REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIAMANI COMMERCIAL COURTS
Civil Case 443 of 2001 (O.S.)

EQUITORIAL COMMERCEIAL BANK LTD……...…….1ST PLAINTIFF

SOUTHERN CREDIT BANKING CORPORATION LTD…....……..2ND PLAINTIFF

FIDELITY SHIELD INSURANCE COMPANY LTD…….....…….3RD PLAINTIFF

VERSUS

RETREAT VILLAS LIMITED……..…...……..……DEFENDANT

R U L I N G

This is an application by the defendant, seeking a stay of execution of the judgement which this court delivered on 14th December 2005. It is the defendant's prayer that execution be stayed pending the hearing and determination of the intended appeal to the Court of Appeal.

The application was filed under a certificate of urgency, on 28th December 2005, and it was dealt with, in the first instance, on that same day, by the Hon. Waweru J. Having been satisfied that the application was urgent, the court so certified it, and then granted an interim order of stay, pending the substantive hearing of the matter.

When canvassing the application before me, on 10th January 2006, Mr. Kilonzo, advocate for the defendant, drew the court's attention to the fact that the judgement against his client was for Kshs. 135 million, as well as for authority to the receivers to execute 999 year leases in favour of third parties, who were not party to this suit. Meanwhile, by the same judgement, the court had dismissed the defendant's counter-claim, with costs.

It was readily conceded by the defendant that this court cannot sit on an appeal over the judgement of the Hon. Kasango J. The said concession was made following the court's question to the parties herein, as to whether or not the application ought to be heard by the trial judge. On their part, the plaintiffs agreed with the defendant that I could proceed to hear and determine the application. In other words, both parties expressed the view that the application need not be placed before the trial judge, for adjudication.

That aspect of the matter having been resolved, the defendant began its submissions by invoking the provisions of Order 41 rule 4(1) of the Civil Procedure Rules. Again, the plaintiffs were in agreement with the defendant that those were the appropriate provisions, which governed applications for stay of execution pending appeal. In that regard, both parties are correct. I therefore find it appropriate, at this early stage of the ruling to set out herein, the following provisions of Order 41 rule 4(1) of the Civil Procedure Rules:-

"**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 say 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 to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."**

As this court is the court whose judgement the defendant is desirous of appealing against, we are the court appealed from. By virtue of the express wording of the above-cited sub-rule, this court "**may for sufficient cause order stay of execution"**.

In an endeavour to demonstrate such sufficient cause, the defendant pointed out that the decision which it seeks to appeal against was a novel one. That fact was pointed out by the trial judge herself, in the judgement. And, for a better understanding of the point in issue, I believe that it is best to now quote from the judgement itself, as from page 24 thereof, whereat the trial judge said:-

"**The Plaintiff's other prayer is that the presently constituted joint manages, namely Ms Sandeep Kaur Balrey and Mrs Shehnaz Nizarali Sumar, be granted a vesting order to execute 999 years subleases to the purchasers, or their nominee, of the villas.**

The defendant argues that the court lacks statutory authority by which it can order the signing of such leases, because the present suit is not a suit for specific performance by a purchaser. That there is no privity of contract between the defendants and the purchasers.

Following the thread of reasoning, of this judgement, the court has already found that the joint managers were lawfully pointed and having found that their acts could bind the defendant, the court therefore finds that they had power to find buyers for the villas since such sale proceeds would have the effect of reducing the defendant's indebtedness to the plaintiffs. The joint managers having so sought the buyers and indeed the proceeds having been applied in reduction of the defendant's debt, it would be unjust to withhold the power of the transfer of those villas to the rightful purchasers. I accept the defendant's submission that the prayers for power to vest the subleases may be novel and does not find statutory provision for its support. To stop there and simply send the managers away without remedy would be a great injustice and would go against the maxim of equity that, equity will not suffer a wrong to be without a remedy. The idea expressed is this maxim is that no wrong should be allowed to go un-redressed if it is capable of being remedied."

Having arrived at that conclusion the learned trial judge granted to the joint managers full power and authority to execute 999 years leases, on behalf of the defendant, in favour of the purchasers or their nominees.

