



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 191 of 2004

SHEIKH OSMAN MOHAMMED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

R U L I N G

This is a notice of motion application brought under Order XLI rule 4(2) and (2), Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is dated 5th June, 2009 and the order sought is that this court do grant a stay of execution the judgment, decree and all consequential orders in this suit pending the hearing and determination of the intended appeal.

The application is premised on three grounds namely:

- (a) The Applicant has a good and arguable appeal with a high probability of success and should the orders sought not be granted substantial loss and damage may result.**
- (b) The Applicant has made this application as soon as it was able to trace the court file.**
- (c) The Applicant is ready to abide by such terms as may be imposed by the Court.**

The Application is supported by an affidavit sworn by Isaac Njoroge the Legal Manger of the Defendant Bank. I have considered this affidavit.

The application is opposed. The Plaintiff has sworn a replying affidavit dated 12th June, 2009 which I have considered.

Mr. Odera urged the application on behalf of the Defendant/Applicant while Mr. Musyoki opposed it on behalf of the Plaintiff/Respondent. Judgment was entered against the Defendant on 4th May 2009. Before taxation of costs was done, the Respondent sent auctioneers to the Applicant who carried out a proclamation and also attached and carted away the Applicant's vehicle. The Applicant's contention is that the proclamation carried out by the Respondent's Agent on 5th June 2009, was in contravention of Section 94 of the Civil Procedure Rules, which provides that no execution of a decree should proceed without leave before ascertainment of costs. Mr. Odera submitted that from the court record, no such leave was sought. The Applicant contends that judgment in the case was passed without notice to the Applicant as required under Order XX Rule 1 of Civil Procedure Rules.

Mr. Odera submitted that the Applicant had filed a notice of appeal to the Court of Appeal and urged the court to grant the prayers sought in this application.

Mr. Musyoki on his part submitted that the date for the judgment in the case was given in open court on 5th March 2009, in the presence of the Defendant's Advocate and that therefore, it was not a basis for grant of stay. Counsel submitted that even if they had no notice, no stay could be granted on that ground. Counsel further observed that the Applicant was not relying on this ground in its application for stay.

Regarding alleged premature execution Mr. Musyoki submitted that as evidenced in the affidavit of service he filed in court on 12th May 2009, he did forward a draft decree to the Defendant's Advocate who resorted to filing Notice of Appeal instead of reverting back to him.

Under Section 94 of the Civil Procedure Act it is provided:

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

This section gives the High Court the power to order execution forthwith of a decree emanating from that court, before taxation of costs incurred in the suit. I have perused the court judgment and nowhere did the learned judge order that the decree of the case shall be executed forthwith or before ascertainment of costs. The record of the proceedings do not bear any evidence of taxation of costs having taken place and in its submissions, the Respondent was silent concerning this. I do find that the execution process begun by the Respondent herein was premature. The Respondent should therefore meet the auctioneer's charges.

There are however important conditions to be satisfied before the application is granted. These conditions are set out under Order XLI Rule 4(2) of the Civil Procedure Rules as follows:

“(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 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 has been given by the applicant.”

Regarding proof that Applicant may suffer irreparable loss if order is not made, the Applicant relies on the filed supporting affidavit sworn by its Legal Manager Isaac Njoroge. Under paragraph 5 and 9 of that affidavit, he deposes that the Respondent had testified in court that he does not work and in the circumstances, if Applicants paid damages ordered in the Judgment and its appeal succeeds, it may be unable to recover the same from the Respondent. Mr. Odera in addition contended that only the Plaintiff knew his wealth as same had not been disclosed nor his ability to pay back the decretal sum demonstrated. Mr. Odera submitted that the Applicant was ready to deposit the entire decretal sum in court in satisfaction of set conditions for stay pending appeal.

Mr. Musyoki on his part urged the court to consider that indeed the Applicant had done business with the Respondent for a long time and that they were aware he was a man of means. Counsel urged the court to order the sum be paid directly to the Respondent, especially the sum of Kshs.220,909/21, which was not being contested in the appeal by the Applicant going by the intended grounds of appeal.

I have carefully considered this application. I am satisfied that the application was brought without undue delay having been filed on 8th June 2009, the next working day after the proclamation by

auctioneers was done on 5th June 2009.

In regard to the issue of the appeal under Order XLI Rule 4(4) an appeal to the Court of Appeal is deemed to have been filed once a notice of appeal is filed in accordance to the Court of Appeal Rules. The Applicant has satisfied the court that indeed a Notice of Appeal has already been filed before the Court of Appeal, the Plaintiff's securities it holds and to deposit the entire decretal sum in court. I have confirmed from the court record that the sum of Kshs.7,631,953/= being entire decretal sum as per the decree dated 3rd June 2009 was deposited in court on 17th June 2009. Having considered this application however, I am convinced that the intended appeal against this court's judgment of 4th May 2009 challenges only the sum awarded of Kshs.4,500,000/= in form of damages. The award of Kshs.220,908/21 in terms of prayer (a) of the plaint is not contested. In order to balance the interest of both parties and to promote fair play, I will allow the Applicant's application dated 5th June 2009 in the following terms:

- (1) A stay of execution of judgment and decree of this court be and is hereby granted pending the hearing and determination of the intended appeal.**
- (2) Kshs.220,908/21 out of the decretal sum deposited on 17th June 2009 with this court, with interest at court rates calculated from the date of filing suit to date of deposit of said sum with court, be released forthwith to the Plaintiff/Respondent's Advocate for payment to the Plaintiff in satisfaction to prayer (a) of the plaint and this court's judgment of 4th May 2009.**
- (3) The balance of the decretal sum be deposited in an interest bearing account in the joint names of the Plaintiff's Advocate and the Defendant's Advocate pending determination of the appeal and/or further orders of this court.**
- (4) The auctioneer's charges be met by the Plaintiff/Respondent.**
- (5) Costs of the application be in the cause.**

Dated at Nairobi this 10th day of July, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in the presence of:

No appearance for Mr. C. Odera for the Applicant

Mr. Musyoki for the Respondent

Dated this 17th day of July 2009

LESIIT, J.

JUDGE