



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E279 OF 2020**

**FIRST COMMUNITY BANK LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**OSMAN ABDI KASSIM.....RESPONDENT/RESPONDENT**

**RULING**

1) The subject matter of this ruling is the motion dated 11<sup>th</sup> November 2021 taken out by the appellant/applicant in which it sought for the following orders:

*i. THAT the application herein be certified urgent and service be dispensed with in the first instance.*

*ii. THAT this honourable court be pleased to issue an interim stay of execution of the warrants of attachment ad proclamation dated 9<sup>th</sup> November, 2021 pending the hearing and determination of the application inter-partes.*

*iii. THAT this honourable court be pleased to order that the warrants of attachment and proclamation dated 9<sup>th</sup> November 2021 are irregular, illegal, null and void.*

*iv. THAT the bank guarantee dated 30<sup>th</sup> July 2021 already deposited in court be deemed as properly filed and on record.*

*v. THAT this honourable court be pleased to issue an order restraining the respondent or his agent from executing the decree pending the hearing and determination of the appeal.*

*vi. THAT the costs of this application be in the cause.*

2) The applicant filed the affidavit of Claris Ogombo in support of the motion. The respondent on his part filed the replying affidavit he swore to oppose the application.

3) I have considered the grounds stated on the motion plus the facts deponed in the rival affidavits. I have further considered the rival oral submissions made by learned counsels appearing in this appeal plus the authorities cited.

4) It is the submission of the appellant/applicant that it was directed by this court to deposit in court a banks guarantee for the decretal sum within 30 days as a condition for the grant of the order for stay of execution of the decree pending appeal. It is further averred by the appellant that in compliance with the court order it deposited the bank guarantee two months after the time fixed and also filed the record of appeal.

5) It is the appellant's submission that despite complying with the court order, the respondent went ahead and instructed Betabase Auctioneers to extract warrants of attachment and sale.

6) It is stated that the aforesaid auctioneer has now proclaimed the appellant's properties and are due for sale. It is pointed out that the warrants of attachment and proclamation were illegally done in breach of the orders for stay.

7) The applicant further stated that the delay in depositing the bank guarantee was neither deliberate nor inordinate nor at the fault of applicant since the court delayed in providing the correct decretal amount. The applicant argued that it will suffer substantial loss should the respondent execute the decree which involves a colossal amount of ksh.7,331,069/= on warrants of attachment issued on irregularly obtained warrants of attachment and proclamation.

8) The respondent opposed the appellant's application arguing that the application is resjudicata. It is stated that the application is based on similar provisions seeking for similar orders as in a previous application. The respondent pointed out that the court found out that the orders for stay lapsed after the applicant failed to provide the bank guarantee within the time fixed by the court.

9) It is also argued that the applicant failed to show the substantial loss it would suffer if the order for stay is denied. It is further argued that the appeal would not be rendered nugatory since it is a money decree.

10) The respondent further attacked the bank guarantee provided by the appellant stating that it was issued by the appellant instead of an independent bank. It is also stated by the respondent that the appellant did not provide the bank guarantee within the 30 days fixed by the court since there is no evidence to show that it was deposited in court.

11) Having considered the rival submissions, the main issue which has been left for determination is whether the applicant provided the bank guarantee as ordered by court. It is not in dispute that this court granted the appellant a conditional order for stay of execution of the decree pending appeal.

12) The applicant was directed to provide a bank guarantee within 30 days from 13.5.2021. The applicant admits that it did not provide the bank guarantee within the 30 days but it instead provided the same after the lapse of two months. The record shows that the 30 days were to run from 13<sup>th</sup> May 2021 and lapse on 13<sup>th</sup> June 2021. The applicant provided a bank guarantee for ksh.2,000,000/= dated 30<sup>th</sup> July 2021 and filed in court on 13<sup>th</sup> August 2021.

13) The record also shows that the respondent applied and was issued with warrants of attachment on 9<sup>th</sup> November 2021. It is apparent that the conditional order for stay of execution lapsed when the appellant/applicant failed to provide the bank guarantee within 30 days. It cannot therefore be said that the warrants of attachment and proclamation were irregularly issued since they were issued when there was no order for stay in existence.

14) The respondent has also argued that the appellant has not provided a bank guarantee from an independent bank as required by law. The applicant is of the submission that there is nothing wrong for it to provide a bank guarantee. It is not in dispute that the applicant provided the bank guarantee dated 30<sup>th</sup> July 2021 in its name.

15) With respect, I am persuaded by the respondent's argument that the applicant should have provided a bank guarantee from an independent third party bank instead of issuing its own guarantee. In the case of **Okiya Omtatah Okoiti & Another vs= national Transport Authority & 2 others (2017) e KLR Justice G. V. Odunga**, expressed himself as follows:

**... it must be a third party bond and the parties to a contract cannot issue to each other bid bonds drawn on themselves. Secondly, a bid bond must be a surety guarantee in the sense that the third party issuing it must guarantee to assume liability that may accrue to one of the parties to the contact.**

**To permit a tenderer to also perform the role of a surety ... amounts to a hollow security and defeats the very essence of security.**

16) I find that the guarantee provided by the applicant is not acceptable.

17) The applicant has further stated that it would suffer substantial loss if the order for stay is not granted. It is the applicant's argument that the decretal amount is colossal. I find that the argument does not explain what substantial loss the applicant would suffer. The execution process being undertaken by the respondent is a lawful process to recover a judgment sum.

18) In the end, I find the applicant's motion dated 11<sup>th</sup> November 2021 to be without merit. The same is dismissed with costs being awarded to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE APPELLANT/APPLICANT**

..... **FOR THE RESPONDENT/RESPONDENT**