It was the defendant's contention that by giving judgement in favour of the plaintiffs, for both the sum of Kshs 135 million, as well as for authority (to the managers) to execute leases in favour of the purchasers, the court's decision went to the very root of property law. And, the decision being a novel one, the defendant feels that it ought to be given every opportunity to put it to the test, before the Court of Appeal. As far as the defendant is concerned, that fact, by itself, constituted sufficient cause, as envisaged by Order 41 rule 4 (1).

Finally, the defendant submitted that it had brought this application promptly. As far as the defendant was concerned, there was absolutely no inordinate delay on its part, in making this application for stay of execution. That is because, the judgement was delivered on 14th December 2005, and the following day, the defendant had lodged its Notice of Appeal. Simultaneously with the filing of the Notice of Appeal, the defendant applied to the court for the proceedings. Thereafter, this application was filed on 28th December 2005, which was no more than fourteen days after the judgement.

This case was likened to **IN THE MATTER OF GLOBAL TOURS & TRAVELS LIMITED, Winding-Up Cause No. 43 of 2000**, in which the Hon. Ringera J. (as he then was) said:-

"…… **I am unable to regard the delay of about one month between the giving of the order complained of and the making of this application as inordinate or unreasonable**."

The application which the court was dealing with, in that case, was for stay of execution.

In response, the plaintiffs' fault the defendant for having failed to make an informal application for stay, immediately after the trial court had pronounced judgement. If the defendant had made the said informal application, or if the defendant had intimated to the plaintiffs that it would be applying formally for an order of stay, the plaintiffs contend that they would not have spent time and money, by applying for execution.

If I understand the plaintiffs correctly, they were alluding to the provisions of Order 41 rule 4 (3) of the Civil Procedure Rules, which reads as follows:-

"**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."**

Subrule (3) empowers the court to grant an interim order for stay of execution, pending the hearing of a formal application. However, it does not impose an obligation on a party who wishes to seek a stay of execution to always make an informal application. Therefore, even though the defendant did not take advantage of that window of opportunity, that fact cannot, by itself, occasion any prejudice to the formal application for stay.

Secondly, I detect the implied suggestion that had the defendant made the informal application, the plaintiffs would not have taken steps to execute the decree. That means that the plaintiffs would have unilaterally withheld execution, simply upon the making of an informal application. If that be the position taken by the plaintiffs, I cannot help but wonder why therefore the plaintiffs were opposing this application. Is it simply because it is a formal one? If so, that would be absurd. But, if it is because the plaintiffs had now commenced the execution proceedings, the court could easily compensate them for the expenses they had incurred in that regard. However, I must make it clear that to my mind, this application will not be determined by the failure of the defendant to first file an informal application for stay of execution.

In my considered view, the period of fourteen (14) days cannot, within the context of this case, be construed as inordinately long. Following the delivery of the judgement on 14th December 2005, the plaintiffs' advocates wrote to the defendant's advocates, on the same date, asking them to approve the draft decree. However, it is not clear whether or not the said letter was delivered on 14th December 2005, or thereafter. That notwithstanding, the fact is that by the date when this application for stay of execution was filed in court, the decree had not yet been extracted. It was only on 6th January 2006 that the plaintiffs' advocates wrote to the court, asking it to sign and seal the decree. In those circumstances, I do not comprehend how it could have been possible for the plaintiffs to have commenced any execution proceedings, whilst the decree had not yet been extracted. I therefore find that this application was not prompted by any action on the part of the plaintiffs. The application cannot therefore have been intended to derail or delay the execution proceedings, which had, in any event, not yet been instituted. Accordingly, I find that the defendant is not guilty of unreasonable delay in presenting this application.

On the issue of the applicable law. The defendant cited no less than eight authorities. The first two authorities were:

(i) **ALLIANCE MEDIA KENYA LIMITED V WORLD DUTY FREE CO. LTD, HCCC NO. 678 of 2004**, and

(ii) IN THE MATTER OF GLOBAL TOURS & TRAVEL LIMITED, WINDING-UP CAUSE NO. 43 OF 2000.

