



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 645 of 2009

**HOUSING FINANCE COMPANY
OF KENYA LTD.....1ST APPELLANT/APPLICANT
NANCY MUTHONI.....2ND APPELLANT/APPLICANT**

VERSUS

**GRACE MUNGE.....1ST RESPONDENT
DR. ANDRERW KANYI GACHII.....2ND RESPONDENT**

RULING

1. Housing Finance Company of Kenya Ltd and Nancy Muthoni, (hereinafter referred to as the applicants), are the appellants in this appeal. They have moved this court by way of a notice of motion dated 18th November, 2009. The motion which is brought under Order XLI Rule 4(1) & (2) and Section 3A of the Civil Procedure Act, seeks an order for stay of execution of the judgment delivered on 3rd November, 2009 in Milimani CMCC No.1911 of 2000, pending the hearing and determination of the appeal which the applicants have filed against the judgment. Grace Munge and Dr. Andrew Kanyi Gachii (hereinafter referred to as the 1st and 2nd respondents), are the respondents to the appeal.

2. The applicants' motion is supported by an affidavit sworn by Joseph Kania, who is the 1st applicant's manager, Legal Services. The application is also supported by grounds which have been stated on the face of the motion. In short, the application is anchored on the fact that the applicants deny having been party to the contract subject of the 1st respondent's claim, and therefore maintain that summary judgment was wrongly entered against them, as they had a good defence. The applicants believe that they have an arguable appeal and that unless the orders sought are granted, they will suffer substantial loss as the 1st respondent is likely to execute the decree which is for a substantial sum. The applicants have already deposited a sum of Kshs.500,000/= into an interest earning account as security, and therefore urges the court to grant their application.

3. The 2nd respondent who has also similarly moved the court by way of a notice of motion dated 20th January, 2010 for an order of stay of execution of the same judgment, supports the applicants' motion and explains that the delay in filing the 2nd respondent's application was due to a change in advocates. The 2nd respondent contends that it filed a defence to the 1st respondent's claim which raised arguable issues. The 2nd respondent maintained that unless an order for stay of execution is granted, the 1st respondent is likely to execute the decree, and the decretal sum being a large amount of Kshs.1.7 million, the 1st respondent would be unable to refund the money should the appeal succeed. The 2nd respondent points out that the 1st respondent has not disclosed her means and that her property which is the suit property was put up for sale due to non-payment and this is an indication of impecuniosity.

4. The 1st respondent opposed both the applicants' motion, and the 2nd respondent's motion. The 1st respondent filed a replying affidavit sworn on 25th November, 2009, and another replying affidavit sworn on 22nd January, 2010, and also filed a preliminary objection. The 1st respondent contends that the appeal filed is misconceived and has no chances of success. The 1st respondent urges the court to dismiss the application for stay of execution, maintaining that she has sufficient means to repay the decretal sum in the unlikely event that the appeal succeeds.

5. The 1st respondent contends that she and her husband, own several companies and has sufficient rental incomes from the companies. The 1st respondent's husband is also practicing as a lawyer, and would therefore be able to facilitate any payment for

reimbursement. The 1st respondent therefore contends that the appellant and the 2nd respondent would not suffer any substantial loss if the orders sought are not granted. The 1st respondent also objected to the 2nd respondent's application contending that it has been brought after an inordinate delay of 3 months. The 1st respondent indicated that she was willing to furnish a professional undertaking from an advocate to reimburse the decretal sum within 7 days of demand in the event that the appeal is successful.

6. I have carefully considered the application and the submissions made. I do note that the applicants' application was brought just about two weeks after the judgment subject of the decree was made. The application was therefore brought without undue delay. The 2nd respondent's application was brought after a period of about 3 months. That delay has however been explained as resulting from the change in advocates representing the 2nd respondent. Both the applicant and the 2nd respondent have complied with the court order requiring them to deposit a sum of Kshs.500,000/= into a joint interest earning account in the names of both parties' advocates. The only issue which requires further consideration is whether the applicants and the 2nd respondent have satisfied this court that they will suffer substantial loss if the order for stay of execution is not granted.

7. No copy of the decree arising from the judgment delivered on 3rd November in CMCC No.1911 of 2000 was availed to this court. From the annexures, it is clear that the summary judgment entered in favour of the 1st respondent was for Kshs.1,117,400/= together with interest at 12% from 22nd October, 2008 until payment in full. Obviously, that sum is not a small amount for an individual. The 1st respondent has purported to demonstrate that she is not impecunious by showing that she is a director in two companies known as Graceland Gardens Ltd and Jeffrey Apartments Ltd. Bank statements for the two companies have been exhibited. In both cases, the balances in the account as at November 2009 was less than Kshs.20,000/=. Secondly, the 1st respondent has not given any evidence to show that the two companies engage in a profit making business, and her earnings if any from the companies. Further, the principle of law that a limited liability company is a separate legal entity from the directors demands that the 1st respondent must be treated as a separate individual responsible for her own liabilities. Indeed, no affidavit was sworn by her husband, who is the other director in the companies to confirm that he is ready and willing to take responsibility for the repayment of the decretal sum if required.

8. I find that in the circumstances of this case, justice would be best served by granting an order of stay of execution on terms. Accordingly, I order that a stay of execution of the judgment and decree delivered on 3rd November, 2009, in Milimani CMCC No.1911 of 2000 shall issue pending the hearing and determination of this appeal on the following conditions:

- (i) The applicants and the 2nd respondent shall equally deposit half the decretal sum to make up the full decretal amount into an interest earning account with a reputable financial institution in the joint names of the parties' advocates within 21 days from the date hereof.
- (ii) The amount already deposited by the applicants and the 2nd respondent shall be taken into account in meeting condition No.(i) above.
- (iii) The applicants shall file and serve a record of appeal within 90 days from the date hereof.
- (iv) The applicants shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.
- (v) Costs of this application shall be costs in the appeal.

Dated and delivered this 19th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mogere for the appellants/applicants

Kimathi for the 1st respondent

Eric - Court clerk

