

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 247 OF 2004

STANDARD CHARTERED BANK KENYA LTD APPELLANT

VERSUS

AYAGA M. SANGALE RESPONDENT

RULING

This is an application for stay of execution of the Judgment of the lower court in CMCC 6819 of 2002 pending the hearing and determination of this appeal.

The appeal is based on a point of law involving the liability of a paying banker vis a vis a collecting banker.

The applicant bank is apprehensive that if the decretal amount is paid to the respondent who it says “is unemployed ... and has no known sources of income”, it will be unable to recover the same. This fact is not controverted as there is no replying affidavit filed on behalf of the defendant. In an application of this nature under Order 41 Rule 4, the Applicant will succeed if he demonstrates to the satisfaction of this Court that substantial loss will ensue if the order of stay is not granted; that he has filed the application without undue delay, and that he has offered such security as may be ordered for the due performance of the decree. The onus is on the applicant to discharge the above through a deposition.

Ms Nyagah, Counsel for the respondent relied on the case of ***Kenya Shell Ltd vs Karuga & Another (1982 – 88) I KAR 1018*** to argue that stay of execution of a money decree is not normally granted, and further that the onus was on the applicant to demonstrate that if stay was not granted, the appeal would be rendered nugatory (See ***Kenya Ports Authority vs James Nderitu Gachagua (Nairobi C A 106 of 1999)***).

Ms Nyagah is right that the onus is on the applicant to show substantial loss. That onus has been discharged to the satisfaction of this court. The applicant has deponed through its authorized officer that “the respondent is currently unemployed and after his retirement has no known sources of income.” This fact, as I said before, is not controverted.

As for the ***Kenya Shell case***, Mr Chacha Odera, for the Applicant, correctly pointed out that the Court of Appeal in ***I. C. D. C. vs Daber Enterprises Ltd.*** (Nairobi 223 of 1999) said that “the Kenya Shell case has at the very least been modified for it was held in the cases of ***Kenindia Assurance Company vs Muturi (Nairobi C A 107 of 1993)*** and ***Nairobi Deluxe Services vs Ndege (Nairobi C A 64 of 1992)*** that if the circumstances of the case so demand a stay order can be granted even in money decrees.”

With regard to the other two considerations of Order 41 Rule 4 – timeliness of the application and security – the respondent’s counsel did not dispute that the application was timely, but argued that the applicant had not offered security. That is, of course, not correct. The applicant has indeed made such offers in the application, as well as in submissions to this Court. In any event, it is for this Court to order such security as it deems appropriate, and for the applicant to be bound by, and to give, such security (Order 41 Rule 4 (2) (b)).

Accordingly, and for reasons outlined, the application for stay of execution dated May 5, 2004 is allowed on condition that the entire decretal sum is deposited in Court within the next 21 days as Security pending

the hearing and determination of this appeal. Costs shall be in the cause.

Dated and delivered at Nairobi this 19th day of July, 2004.

ALNASHIR VISRAM

JUDGE