



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL SUIT NO. 800 OF 2003

**PAMELA AKINYI OPUNDO..... DEFENDANT/RESPONDENT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT/APPLICANT**

**R U L I N G**

This application is brought by a notice of motion dated 16<sup>th</sup> December, 2009, and taken out under Sections 1A, 1B and 3A of the Civil Procedure Act, Order XLI Rule 4, Order L Rule 1 of the Civil Procedure Rules, the court's inherent powers as well as all other enabling provisions of the Law.

By the application, the applicant seeks from the court the following orders –

- (1) ... (spent)
- (2) That pending the hearing and determination of this application there be a stay of further proceedings in the matter and the execution of the judgment herein and or the decree arising therefrom be stayed.
- (3) That pending the hearing and determination of the applicant's intended appeal against the judgment in this suit, and the resultant decree herein, there be a stay of further proceedings in this matter and the execution of the judgment herein and/or the decree arising there from be stayed.
- (4) That the court do grant such further and/or other orders that it may deem expedient in the interest of justice.
- (5) That the costs of this application be provided for.

The application is supported by the annexed affidavit of David Swao, the Senior Legal Counsel of the plaintiff, and is based on the grounds that –

- (a) Judgment has been entered against the defendant in this suit
- (b) The applicant has taken steps to appeal against the judgment and has filed a Notice of Appeal and also applied for the proceedings of the court for the purpose of appealing.
- (c) The intended appeal is arguable and has good prospects of success.
- (d) Unless this application is allowed, the applicant will suffer substantial loss in that it will be put out of significant sums of money with no guarantee of making recovery should its intended appeal succeeded.
- (e) This application has been presented without undue delay.

- (f) **The applicant is prepared to abide by any conditions that may be imposed by the court before the application is granted.**
- (g) **A grant of the prayers sought herein will not prejudice the defendant as it is a large commercial bank that will be able to satisfy the decree should its intended appeal fail.**
- (h) **The interest of the justice will be best be served if the prayers sought herein are granted.**

On their part, the respondents filed the following grounds in opposition to the application –

- (i) **The notice of motion is incompetent, frivolous, vexatious, lacks merit and is misconceived as it does not satisfy and/or fulfill the conditions laid out in Order XLI Rule 4 (2) of the Civil Procedure Rules.**
- (ii) **The reasons set forth in the said application and supporting affidavit do not warrant or support the granting of a stay of execution as the appellant has not demonstrated that it may suffer substantial loss if stay is not granted.**
- (iii) **The defendant/applicant's application for stay of execution of decree is not made in good faith as the appellant seeks to use the same both as a shield and sword to unreasonably withhold the plaintiff/respondent, in whose favour a money decree has been issued, from the enjoyment of the fruits of the judgment.**
- (iv) **The defendant/applicant's appeal is a futile exercise and has no chances of success at all.**
- (v) **The defendant/applicant has failed to give security for due performance of the decree to secure the plaintiff/respondent's pecuniary interest in the said decree.**

As observed earlier, the application is made under, *inter alia*, O.XLI Rule 4 of the old Civil Procedure Rules, which deals with stay in case of appeals.

The relevant parts of Order XLI Rule 4(2) under which the application is made read as follows –

**“No order for stay of execution shall be made under sub rule (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 as been given by the applicant.”**

From the wording of this subrule, it is self evident that for the court to order a stay of execution, four conditions must abide. There must be (i) sufficient cause; (ii) substantial loss (iii) no unreasonable delay in making the application; and (iv) security. For what it is worth, the applicant did not raise the issues of whether or not there was sufficient cause, or whether there was unreasonable delay. I will therefore grant that both conditions are not in contention. That leaves two other conditions to be satisfied. The 1<sup>st</sup> of these conditions is whether the applicant will suffer substantial loss if the order of stay is not granted. It is significant that in paragraph 2 of the grounds of opposition, the respondents assert as follows –

**“The reasons set forth in the said application and supporting affidavit do not warrant or support the granting of a stay of execution as the appellant has not demonstrated that it may suffer substantial loss if stay is not granted.”**

This statement flies in the face of paragraph 4 of the grounds upon which the application is based where the applicants state that unless the application is allowed, the applicant will suffer substantial loss in that it will be put out of significant sums of money with no guarantee of making recovery should its intended appeal succeed.

This is a very significant issue in this matter, and perhaps its defining threshold. The law does not say that where there is an arguable appeal, no payment is to be effected until the appeal has been disposed; but that where there is an arguable appeal, it should not be rendered nugatory by making payment, winning the appeal, only to discover that the respondent cannot refund the money. As was held in **CARTER & SONS LTD.v. DEPOSIT PROTECTION FUND BOARD & 2 ORS., CIVIL APPEAL NO. 291 OF**

1997, “... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay ...”

Unless there is evidence to show that the respondent cannot be trusted with the money in question, and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation. An appeal cannot be rendered nugatory in a monetary decree if payment is made, and it is not just to deny a successful party the benefit of judgment merely because he is poor.

In an application for stay of execution pending appeal, the burden lies upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. It is only when the applicant tables evidence to show that the respondent will not be able to refund the same can it be said with any comfort that the appeal will be rendered nugatory. As was stated in **STEPHEN WANJOHI v CENTRAL GLASS INDUSTRIES LTD.** Nairobi HCCC No. 6726 of 1991, “**Financial ability of a decree holder solely is not a reason for allowing a stay. It is enough that the decree holder is not a dishonorable miscreant without any form of income,**”

On the facts of this case, I find that the applicant has not satisfied the condition that substantial loss may result to the applicant unless the order for stay of execution is made. For that reason, I find it more equitable to exercise my discretion in favour of the respondent. The application for stay is accordingly dismissed with costs to the respondent.

Orders accordingly.

**DATED** and **DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of September, 2011.

**L. NJAGI**  
**JUDGE**