REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 326 of 2011

GEORGE JOASH AKONGO. ..... APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA. ..... RESPONDENT

R U L I N G

The application before this court is the Notice of Motion dated 14th February, 2012 filed by the applicant who is the appellant in this appeal. He seeks a stay of execution of the lower court judgment and decree passed under Nairobi CMCC No 2010 of 2009, in favour of the Respondent herein. An Appeal was filed by the applicant herein on 18th July, 2011 and is pending.

It is clear from the record that the Applicant thereafter filed an application before the lower court seeking a stay of execution of the judgment aforemention. In a ruling dated 3rd February, 2012, the lower court granted a stay on the following conditions: -

i) That he pays half the decretal sum within 14 days of the ruling and,

ii) That the applicant as well, deposits the remaining half in a joint, interest earning account in the names of both counsel who represented the parties in the suit within 21 days.

The applicant found the above conditions to be harsh and unattainable on his part. That is when he filed this application under Order 42 Rule 6(1) and (2) and Section 1A, 1B and 3A of the Act. He avers that the terms being unattainable by him, do prejudice his appeal to this court since execution is likely to follow and the appeal will be rendered nugatory. He also claims that he will thus suffer a substantial loss. He otherwise, offers security in form of a piece of undeveloped Land in Kisumu Rural known as L.R. No. Kisumu/Kapuonja/2302 measuring 2.2 Ha and valued at between Ksh.2.75 to Ksh.1.75 million. The copy of the title, the official search and Valuation Report, are annexed to this application. He also asserts that his appeal has high chances of success since the interest rates applied by the decree holder and which formed much of the sum claimed, were not compliant to Section 44A of the Banking Act, Cap 488.

This application is tenuously opposed by the decree holder who avers that the applicant will not suffer any substantial loss as it will easily refund the decretal sum if recovered since its business is banking business. That the decree-holder's security offered is not equal to the decretal sum due and that the latter is still growing in interest.

I have carefully considered the material upon which this application is grounded, as well as the arguments filed by each party. I have also perused the grounds of appeal in the Memorandum of Appeal.

The court is persuaded that the applicant filed both this application and the earlier application to the lower court seeking stay of execution, timeously. It offered a substantial security valued at almost the value sum claimed by the Respondent/decree holder. The court notes also that the bone of contention are the interest rates charged by the decree holder and the issue of such interest rate is part of the subject matter of the appeal which gives the court opportunity to explore the issue as to whether the provisions of Section 44A of the Banking Act, Cap 488 were breached or not.

In the circumstances of this case it is the view of this court, therefore, that the terms under which the lower court granted stay, were harsh and probably not attainable within the period prescribed by the said court. Furthermore, execution if allowed to proceed especially if it is by civil jail, is likely to prejudice the applicant who will lose his freedom of movement. On the other hand, the security offered by the applicant is not unsubstantial substantial and secures much of the amount due from him. Finally, the appeal may have arguable issues and may have a high chance of success especially as touches the rate of interest applied. This court will accordingly grant a stay on the following terms and orders.

ORDERS

1. Stay of execution is granted on condition

(i) That appeal is prosecuted within eight (8) months.

(ii) The title documents to L.R. No. Kisumu/Kapuonja/2302 is surrendered to the Respondent within 15 days and is secured by the Respondent by registration of restriction order which is hereby granted.

(iii) That if the Appellant/applicant loses this appeal but fails to settle the debt then outstanding, the Respondent shall have power, after an open market current valuation, to sell the property at an open market or forced or mortgage value to recoup itself, without losing the right to recover the balance debt thereafter still outstanding.

2. That in default of either one of the conditions in (1) above, the stay granted shall automatically stand discharged without prejudice to the power of sale given to the Respondent in condition 1(ii) above.

Dated and delivered at Nairobi this 17th day of December, 2012.

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D A ONYANCHA
JUDGE