



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 70 OF 2010

GEORGE NDEGE OKELLO.....APPLICANT

-VERSUS-

K-REP BANK LIMITED.....1st RESPONDENT

HENRY OWOUR

T/A BOMAS PROPERTY MANAGEMENT SERVICES.....2nd RESPONDENT

RULING

This is an application by way of Notice of Motion brought under order XLI rule 4 (1), (2) and (6) of the **Civil Procedure rules**, sections 1A, B, 3A and 63(e) of the **Civil Procedure Act** and all other enabling provisions of the law in which the applicant in the main is seeking:

“4. The honourable court be pleased to grant an order of stay of execution of the decree dated 1st April, 2010, vide KISII CMCC No. 728 of 2008, together with all consequential orders, pending the hearing and determination of the instant appeal.

5. Costs of the application be made as the court may deem fit and expedient.”

This application is brought on the grounds that:

a) The Appellant/Applicant herein filed a suit against the respondents vide Kisii CMCC No. 728 of 2008.

b) The suit so filed by the Appellant/Applicant was heard and determined vide judgment delivered on the 1st day of April 2010.

c) The suit by the Appellant/Applicant touched and/or concerned irregular and or illegal repossession of the security offered by the Appellant/Applicant in favour of the 1st respondent.

d) The repossession was levied by the 2nd respondent on instructions by the 1st respondent.

e) The 2nd respondent was not a duly licensed and or authorized auctioneer.

f) The retention of the 2nd respondent, by the 1st respondent to levy repossession was illegal and invalid.

g) The instrument of Chattel transfer, issued in favour of the 1st respondent, were never

registered within the statutory duration or at all.

h) The instrument of Chattels Transfer were thus void/or illegal.

i) The judgment appealed against has sanctioned and/or vindicated commission of an illegality.

j) At any rate, the entire monies at the foot of the Chattel Instruments, had been fully realized and/or recovered.

k) The judgment of the honourable subordinate court amounted to exacting double jeopardy against the appellant/applicant.

l) In the premises, the appeal so far filed, raises salient and/or pertinent issues and hence same has overwhelming chances of success, in terms of the Memorandum of Appeal.

m) The appellant/applicant herein may be subjected to execution in respect of monies already realized and/or recovered.

n) The appellant's/applicant's business, which revolves around transportation, may ground to a halt.

o) The appellant/applicant is bound to suffer substantial loss, unless the orders sought are granted.

p) Conversely, the 1st respondent shall not suffer any prejudice if the orders sought herein are granted.

q) The instant application has been made with unreasonable delay.

r) It is the interest of justice that the application herein be heard and allowed”.

The application too is supported by an affidavit sworn by the applicant. In a nut shell the applicant's story is that on or about the 12th September and 24th December 2007 respectively, he approached the 1st respondent and obtained financial accommodation to the tune of Kshs. 1,450,000/= which facility was secured via Chattels Mortgage in favour of the respondent involving motor vehicle registration number K.A.G 121P, Isuzu canter. After appropriating the loan facility, the applicant made various repayments, but subsequently fell into arrears. Pursuant to the terms of the loan agreement, the 1st respondent instructed the 2nd respondent to repossess and sell the security offered by the applicant as aforesaid. However, the 2nd respondent was not at the time a licensed auctioneer. Pursuant to and as a result of the actions of the respondents aforesaid, the applicant filed a suit in the chief magistrate's court at Kisii being **CMCCC No. 728 of 2008** seeking various declarations. The 1st respondent in turn filed a statement of defence as well as a counterclaim. The suit was subsequently heard and determined vide a judgment delivered on 1st April, 2010 by **Hon. M. N Gicheru**, in which the learned chief magistrate dismissed the applicant's suit with costs but entered judgment in favour of the 1st respondent on the counter claim in the sum of Kshs. 662,618/09.

Aggrieved by the said judgment and decree, the applicant mounted an appeal. He now wishes to have the execution of that judgment and decree stayed pending the hearing and final determination of the said appeal on the grounds already set out in extenso elsewhere in this ruling.

The application as expected was resisted. Vide a replying affidavit sworn by **Manco Mark Gikaro**, the branch manager of the 1st respondent at Kisii, he deponed where pertinent that the applicant defaulted in repaying the loan to the 1st respondent and to date he had stopped completely servicing the same. As at the time of the trial of the suit in the subordinate court, he owed the 1st respondent Kshs. 662,618/09. It denied having realized or recalled the entire cash collateral amounting to Kshs. 1,018,500/=. The amount

recovered was however Kshs.348,770/=. The 1st respondent would in the premises suffer prejudice, loss and damage if the orders sought were granted. Finally it deponed that no substantial loss will be suffered by the applicant if it was allowed to recover the arrears of the loan and interest.

