Plaintiff would not be in a position to repay the decretal amount in the event that the appeal were to be successful. The Plaintiff has attached its financial statements for the year ending **30th June 2012** to show that they would have means to repay the decretal amount in the event that the appeal is

- successful.
16. It is the Defendant's case that it would lose opportunity to earn interest income if it were to pay the decretal sum now. But then again, the Plaintiff would also lose out on investments and profits if the decretal amount is paid later as opposed to now. This Court is alive to the fact that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause. Therefore, at the end of the day this Court has to balance the rights of the Defendant *vis a vis* those of the Plaintiff.
17. This Court acknowledges that the Defendant filed the current application in good time and that the Defendant has also demonstrated that it is ready to offer security for the due performance of the decree. However, as has already been established the Defendant has failed to prove that it will suffer substantial loss.
18. I am not particularly keen to look at the proposed grounds of appeal at this stage but I assume that the intended appeal is against the entire judgment of this Court delivered on 20th March 2013 the execution of which the Defendant now fears may result in the Defendant having to pay the said sum of Kshs. 121 million. I however own the privilege of having heard the matter and delivered the said judgment. Whatever the outcome of the intended appeal, one thing is clear to me; a substantial amount of money will be paid to the Plaintiff by the Defendant even if that sum of money is not the alleged Kshs. 121 million. Both parties in this matter have demonstrated to me that they have the capacity to refund the said Kshs. 121 million with interest depending on the outcome of the intended appeal.
19. In applying the justice that a party in whose favour a Judgment has been given should not be unduly delayed from enjoying the fruits of that judgment and in acknowledging that at the end of the appeal the Plaintiff will still be owed a good fraction of the alleged Kshs. 121 million, if not all of it, and in protecting the rights of the Defendant to safeguard the subject matter of the suit pending the intended appeal, I make the following orders:-
- a. ***The value of the decretal sum including costs based on the Judgment delivered on 20th March 2013 be ascertained.***
 - b. ***The Defendant shall within 7 days of such ascertainment in (a) above pay to the Plaintiff half of the decretal sum pending the outcome of the intended appeal.***
 - c. ***The Defendant shall within 7 days of such ascertainment in (a) above deliver to the Plaintiff a bank guarantee for the balance of the said decretal sum pending the outcome of the intended appeal.***
 - d. ***In the event that the parties are not able to ascertain the decretal sum due within fourteen (14) days from today then the Applicant shall pay Kshs. 60,000,000/= to the Respondent and deliver to them a bank guarantee for the balance of the said decretal sum pending the outcome of the intended appeal.***
 - e. ***The costs of this application shall be for the Plaintiff/Respondent.***

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

Khesian holding brief for Kapila for Plaintiff

Kang'atta for Defendant

Teresia – Court clerk