



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

CIVIL CASE 1386 OF 1999

KENYA POST OFFICE SAVINGS BANK.....APPLICANT

VERSUS

ROSALINE NJERI MACHARIA.....RESPONDENT

RULING

The application is a notice of motion dated 17th July 2007 seeking for a temporary stay of execution of the ruling delivered by Hon. Azangalala, J on 13th May 2005 and the consequential decree issued on 15th June 2004 pending the hearing and determination of the Civil Appeal No. 145 of 2004 filed against the said order. The application also seeks liberty to apply for further orders and or directions the court may deem fit and just to grant. The grounds for the application are on the fact of the application which are:-

- a) **THAT the Defendant/Applicant having been aggrieved and dissatisfied herewith has lodged an appeal, Civil Appeal No. 145 of 2004, Rosaline Njeri Macharia vs Kenya Post Office Savings Bank, against the said decision.**
- b) **THAT the said Appeal raises several issues for determination and has a good chance of success as evidenced by the Memorandum of Appeal annexed to the Supporting Affidavit of Rosaline Njeri Macharia filed herewith.**
- c) **THAT the Defendant/Applicant stands to suffer substantial loss if the Plaintiff/Respondent proceeds to execute the said Order unless a stay execution is granted.**
- d) **THAT the Plaintiff/Respondent herein has taken out a Notice to Show Cause why the Defendant/Applicant should not be committed to civil jail for failure to pay the Decretal sum and risks being committed to Civil Jail if the Orders sought herein are not granted.**
- e) **THAT the Defendant/Applicant is willing to abide by any conditions set by this court for the performance of the said Decree in the event that the said Appeal is unsuccessful and towards this end is willing to deposit into court the Title Deed for L. R. Number 209/10858.**
- f) **THAT the pending Appeal is meritorious and raises several serious issues of Law.**

The application is further supported by an affidavit sworn by the application. The affidavit annexes the memorandum of appeal filed the Applicant in the court of appeal and the Notice to show cause issued under Order XXI rule 18 by the Court in May, 2007.

The application was opposed. The Plaintiff/Respondent filed a replying affidavit dated 26th July 2007 sworn by **MERCY MBIJIWE**, its Corporation Secretary. The gist of the Affidavit is to show that after judgment was passed and decree obtained in the sum of Kshs.5, 652,380.28 the Applicant filed an appeal in the court of Appeal which is still pending. The deponent avers further that no stay of execution was ever sought for nor obtained by the Applicant and that the filing by the instant application two days before a notice to show cause was to be heard was intended to cause delay in the Plaintiff's efforts to execute the judgment. It also avers that the Plaintiff is capable of refunding any sum ordered if the pending appeal succeeded.

I have considered submissions by Mrs. Lele for the Applicant and Mr. Kimathi for the Respondent. I must say that it is rather curious that both parties in this case are guilty of laches. On the one hand the Respondent just recently served the Notice to show cause why execution should not issue on the Applicant. On the other hand the Applicant filed for a stay of execution of a decree more than 3 years ago after it was issued. Be that as it may, the Applicant has offered a title deed as security for the due performance of the decree in support of his application for a stay under Order XLI rule 4. My attention has been drawn to two Court of Appeal decisions by the Respondents Advocate.. The first is **HALAI & ANOTHER VS THORNTON & TURPIN [1963] LTD [1990] KLR 365** where **Gicheru JA, Chesoni and Cockar Ag. JJA** observed thus:-

“The High Court’s discretion to order a stay is fettered by three conditions firstly the applicant must establish a sufficient cause. Secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the Applicant must furnish security. The Application must of course be made without delay.”

The second case is that of **BUTT V RENT RESTRICTION TRIBUNAL 1982 KLR 417** where **Madan, Miller and Potter JJA** held thus:-

- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. 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 Judge’s discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.**
- 4. The Court in exercising it’s discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant hand an undoubted right of appeal.**
- 5. The court in exercising its powers under Order XLI rule 4(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 to stay of execution to lapse.**

These two cases provide good guidance in determining this kind of application. I am mindful that the rights of the Respondent Bank have crystallized after judgment was entered in its favour. Those rights should not be interfered with by judicial whim. I am also aware of the Applicant’s equally weighty right to an appeal and the expectation that it should not be rendered nugatory. Both rights must be balanced.

The decree in issue in this matter is a money decree now standing in the tune of about Kshs.8 million

going by the notice to show cause issued by this court under Order XXI rule 18 in May, 2007. That is a substantial amount of money by any standards. The Applicant has not demonstrated what loss she is likely to suffer, if the stay sought is not granted and whether it cannot be compensated by way of damages. I would go further and find that indeed the Respondent, being a bank, is capable of meeting whatever damages the Applicant may suffer if the appeal were a success.

To the Applicant's credit however, she has attempted to offer a security by giving a Land reference number of some property. However no documents were annexed to show in whose name the property is registered, or any proof placed before the court to show its value. I am unable to accept the Land number given as security as it may well be found worthless for the purpose. The Respondents have not seriously opposed the application on condition there is sufficient security provided by the Applicant. Having taken all matters into consideration I will allow the Applicants application on the following terms:-

- 1) The Applicant is granted a stay of execution of the judgment and decree of this court subject to the Applicant depositing with this court the sum of Kshs.3.5 million within 30 days from today's date, as security for the due performance of the decree.
- 2) The costs of the application will go the Respondent.
- 3) If the order to deposit the money is not complied with within the period prescribed by this court, the stay granted herein will lapse.

Dated at Nairobi this 21st Day of September, 2007.

LESIT, J.

JUDGE

Read, Signed and Delivered in the presence of:-

Mrs. Lele for Applicant

Miss Munyasi for Mr. Kimathi for Plaintiff

LESIT, J.

JUDGE