When the application came up for interpartes hearing before me on 11th June, 2010 **Mr. Ochwangi** and **Mrs. Asati**, learned counsel for the applicant and respondents respectively agreed to canvass it by way of written submissions. Subsequently they filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is settled law that for an applicant to succeed on application for stay of execution pending appeal under order XLI rule 4(1) and (2) of the Civil Procedure rules he has to satisfy the court to which the application has been made that:-

“i) Sufficient cause for the grant of the order exists.

ii) Substantial loss that he is likely to suffer unless the order sought is granted.

iii) The application has been made without undue delay.

iv) Such security as the court may order for the due performance of the decree or order is given.”

The above notwithstanding, the court of appeal in the case of **Butt V Rent Restriction Tribunal (1982) KLR 417** considered at length grounds for granting stay of execution and or factors to be taken into consideration when granting stay of execution. It held that the power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised not capriciously but in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges’ discretion. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements and finally that the court in exercising its powers under order XLI rule (2) (b) of the Civil Procedure rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

It has also been held severally that a money decree may not be the subject of a stay of execution order. For instance, in the case of **Ujagar Singh V Runda Coffee Estates Ltd (1960) E.A 263**, the court observed that: ***“... It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in event that its appeal is successful ...”***. This position was reinforced by the court of appeal in the case of **Kenya Shell Ltd V Benjamin Karuga 1 KAR 1018** when it boldly stated that ***“... it is not normal for an appeal to be rendered nugatory in monetary decree if payment is made.”***

From all the foregoing the law on stay of execution pending appeal may be summarized as follows; In order for the court to issue an order of stay of execution, there must be:

“a) (i) Sufficient cause

(ii) Substantial loss

(iii) No unreasonable delay in filing the application; and

(iv) Security

b) The grant of stay is discretionary

c) It is not just to deny a successful party the benefit of judgment and or fruits of his litigation.

d) Ordinarily Money decree may not be the subject of a stay order.

Applying all the above considerations in the circumstances of this case, I would say that the applicant has filed an appeal, which appeal is not frivolous but arguable. He has raised salient and pertinent issues of law. The applicant too is being asked to pay to the 1st respondent a total sum of Kshs. 662,618/09. This is by no means a small amount. The judgment and decree that is the subject of this appeal was delivered on 1st April, 2010. The appeal was filed on 16th April, 2010. The instant application was then filed on the 29th April, 2010. It is apparent therefore that the application was made without undue delay. As for security, the applicant has indicated his unwillingness to abide by such an order in view of the fact that the 1st respondent is over secured in respect of the suit judgment which amounts to Kshs. 662,618/09 as compared to the security worth Kshs. 2,168,508/= only currently held by the 1st respondent. On the other hand the 1st respondent is willing to have the decretal sum deposited in court, pending hearing and determination of the appeal. The grant of stay being discretionary I would have no difficulties exercising it in favour of the applicant in the circumstances. However I am also well aware that it is not just to deny a successful litigant the benefits and fruits of his judgment and or litigation.

Though the amount involved is colossal, it has not been suggested in the event that the applicant pays and he is successful on appeal the 1st respondent may not be able to repay the same unto the applicant. The 1st respondent after all is a financial institution and I am certain that in the event the applicant succeeds in his appeal, the 1st respondent will be capable of refunding the amount. Again what is sought to be stayed is a money decree. Ordinarily an appeal arising out of money decree will in the rarest of cases be rendered nugatory. However in view of what has been deponed to as well as issues raised in the written submissions this is one of those cases that calls for a balancing act. Much as the applicant is opposed to security being imposed I am however inclined to grant stay on such terms. The terms that best commends themselves to me are that there shall be stay of execution of the decree pending the hearing and final determination of the appeal on condition that the applicant shall deposit a sum of Kshs. 331,309/45 in an interest earning account to be opened jointly in the names of respective counsel for the parties herein. This has to be within the next fourteen (14) days from the date of this ruling failing which this application shall stand dismissed. The costs of this application shall abide the outcome of the appeal. The deposit shall of course be in any other financial institution other than the 1st respondent.

Ruling dated, signed and delivered at Kisii this 30th July 2010.

ASIKE-MAKHANDIA

JUDGE