



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 550 OF 2018

MERIDIAN ACCEPTANCES LIMITED..... APPLICANT

VERSUS

BOBJANE CREDIT COMPANY LIMITED..... RESPONDENT

RULING

1. By its Notice of Motion dated 6th February 2020, the applicant, *Meridian Acceptances Limited* approached this court principally seeking orders to stay further execution of the judgment delivered on 6th November 2018 by *Hon. P.N. Gesora (CM)* in Civil Suit No. 3427 of 2013 pending hearing and determination of its appeal.

2. The application is premised on the grounds stated on its face and depositions in the supporting affidavit sworn by *Mr. James Ndwigah*, its Chief Executive Officer. The applicant contends that it is dissatisfied with the judgment of the trial court in which it was ordered to pay the respondent KShs.5,404,545 together with interest at the rate of 3.5% per month with effect from 30th April 2013 until payment in full as well as costs of the suit; that after filing the instant appeal, it filed an application for stay of execution before the trial court and though conditional stay was granted, it was dissatisfied with the terms of stay imposed by the trial court; that its advocates then on record filed a fresh application for stay dated 7th December 2018 before the High Court but by mistake, the advocates quoted Civil Appeal No. 579 of 2018 as the appeal in which the application was filed instead of the current appeal HCCA No. 550 of 2018 which is the appeal in which the application was supposed to be filed; that as a result of this inadvertent error, the application was struck out vide a ruling delivered by this court on 24th May 2019.

3. The applicant further averred that so far, it has paid the respondent a total of KShs.14,071,344 and has in addition issued postdated cheques for the balance of the decretal sum which continue to be banked and their proceeds disbursed to the respondent; that the amounts paid exceeds half of the decretal amount which the respondent indicated to the trial court it was capable of refunding the applicant if its appeal succeeded; that if further execution is not stayed, the whole decretal amount will be paid and it might be impossible to recover the amount in the event the appeal is successful which means that failure to grant stay would render the appeal nugatory; that the applicant is ready and willing to deposit the balance of the decretal amount in a joint interest earning account to secure the same pending determination of the appeal.

4. The application is opposed. The respondent's Director *Mr. Patrick Kinyua Njagi* swore a replying affidavit in which he admitted that so far, the applicant has paid KShs.14,071,344 out of KShs.18,857,014.63 decreed by the trial court; that the balance now outstanding is KShs.4,785,672.

5. Further, *Mr. Njagi* deponed that the applicant is not deserving of the exercise of the court's discretion since in his view, it has approached the court with unclean hands having issued six post dated cheques which it had no intention of honouring; that though the applicant had given the respondent the go ahead to deposit the cheques, on presentation to the bank, they were dishonoured as the applicant had stopped their payment.

6. The deponent in addition asserted that the respondent is financially sound and is capable of refunding the applicant any money that may be found due to it in the unlikely event that the appeal succeeds. He annexed evidence of the respondent's financial capability in the form of certificates of balance of funds in its various bank and money market accounts.

7. By consent of the parties, the application was canvassed by way of written submissions. The firm of *Waweru Gatonye & Company Advocates* filed submissions on behalf of the applicant dated 27th October 2020 while the firm of *Muciimi Mbaka & Company Advocates* filed submissions on behalf of the respondent dated 11th November 2020.

8. I have carefully considered the application, the affidavits sworn in support and in opposition to the application, the parties' rival written submissions and the authorities cited.

At the outset, I wish to state that the relief of stay of execution pending appeal is discretionary but like all other judicial discretions, the discretion must be exercised judiciously in accordance with the law and not whimsically or capriciously.

9. The parameters within which the court ought to exercise its discretion in applications such as the current one are set out under *Order 42 Rule 6 (2)* of the *Civil Procedure Rules*. The rule is clear that in order to be deserving of orders of stay, the applicant must satisfy the court that unless stay is granted, he stands to suffer substantial loss; that the application has been made without unreasonable delay and that he has given adequate security for the due performance of the decree or order subject of appeal.

