



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 85 OF 2002

SOUTHERN CREDIT BANKING
CORPORATION LTD.....PLAINTIFF

VERSUS

CHARLES WACHIRA NGUNDO.....1ST DEFENDANT
WILLIAM OUKO OKELLO2ND DEFENDANT

RULING

This Ruling is delivered in the Notice of Motion dated 6th December 2010, in which the judgment debtor/Applicant seeks an order for stay of execution of the judgment and decree passed against him in the sum of KShs. 25,611,497/= in favour of the Respondent.

The application was brought under **Order XL1 Rule 4** of the **Civil Procedure Rules (2009 Revised Edition)**, **Sections 1A 1B and 3A** of the **Civil Procedure Act** and is premised on the following grounds:-

1. The decree issued against the Applicant is for a principal sum of KShs. 25,611,497.70/= together with costs and interest;
2. The Applicant has already filed an appeal against the decision by lodging a notice of appeal and serving same as required;
3. That in addition the Applicant has also requested for letters of (*sic*) typed proceedings as required by the Appellate (?) Act;
4. The Applicant stands to suffer irreparable loss if execution was to proceed before the determination of the appeal
5. That the intended appeal is arguable and has merits.
6. That the Applicant will stand guided by the court as regards such security as may be ordered by the court to be furnished having regard to the circumstances of the case.
7. That it will be meet and just that the instant application is allowed.

The application is supported by the affidavit of the Applicant sworn on 6th December 2010, which

only emphasizes on the merits of the Applicant's intended appeal, the grounds of which have been set out in paragraph 5 of the Supporting Affidavit. In paragraph 6 of the said affidavit, the Applicant states that he would suffer "irreparable loss" given the amount decreed against him, the enforcement of which would most likely grind his personal affairs to a halt. He concedes delay in bringing the application but explains the same as having been as a result of illness. To support the depositions made in his affidavit, the Applicant has annexed a copy of his advocate's letter requesting for certified copies of proceedings and judgment, a copy of the Notice of Appeal lodged, a copy of a draft decree sent to his advocates by the 1st Respondent's advocates and the letter forwarding the same.

The application is opposed on the strength of a Replying Affidavit sworn on 24th January 2011, by Jeckonia A. Agoro, the Head of Recoveries with the 1st Respondent's successor, Equatorial Commercial Bank Limited, in which he depones to the Applicant's present credit unworthiness and bad credit history to show that he would not be able to secure the repayment of the decretal sum in the event that the appeal did not succeed. He also depones to the fact that no substantial loss has been established and that the application was brought 45 days after the date of judgment and has no merit.

Order XL1 Rule 4 under which the application is brought provides, *inter alia*, as follows:-

"4(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 seem just, and any person aggrieved by an order for stay made by the court 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 the application has been made without delay; and

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

(underlining by the court)

Substantial loss will be presumed where it is shown that the Applicant may not recover the money paid in satisfaction of the decree in the event that the appeal succeeds, in which case the appeal would be rendered nugatory. The Applicant herein has not demonstrated likelihood of such eventuality. His complaint that the decretal sum is colossal and that the enforcement of its payment would cause his personal affairs grind to a halt goes to show that he is not in a position to provide security for the satisfaction of the decree, which security he has not even offered as required under **Order XL1 (2) (b)**. Moreover, it has been submitted, by way of affidavit evidence, which is not controverted, that the Applicant's creditworthiness is questionable.

That the application was brought, 45 days after the delivery of the judgment is not disputed. The Applicant has stated that the delay is due to illness, which prevented him from instructing an advocate. I consider this explanation untenable due to the fact that the advocates on record for the Applicant are the same ones who represented him in the suit and were able to file the appeal relied upon on time.

It is evident from the above that the Applicant has not satisfied the legal requirements for the granting of a stay in that substantial loss has not been demonstrated, no security has been offered and the delay in bringing the application is not satisfactorily explained. Many times over, courts have held that substantial loss is never to be measured by the decretal sum without more. I find the application to be devoid of any

merit and I have no option but to dismiss it,

which I hereby do. The Respondents shall have costs of the application.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 11TH day of NOVEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Ndegwa holding brief for Mr. Maina For the Applicant

Mr. Mwanyale holding brief for

Mr. Masinde

For the Respondent