Those two decisions were dismissed by the plaintiffs as being irrelevant to this application. It was submitted that those cases dealt with applications for stay of proceedings, as opposed to say of execution. For that reason, the plaintiffs expressed the view that the cases could be distinguished from this one, as in matters for stay of proceedings, the court's discretion was wholly unfettered, unlike when the court was handling an application for stay of execution.

To some degree, the plaintiffs are right, insofar as the provisions of Order 41 rule 4 (2) of the Civil Procedure Rules apply only to applications for stay of execution. However, it must also be recognised that for both stay of proceedings as well as for stay of execution, the applicant is required to satisfy the court that he has sufficient cause, to warrant the grant of the orders sought. This is the manner in which the Hon. Njagi J. expressed the position, in **ALLIANCE MEDIA KENYA LTD v. WORLD DUTY FREE CO LTD** (above), at page 12:-

"**unfettered as its discretion might be, however, before the court can grant an order of stay, it must be satisfied, inter alia, that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay."**

That fact, coupled with the fact that applications for stay of proceedings as well as those for stay of execution are provided for by Order 41 rule 4 of the Civil Procedure Rules leads me to conclude that, decisions pertaining to applications for stay of proceedings are not necessarily irrelevant to applications for stay of execution.

The defendant then went on to submit that the sums in issue in this suit is, by any means, substantial. The said sum is in excess of Kshs. 135 million. In that regard, there is no dispute at all.

It was thus contended that if no stay was granted the defendant would suffer substantial losses, especially when it is borne in mind that the receivers had also been authorised to execute 999 years leases in favour of third parties who had purchased the villas, which were developed by the defendant. For that reason, the defendant submitted that a stay ought to be granted so that its intended appeal would not be rendered nugatory.

If I understood the defendant correctly, it feels that payment of the sum of Kshs. 135 million with interest thereon at 30% per annum, from 2001, was an onerous task. And, if the defendant was not only to pay that sum, (whose calculation the plaintiffs have placed at Kshs. 314,584,988, as at 30th December 2005); but also end up losing the vilas, before its appeal was heard and determined, the said appeal may thereafter have no tangible meaning to the defendant.

In **ORARO & RACHIER ADVOCATES V. CO-OPERATIVE BANK OF KENYA LTD, CIVIL APPLICATION NO. NAI 358 of 1999,** the Court of Appeal held as follows, at page 5 of its Ruling:-

"**If M/s Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas, if the respondent bank is kept out of the sum of Kshs. 10,000.000/= it would not be affected**."

For that reason, the Court of Appeal granted a stay of execution, without imposing any conditions on the successful applicant.

Then, in **SWANYA LIMITED V. DAIMA BANK LIMITED, CIVIL APPLICATION NO. NAI. 45 of 2001**, the Court of Appeal granted a stay of execution because it was satisfied that it was necessary to stop the intended sale of the property which was the subject-matter of the intended appeal, so that the substratum thereof was not destroyed. The Court expressed the view that if the property were sold off, the appeal would be rendered nugatory, as the substratum of the intended appeal would be destroyed.

In **RELIANCE BANK LIMITED (IN LIQUIDATION) v NORLAKE INVESTMENTS LIMITED, CIVIL APPLICATION NO. NAI. 93 of 2000,** the Court of Appeal, once again, granted stay of execution, as it was satisfied, inter alia that otherwise the appeal would be rendered nugatory. When doing so, the Court set aside the order by the superior court, which had directed the applicant to deposit Kshs. 15 million, as a pre-condition for the stay order. In arriving at its decision, the Court of Appeal said, inter alia:-

"**We think that in the circumstances disclosed in this case, it would be too onerous to require the liquidator of the applicant to deposit the money in Court or to comply with any of the orders made by the learned judge. As we said earlier in this ruling, it was conceded that the applicant has an arguable appeal. To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."**

In the face of all those authorities, what was the plaintiffs' response?

The answer was crisp. The principles were accurate, but they were only applicable before the Court of Appeal. In other words, although the decisions were by the Court of Appeal they were not binding on the superior court, as the two courts were, by law, empowered to apply different principles when giving consideration to application for stay of execution.