10. Starting with the requirement that the application must be made without unreasonable delay, I find that the decision challenged on appeal was delivered on 6th November 2018. The appeal was filed on 9th September 2019 about 10 months later while the instant application was filed on 6th February 2020 about one year and four months later.

11. The applicant has explained the delay in filing the application by claiming that its erstwhile advocates inadvertently filed the application in the wrong file and they apparently realized the mistake after the application was struck out. This may well be the case and may explain the delay between the date the impugned judgement was delivered and the date the application was struck out which is 24th May 2019. The explanation does not however account for the delay between 24th May 2019 and the date the instant application was filed which amounts to about eight months. Although there is no standard measure of determining what would constitute unreasonable or inordinate delay, and each case should be determined on its own facts and circumstances, the delay of slightly over 8½ months in this case is prolonged and unexplained. The delay is in my view inordinate and inexcusable. It is thus my conclusion that there was unreasonable delay in filing the application.

12. On the need to demonstrate the likelihood of suffering substantial loss if stay was refused, both parties are in agreement that the applicant has already paid a substantial portion of the decretal amount. It is not disputed that the applicant has already paid KShs.14,071,344 and only KShs.4,785,672 is outstanding. The applicant argues that if stay is not granted, execution will issue for the outstanding balance and this will render the appeal nugatory as it is unlikely to recover the amount from the respondent if the appeal was successful. This claim is denied by the respondent which has maintained that it has sufficient funds at its disposal to pay the applicant whatever amount is found to be due to it in the event the appeal succeeds.

13. The onus of proving substantial loss rests on the applicant in alignment with the law of evidence that he who alleges must prove. Proof must be by way of cogent evidence not by mere averments or unsubstantiated statements. In monetary decrees, the likelihood of substantial loss occurring if stay was not granted can be demonstrated by evidence showing that the respondent is incapable of refunding the decretal amount upon successful determination of the appeal. I am persuaded by the decision of this court in **Lalji Bhimji Sanghani Builders & Contractors V Nairobi Golf Hotels Limited, HCCC No. 1990 of 1995** in which the court explained what constituted substantial loss in monetary decrees and how it should be proved. The court expressed itself as follows:

“... for an applicant to satisfy this condition, he must persuade the court that the decree holder is a man of straw from whom it will be well nigh impossible, or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bold statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matters I have alluded to carries no weight of persuasion in the mind of a judge.”

See also **Samvir Trustee Limited V Guardian Bank Limited, [2007] eKLR**.

14. In this case, the applicant has not adduced any evidence to substantiate its claim that it is likely to suffer substantial loss if stay is not granted as sought.

I appreciate the legal principle that when an applicant expresses apprehension that the judgement debtor is impecunious and is incapable of refunding the decretal sums if the appeal outcome is favourable, the evidential burden of proof shifts to the respondent to demonstrate that he is capable of refunding the amount in question if the appeal was successful. See: **ABN Amro Bank N.K. V Le Monde Foods Ltd, Civil Appn No. 15/2002 (NRB); Stephen M. Mwangi & 2 Others V Albert Wesonga, [2017] eKLR**.

15. The respondent has adduced documentary evidence showing its financial standing and has been consistent in its claim that it has the means to refund the monies that may be found due to the applicant if called upon to do so. This evidence has not been adequately rebutted by the applicant. Considering that the balance currently outstanding which is the only amount subject to execution is KShs.4,785,670 out of a total of KShs.18,857,014.63, I am satisfied that the respondent has satisfactorily discharged the burden of establishing that it has the wherewithal to refund the above amount to the applicant if execution proceeded and the appeal is determined in the applicant's favour. I am thus not convinced that the applicant has established that it is likely to suffer substantial loss if stay is not granted.

16. Flowing from the foregoing, I find that even if the applicant has offered security for payment of the balance of the decretal sum, it has failed to meet the threshold for grant of orders of stay of execution pending appeal having failed to satisfy two of the three prerequisites for grant of the orders sought. Consequently, I am satisfied that the Notice of Motion dated 6th February 2020 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mohamed Abdilahi for the appellant

Mr. Muciimi Mbaka for the respondent

Ms Karwitha: Court Assistant