



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 341 OF 2006

FINA BANK LIMITED.....PLAINTIFF

VS

SAM-CON LIMITED.....1ST DEFENDANT

NARWAR SINGH BHOGAL.....2ND DEFENDANT

GURBUX SINGH BHOGAL.....3RD DEFENDANT

PARAMJIT SINGH BHOGAL.....4TH DEFENDANT

RULING

1. Before me for determination are two applications by the 2nd and 3rd Defendants dated 11th May 2012 and 3rd May 2012 respectively. The applications are brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. Both applications seek orders of stay of execution of the decree arising from the judgment entered against the Applicants by Honourable Lady Justice Luka Kimaru on 27th March 2012 pending hearing and determination of the Applicants' appeal against that decision.
2. The applications are based on grounds set out on the face of the applications and are further supported by affidavits sworn by the Applicant/Defendants.
3. In opposition to the application, the Plaintiff relies on a replying affidavit sworn by one Zachary Muturi Muchai on 24th May 2012.
4. The applications are essentially premised on the grounds that the 2nd and 3rd Defendants are aggrieved and dissatisfied by the judgment of Justice Kimaru aforesaid and intend to appeal against the decision. They contend that they have arguable appeals with high chances of success. They are anxious that the Plaintiff may move to execute the decree ensuing from the judgment before the appeals are heard and determined which would occasion them substantial loss. They are ready and willing to abide by any conditions that the court may impose for the grant of the stay orders sought.
5. In reply to the application, the Plaintiff avers that the Applicants have not advanced before the court good reasons to merit stay. The claim that the 3rd Defendant is an old man with health complications is not a valid reason for grant of stay. So is the fear of bankruptcy expressed by the Defendants should execution be levied against them. That the Defendant is a commercial bank whose financial state is unlikely to be impaired by grant of the stay orders sought would also not afford the Applicants respite as the bank is entitled to enjoy the fruits of its judgment. The Plaintiff therefore urges the court to dismiss

the applications with costs.

6. I have carefully evaluated the application on the basis of the affidavit evidence placed before me and the useful written submissions by counsel for the parties.

7. The conditions for grant of stay of execution pending appeal are set out in Order 42 rule 6(1) and (2) of the Civil Procedure Rule 2010, which provides:-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule

(1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The above provision was aptly considered by the Court of Appeal in the case of ***Butt Vs Rent Restriction Tribunal***[1982] KRL 417 where the learned Judge, Madan JA (as he then was) quoted with approval the views of ***Brett L.J. in Wilson Vs Church*** (No 2) 12 Ch D [1879] 454 AT 459 as follows:

“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. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

8. Again the court will grant a stay if special circumstances of the case dictate so. In the ***Butt*** decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. These general principles were also stated in ***Madhupaper international Limited Vs Kerr*** [1985] KLR 840.

9. Further conditions for stay of execution were laid down by ***Visram J*** in the case of ***Prime Bank vs. Esige*** [2005] 1 KLR as follows:

“Now the Court of Appeal has developed some principles to guide the exercise of that power so that the same is not left to caprice and those principles are simple and direct as follows:

(a) The appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one.

(b) The appellant must also show in addition that if the order of stay of proceedings is not granted, his appeal, if it were to succeed, would be rendered nugatory”.

10. Similarly, in the recent case of ***Henson Nigel Graham vs Divina Jerop Cheruiyot*** [2011] eKLR,

Hon. J.B. Ojwang J (as he then was) reiterated the grounds of sufficient cause, substantial loss and the need to furnish security for stay to be granted. He then went on to hold as follows with regard to the mandatory injunction orders that sought to be stayed:

“However, the foundation of the mandatory injunction granted on 28th May 2010 was clearly stated, and it is not apparent to me that any serious appeal is being put up by the Applicant. Without the conviction that the applicant has a grievance for appeal that is not frivolous, I am not able to grant the main prayer in the application”.