In that regard, it is very clear that whilst the Court of Appeal applied the provisions of Rule 5 (2) (b) of the Court of Appeal Rules, the superior court was supposed to apply the provisions of Order 41 rule 4 (1) and (2) of the Civil Procedure Rules.

Or, to put the matter in a different manner, the superior court cannot and ought not to apply the provisions of Rule 5 (2) (b) of the Court of Appeal Rules.

In TRUST **BANK LIMITED & ANOTHER V INVESTEC BANK LIMITED & 3 OTHERS**, **Civil Application No. NAI. 258 and 315 of 1999,** the Court of Appeal expressed itself thus:-

"**The jurisdiction of the Court under rule 5 (2) (b) aforestated, is original and discretionary, and it is trite law that to succeed an applicant has to show, firstly, that his appeal or intended appeal is arguable, or put another way, is not frivolous; and secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. Those are the guiding principles, but those principles must be considered against the facts and circumstances of each case……"**

Those, principles, as correctly submitted by the Plaintiffs, were only applicable by the Court of Appeal. The superior court lacks jurisdiction to apply them. Therefore, insofar as the authorities cited by the defendant are founded on the provisions of rule 5 (2) (b) of the Court of Appeal Rules, the same are inapplicable to the matter before me.

In **CARTER & SONS LIMITED V. KENYA FINANCE CORPORATION LTD & 2 OTHERS, HCCC NO. 5638 of 1989,** the Hon. J.F. Shields J. granted a stay of execution, having been guided, inter alia with the principle that the applicant's intended appeal ought not to be rendered nugatory. He also expressed the view that the superior court had an unfettered discretion on the question as to whether or not a successful applicant for stay of execution should be required to provide security. He therefore granted stay, on condition that the applicant deposited about one-tenth (1/10) of the damages awarded against it. The said sum was to be deposited within three weeks of the ruling.

The said ruling prompted an appeal to the Court of Appeal, in **CARTER & SONS LIMITED V. DEPOSIT PROTECTION FUND BOARD (The Liquidator for the Kenya Finance Corporation Ltd (In Liquidation) & 2 others**, **CIVIL APPEAL NO. 291 OF 1997.**

In its judgement, the Court of Appeal noted that the application which was before the superior court:-

"…….. **had been made under the provisions of Order 41 rule 4. Sub-rule 2 of the same rule reads**:-

"**(2) No order for stay of execution shall be made under sub-rule 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."

As far as the applicant, herein is concerned the foregoing provisions do not make it mandatory for the superior court to order a successful applicant for stay of execution to provide security. It was contended that the court has the discretion to grant orders for stay of execution without necessarily ordering that security be provided. The applicant submitted that it was only if the court did decide to order that there be security, that the said court's discretion was fettered in relation to the quantum of such security. In other words, as far as the applicant was concerned, if the court was not minded to direct that there be security, the court could nonetheless still grant orders staying execution.

The applicant's said views do not however find favour with this court, as I find the express wording of Order 41 rule 4 (2) (b) to be self-explanatory, and inconsistent with the applicant's view.

In **CARTER & SONS LIMITED V DEPOSIT PROTECTION FUND BOARD & 2 OTHERS, CIVIL APPEAL NO. 291 of 1997**, at page 3, the Court of Appeal said:-

"**As was held by the Court of Appeal in VISHRAM RAVJI HALAI & ANOTHER vs. THORNTON & TURPIN (1963) LIMITED, CIVIL APPLICATION 15 OF 1990 (unreported)**

"**The superior court's discretion 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 unreasonable delay."**

In our judgement, it is manifestly clear that the judge erred in failing to make an order for security for the due performance of the decree."

The message from the Court of Appeal is thus very clear. If the superior court is minded to grant an order for stay of execution, the court must order the successful applicant to provide security. Indeed, the Court of Appeal went further to emphasize that in an application for stay of execution, under Order 41 rule 4 (2) of the Civil Procedure Rules, the judge of the superior court has:-

"**the power to grant a stay within the four corners of the said rule.**

It will, therefore, be seen that the discretion vested in the superior court under Order XLI rule 4 of the Civil Procedure Rules is not unfettered. On the other hand, an application for stay of execution can be made to this Court under rule 5 (2 (b) of the Rules of this Court and this Court's discretion under that rule is wide. This court is at liberty to consider the application made to it and make such order thereon as may, to it, seem just. Not so with the superior court under order XLI of the Civil Procedure Rules as is the position in the instant proceedings."

