REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 177 of 2002

DIAMOND TRUST BANK KENYA LTD…….....
…….PLAINTIFF

VERSUS

PETER MAILANYI …….....…….1ST
DEFENDANT

DENIS COSTELLO DOYLE…….....…2ND
DEFENDANT

PHOENIX OF EAST AFRICA ASSURANCE CO. LTD……3RD
DEFENDANT

R U L I N G

This is an application by the 1st defendant, seeking a stay of execution pending the hearing and determination of an intended appeal.

The ruling against which the applicant wishes to appeal was dated 16th February 2006. By the said ruling, the Hon. Emukule J. granted summary judgement in favour of the plaintiff, in the sum of Kshs. 4,083,052/=, together with costs and interest.

It is the applicant's case that the decretal amount was now Kshs. 23,805,310/50, once interest was added onto the principal sum. That sum was not inclusive of costs. Therefore, it is the applicant's contention that the amount of money which he may be required to pay out to the plaintiff, in satisfaction of the decree, was very substantial.

The applicant then illustrated to the court the circumstances in which the court granted judgement. It was explained that at the time when the 1st defendant had lodged a claim before the High Court of Kenya at Embu (In **HCCC No. 32 of 1997 PETER M. MAILANYI V., MOHAMED HASSAN MUSA & 2 OTHERS**), he was employed in the firm of advocates who are representing him in this case. The 1st defendant subsequently left the said employment, but failed to notify his erstwhile employer, about his new address. Consequently, when the plaintiff's application for summary judgement had been served on his advocates, they were unable to locate the 1st defendant, and therefore he did not have the opportunity to file a replying affidavit.

The applicant's advocates then sought an adjournment, so that they could apply to cease acting for him. The adjournment was denied, whereupon the advocates asked for leave of the court to withdraw from the proceedings of the plaintiff's summary judgement application. The court did grant leave to the advocates, who then left the court. However, the court then went ahead to hear the plaintiff's application.

It is contended by the applicant that in the circumstances the plaintiff's application was heard exparte. Indeed, he complains that he was condemned unheard, and he therefore believes that he has very good prospects on appeal.

One of the grounds upon which the applicant believes his appeal will succeed on, is in relation to the award of interest at 36% per annum. As far as he is concerned, the plaintiff did not prove, through evidence, how it was entitled to an award of interest, at that rate.

On their part, the respondents feel that the applicant cannot be right to assert that the summary judgement application was heard exparte. The reason for so saying is that the application was duly served on the advocates on record. The said advocates thereafter attended court, and sought an adjournment. When the court refused an adjournment, the advocates sought and were allowed to withdraw from court. Those facts indicate, as far as the respondents were concerned, that the application was not heard exparte.

The respondents also submit that the issue of interest on the principal amount was determined appropriately, by the superior court.

On my part, I first remind myself that those two issues are intended to be canvassed before the Court of Appeal. Thus, whether or not the summary judgement application could be said to have proceeded exparte, and also whether or not the learned judge of the superior court was justified in awarding interest at 36% per annum, are not issues about which I need to make any findings. In my considered view, I would be purporting to empower myself with jurisdiction with which I am not clothed, if I were to arrogate to myself the role of assessing the decision of my learned brother. I therefore decline to make any comments on the questions.

Having said so, I do not think that the decision on the application for stay of execution, if executed before this court, is dependent on the probability of success on the intended appeal. As all the parties hereto have said, the conditions to be met are set out in Order 41 rule 4(2) of the Civil Procedure Rules.

In HALAI & ANOTHER V THORNTON & TURPIN (1963) LTD [1990] KLR 365 at 365, the Court of Appeal pronounced itself as follows:

"**Thus, 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."**

Those words succinctly summarise the legal position. I will therefore strive to apply the said legal principles to the matter before me.

First, has the applicant demonstrated a sufficient cause? He says that by pointing out to the court that he was condemned unheard, and that therefore the judgement ought to be set aside ex debito justitiae, and also because he believes that the award of interest was not legally sound, he has shown sufficient cause.

I have already held that it is not my role to assess the applicant's chances of success, in his intended appeal. Therefore, in ascertaining whether or not the applicant has made out sufficient cause, I find that I must delve into the undisputed facts in this case. Those facts are derived largely from the judgement of the Court of Appeal in **MOHAMED HASSAN MUSA & ANOTHER V PETER M. MILANYI & ANOTHER, CIVIL APPEAL NO. 243/98.**

The applicant had been involved in a motor accident. As he believed that the driver of the other

vehicle was at fault, he sued him as well as the owner of the said vehicle. After hearing the case, the Hon. Etyang J. granted judgement in favour of the applicant, in the sum of Shs. 3,266,774/=.

Following the judgement, the applicant promptly caused execution to be levied, by way of attachment of the plaintiff's goods. The said execution process culminated in the applicant being paid the decretal amounts, on 6th August 1998.

Meanwhile, the 2nd defendant herein and his driver preferred an appeal against the judgement of the superior court. In a judgement delivered by the Court of Appeal on 30th June 2000, the judgement of the superior court was set aside in its entirety. It is thereafter that this suit was filed, in an endeavour to recover the money which the plaintiff had paid out earlier, on the strength of the judgement by the superior court.

Placing the current application within context, I find that the applicant has not shown sufficient cause to justify my granting of an order which would enable him to continue to enjoy the fruits of a judgement which has been upset by the Court of Appeal.

The next question, which is closely inter-linked with the first one is whether the applicant has demonstrated that he would suffer substantial loss, if no stay is granted.

In **KENYA SHELL LIMITED V.KIBIRU & ANOTHER [1986`] KLR 410 at 416**, the Court of Appeal said:

"**It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."**

In an endeavour to persuade me that he would suffer substantial loss, the applicant pointed out that the decretal amount was now in excess of KShs. 23.8 million. Of course, that is a substantial sum, by any standards. But is that sufficient to warrant a stay?

In **KENYA SHELL LTD V KIBIRU & ANOTHER** (abovecited) at page 417, the Court of Appeal said:

"**It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What 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."**

I am afraid that in this case the applicant has not given the court sufficient material from which the court could conclude that if no stay was granted, he would suffer substantial loss.

I also note that the applicant has not as much as suggested that if he has to pay the money to the plaintiff now, the said plaintiff might be unable to repay it, if the intended appeal should ultimately be successful.

In **PATANI & ANOTHER V PATANI [2003] KLR 518**, the Court of Appeal declined to grant an order for stay of execution. In arriving at that decision, the court found as follows, at page 520:

"**No prejudice would be caused to the applicants in the event that the intended appeal is successful as the respondent would have no difficulty in refunding the decretal amount."**

A similar position was taken by the Court of Appeal in **JETHWA V. SHAH t/a SUPREME STYLES [1989] KLR 198 at 199**, whereat it was held as follows:

"**Generally, an applicant in these circumstances would be entitled to an order for stay of execution to preserve the subject-matter so that the appeal if successful is not rendered nugatory. The applicant has a money decree against him. So, besides demonstrating that any success in the intended appeal would be rendered nugatory, he has to persuade us that the respondent is so impecunious that the applicant will never be able to get his money back."**

Order 41 rule 4 (2) of the Civil Procedure Rules stipulates that no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant. In this case, the applicant has failed to satisfy me that if no stay is granted, he will suffer substantial loss. Accordingly, no order for stay of execution may issue. I therefore find no merit in the application dated 2nd March 2006, and thus dismiss it, with costs to the plaintiff as well as the 2nd and 3rd defendants.

Dated and Delivered at Nairobi this 17th day of May 2006.

FRED A. OCHIENG

JUDGE