11. In addition, the court should also pay regard to the overriding objective to do justice to the parties as captured at Section 1A and 1B and as read together with section 3A of the Civil Procedure Act. This was recognized by the court of appeal in ***HaritShett T/a HaritSheth Advocate VsShamasCharania[2010] eKLR (Civil Application No 68 of 2008)*** as follows:

“We have also taken into account the provisions of Section 1A and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23rd July, 2009. By these new concepts of jurisprudence the courts, including this court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

12. Applying the above legal parameters for the grant of stay of execution pending appeal to the present case, I will begin with considering if the Applicants have arguable appeals. An arguable appeal is not an appeal that would necessarily succeed. My jurisdiction does not also allow me to venture into the merits of the intended appeals. For the purposes of the present application, I need only satisfy myself that the proposed appeals present reasonable contests to the conclusions reached by this court in the decision sought to be appealed against and are not frivolous. To that end, I have perused the memorandum of appeal annexed to the supporting affidavit of the 2nd Defendant’s applications and noted that the Applicant seeks to attack the judgment on a number of fronts including a challenge based on Section 48 of the Bills of Exchange Act (cap 27) and the effect of the admitted failure by the Plaintiff to issue notices of dishonor to the parties who had issued the cheques that gave rise to the Plaintiff’s claim. Similarly, the 3rd Defendant in his proposed memorandum of appeal states that the judgment of the court was based on a guarantee dated 27th January 1998 which guarantee had expired. He also takes issue with the Plaintiff’s failure to issue notices of dishonor to the drawers of the bills that gave rise to the Plaintiffs claim. My appraisal of these grounds reveals that the intended appeals are reasonably arguable. The application passes on this limb.

13. With regard to the issue of whether the Applicants are likely to suffer substantial loss, the Applicants claim that the decretal amount is currently in the region of Kshs. 16 Million which is a colossal sum. The 3rd Defendant states that he is an old man with health complications and if execution is levied, he will be devastated and forced into bankruptcy. On the other hand, they argue that the Plaintiff would not feel a pinch if execution is temporarily stayed pending the outcome of the appeal as it is a commercial bank. The 2nd Defendant advances the same argument that the decretal sum is substantial hence likely to inflict substantial loss to him. He also sees the bank as suffering no loss as the decretal sum is not substantial from its standpoint. On the comparative strengths of the parties the 2nd defendant relies on the case of ***Oraro&Rachier Advocates vs. Co-operative Bank of Kenya Limited (1999) EA 236*** where the Court of appeal held as follows:

“...and we must therefore consider whether or not the intended appeal will be rendered nugatory if stay is not granted. Mr. Gatonye for the Respondent Bank argued that if Mr. Oraro were to succeed in the appeal, the Respondent Bank was sound enough to be able to refund the sum in question. Ordinarily that is the principle on which the court acts but recent rulings of this court suggested that dealing with this limb on the application, the court ought to weigh the claims on both sides. We must

weigh the claims on both sides. Is M/s Oraro&Rachier Advocates are required to pay the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the Bank is kept out of a sum of Kshs. 10,000,000/- it would not be affected. This is in our view, in this case, the position when we are considering the situation. The balance of convenience overall favours the Applicant”

14. I do not accept that the fear of consequences of execution upon the health and solvency of the 3rd Defendant can be a basis for seeking stay of execution. Execution of decrees carry the natural consequence of leaving the debtor bruised. The non-payment of a debt should readily prepare the debtor for the consequences of execution. The decree-holder extended the facilities giving rise to the debt from depositor funds and should have every right to recover what is owed and bridge its exposure.

15. However, I am persuaded that the decretal sum in this matter is fairly substantial given the comparison with the sum involved in the case of ***Oraro&Rachier*** above, although that case was before the Court of Appeal over 12 years ago. Execution of the decree before the appeal is heard and determined is therefore bound to cause substantial loss to the Applicants.

16. On the reasoning that the bank being a commercial bank would not feel any pinch by orders of stay, I am not particularly happy with the proposition as justice must be dispensed to all irrespective of status as expressly provided for under Article 159 (2) (a) of the Constitution. This comment does not in any way alter my above finding on the limb of substantial loss.

17. This brings me to the issue of provision of security. Order 42 of the Civil Procedure Rules does not specify a firm formula for computation of what constitutes security that assures “due performance of the decree as may be ultimately binding upon the Applicant”. I am therefore persuaded that a sum of Kshs. 10,000,000/- would suffice to meet this condition for grant of stay. Consequently, I order that the Applicants do furnish a joint security in the said sum of Kshs. 10,000,000/- by way of a cash deposit to a joint account opened in the names of counsel for the parties or, in the alternative an irrevocable bank guarantee for the said amount in favour of this court. Either security to be perfected and furnished within 21 days from today. In default, the Respondent be at liberty to execute for the full decretal sum.

18. Subject to the Applicant’s compliance with the requirement to provide security within the period stipulated above, I am inclined to allow the 2nd and 3rd Defendants’ Notices of Motion dated 11th May 2012 and 3rd May 2012 respectively.

19. Costs of the applications shall be in the cause.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19th DAY OF JULY 2012.

J.M. MUTAVA

JUDGE