



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 2695 OF 97

SAVINGS & LOAN KENYA LTD. PLAINTIFF

VERSUS

MARY WAHITO MBUGUA DEFENDANT

RULING

Savings and Loan Kenya Ltd. are the plaintiff in this case. They sued Mary Wahito Mbugua, the defendant in this case for Ksh.3,500,000/-.

The Plaintiff had extended Mortgage facilities to the defendant on an immovable property known as LR No.209/139/44 which property was registered in the defendants name. In another case - High court civil appeal 234/96 the defendant was declared to have procedurally acquired title to LR209/139/44.

The order was given that her title be cancelled and the suit property revert to its original owner (not party to this present suit).

The plaintiffs at once filed this suit to recover the mortgage and a further mortgage extended to the defendant amounting to Ksh.2,200,46570/-. They also prayed for interest on the said amount of 28%.

The defendant entered appearance and filed defence stating inter alia, that she was not satisfied with the courts decision. That she has appealed against the said decision.

The plaintiffs filed an application on the 23.4.98 dated the 17.4.98 in which they sort for the defence to be struck out as it discloses no reasonable defence. They stated that the defendants took a facility from them. The security is now no longer there and as a result she should pay back the sum loaned to her.

The defendants opposed this applications stating that the application was premature.

I heard the parties on this application. I then made a ruling on the 8th of July 1998 striking out the defence and entering judgement for the plaintiffs for Ksh.2,200,465.70 at 12% per annum as of 31.10.96 until the payment in full.

The defendant changed advocates and filed this current application dated the 20.7.98 seeking for a stay of execution against my orders. It is this application that is the subject matter of this ruling.

The defendant/applicant prayed that there by a stay of execution on the grounds that they intend to appeal against the decision of this court. If stay is not granted, the defendant/applicant would suffer irreparable

loss. The whole appeal would also be rendered nugatory. The advocate relied on the case of:-

H.M. Butt Vs. Rent Restriction Tribunal CA Appl Nairobi 6/79 Whereby the court stated

“If there is not other overwhelming evidence, a stay ought to be granted so that an appeal, if successful may not be nugatory.

....”It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.....”.

The advocate also relied on the case of African Express Airways (K) Ltd. V. Nobel Viajes CA 128/93 Where it was held that a stay may be granted irrespective of whether it is a momentary decree or not. The decision of:-

Keninda Associate Co. Ltd. vs Patrick Muli C.A Nairobi 107/93

Also held in the same hires as the above authority. In reply the plaintiff/respondent stated that the debt is admitted and is not in dispute. He went on to say that the matters the defendant/applicant wishes to appeal from are irrelevant. Although the discretion is with this court it should not be given. If it is, security should be provided. He relied on the case of:-

Olula Maternity & Nursing Home Ltd. Vs. Patel Poshotam and Gichuhi Kimira Vs. Samuel Ngunu Kimotho

Nairobi, 248/96

The advocate for the applicant said the above authorities deal with court of appeal rules.

I have entered judgement against the defendant/applicant. She seeks a stay of execution pending the court of appealed decision on my judgement. There is also pending another appeal on an earlier matter that was not before me but concerned the same subject matter.

The appeal would be rendered nugatory if a stay of execution is not granted. I hereby grant the stay of execution pending the hearing of the court of appeal decision. If no appeal has been filed or no action taken on this file with the court of appeal after 6 months from to-days date the stay orders lapse.

I award costs of this application to the respondent/plaintiffs.

Dated this 12th day of April 2000 at Nairobi.

M.A. ANG’AWA

JUDGE