In the light of such explicit words, it is obvious that the applicant's reliance upon decisions of the Court of Appeal was misguided, insofar as the said court's discretion was unfettered, as compared to the discretion of the superior court.

I now ask myself whether or not the fact that the applicant's intended appeal may be weighty, could by itself constitute sufficient cause to warrant the favourable consideration of an application for stay. In **CARTER & SONS LIMITED V. DEPOSIT PROTECTION FUND BOARD, CIVIL APPEAL NO.**

291 OF 1997, the Court of Appeal held as follows:-

"**It was also contended that the intended appeal has strong probability of success. In our view, the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. A party is expected to prefer an appeal only when there are strong reasons for doing so."**

In the same vein, I hold the considered view that simply because the point which the defendant seeks to appeal against was a novel one, is not sufficient cause to justify a stay of execution. The novelty of the point of law could, properly, be the foundation for leave to appeal, if such leave were necessary.

It must be borne in mind that the provisions of Order 41 rule 4 (2) of the Civil Procedure Rules is worded in a unusual manner. I say because, whereas most of the rules are worded "**positively**", Order 41 rule 4 (2) actually stipulates that no order for stay of execution shall be made **unless**, substantial loss may result to the applicant; and that the application is made without unreasonable delay. Furthermore, the applicant would have to provide security for the due performance of the decree or order which may ultimately be binding on him.

The defendant submitted that the sum of Kshs. 135 million was substantial. It also feared that the receivers would, unless restrained by an order of stay, transfer the villas to the purchasers thereof, who were not parties to this suit.

In response to the claim of substantial loss, the plaintiffs pointed out that the applicant had failed to identify the losses it would suffer, if the decree was executed. In that regard, I accept the plaintiffs' contention. I say so because the defendant itself did concede, in its defence, that the villas which were developed with funds provided by the plaintiffs, in the form of loans to the defendant, were to be sold off, and the proceeds therefrom utilised towards settling the loan. Indeed, the defendant pleaded, in paragraph 15 of its defence, that it procured buyers for seven of the villas, and thereafter utilised the proceeds towards the repayment of the loan.

Furthermore, the defendant admitted, in its defence, that the sale of the villas was to be made by way of 999 years' leases. To that end, the defendant did execute leases for villas No. 5 and 12.

In these circumstances, I cannot comprehend how the sale of the remaining villas, and the leasing out thereof to the purchasers for 999 years, would occasion losses to the defendant, if the proceeds were utilised towards repaying the loan it owes the plaintiffs.

In **KENYA SHELL LIMITED V. KIBIRU & ANOTHER** [1986] KLR 410, at 417 the Hon. Gachuhi Ag. JA (as he then was), held as follows:-

"**It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted."**

Whilst I appreciate that those views were expressed on an application before the Court of Appeal, I believe that the said views do apply, with equal measure, to the application before me, in relation to the issue of substantial loss. In the circumstances, I find that the defendant has failed to satisfy me that if no order for stay of execution is granted, it will suffer substantial loss.

Accordingly, I hold that the defendant has failed to persuade me that it is deserving of the order for stay. In arriving at this conclusion I have taken into account the following words of the Hon. Waki J. (as he then was) in **PORTRITZ MATERNITY V. JAMES KARANGA KABI, HIGH COURT CIVIL APPEAL NO. 63 of 1997**;

"**That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be just cause for depriving**

him of that right."

In this case, I have found no just cause for depriving the plaintiffs of their right, to enjoy the fruits of the judgement delivered in their favour. I therefore find no merit in the application dated 28th December 2005, and thus dismiss it with costs.

Dated and delivered at Nairobi this 31st day of January 2006.

FRED A. OCHIENG

JUDGE