REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E058 OF 2020

FIRST COMMUNITY BANK LIMITED.....APPLICANT

VERSUS

OSMAN ABDI KASSIM .....RESPONDENT

RULING

1. For determination is the motion by First Community Bank (the Applicant), dated 17th August, 2020 seeking *inter alia* orders to stay execution of the judgment delivered on 13th March, 2020 pending hearing and determination of the intended appeal, leave to appeal out of time against the said judgment and that the memorandum of appeal annexed to the motion be deemed as duly filed and served , upon payment of the requisite court fees. The motion is expressed to be brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B, 3A, 79G & 95 of the Civil Procedure Act, and Order 42 Rule 6, of the Civil Procedure Rules inter alia.

2. The motion is supported by the affidavit sworn by **Claris Ogombo** described as a Legal Officer in the Applicant. The gist of the affidavit is that, the judgment sought to be appealed from was delivered on 13.03.2020 in the absence of and without notice to the Applicant; that upon making inquiries with the court registry through a letter dated 3rd June, 2020, the Applicants were informed of the delivery; that the Applicant is aggrieved by the decision of the trial court and desires to file an appeal ; and that if the motion is denied, the Applicant will "suffer irreparable harm". It was further deposed that the delay in filing the appeal and present motion was mainly occasioned by the onset of the Covid-19 pandemic that led to scaling down of court activities; that the Applicant has an arguable appeal and is apprehensive that the intended appeal will be rendered nugatory if stay orders are denied, given the colossal decretal. Finally, the Applicant asserted willingness to abide by the conditions on stay of execution that may be imposed by the court.

3. The motion was opposed by the **Osman Abdi Kassim,** the Respondent by way of a replying affidavit 16th September, 2020. To the effect that the Applicant's depositions are false and misleading for reasons that not only were they represented on the date the judgment date was reserved, but also the directions on the scaling down of court activities was announced after the judgment date. The Respondent asserts that the Applicant failed to follow up on the outcome of the lower court suit and neglected the matter and their motion, which lacks merit, was brought for the purpose of denying the Respondent the enjoyment of the fruits of his judgment. In response the Applicant filed a supplementary affidavit reiterating earlier depositions and asserting that they have been diligent, had already filed an appeal, namely, **HCCA No. E 279 of 2020** First **Community Bank Ltd. V Osman Abdi Kassim** as well as the record of appeal, and that no prejudice will be suffered by the Respondent if the motion is allowed.

4. The parties informed the Court on the hearing date that both had filed their respective submissions and agreed to canvass the motion through the same. The submissions were deemed as duly filed even though no directions had been given by the Court prior.

5. The Applicant's submissions reiterate the affidavit and assert that the decretal sum is colossal and if paid over to the Respondent he may not be able to refund the amounts in the event of the appeal succeeding, hence rendering the appeal nugatory. Reliance was placed on the cases of **Antoine Ndiaye v African Virtual University [2015] eKLR** and **Mukoma v Abuoga (1988) KLR 645** to urge that the substantial loss is what must be prevented by preserving the status quo, and that the Applicant will suffer substantial loss if the judgment of the lower court is not stayed, pending appeal. Further citing the case of **Mumias Sugar Company Ltd v Henry Khatolwa Amukoya [2013]. eLKR ,** the Applicant argued that no prejudice would be visited upon the Respondent if the court were to issue an order of stay of execution to preserve the subject matter of the appeal and thus relied on on the question of prejudice.

6. Concerning delay in bringing the motion, the Applicant emphasized the explanations in the affidavit material asserting that they had subsequently moved swiftly to request for proceedings and to file the instant application on 17th August, 2020 upon learning of the judgment of the lower court.Further, that the Applicant was willing to provide security as the court may order and counsel .

7. On the prayer for leave to appeal out of time, the Applicants asserted discretion of the Court under section 79G of the Civil Procedure Act and reiterated the considerations laid out in in **Mwangi v Kenya Airways Ltd [2003] eKLR** The Applicant argued that the delay herein was not inordinate and had been satisfactorily explained. Moreover, that the intended appeal was arguable and had a high chance of success; that the right of appeal being a constitutional right, the enlargement of time would serve the interests of justice especially since no prejudice

would be visited upon the Respondent. Counsel cited several authorities including the Court of Appeal decision in **Paul Musili Wambua – V- Attorney General & 2 Others [2015].**

8. The Respondent restated the contents of his replying affidavit. And submitted that the Applicant must satisfy the requirements of Order 42 Rule 6 of the Civil Procedure Rules to be successful regarding the prayer for stay pending appeal. On the issue of substantial loss, the Respondent argued that the Applicant has not demonstrated how it stands to suffer substantial loss. The Respondent asserted that the decretal sum is not colossal to him as a successful business person with steady sources of income and in the event the Applicants' appeal is successful he has the ability to comfortably refund the decretal sums to the Applicant. Counsel for the Respondent called to his aid the cases of **Machira T/A Machira & Co Advocates V East African Standard [2002] eKLR** and **Equity Bank Ltd V Taiga Adama Company Ltd [2006] e KLR**.

9. The Respondent submitted that the delay of five (5) months by the Applicant is inordinate. On the question of security, counsel submitted that provision of security being one of the conditions for stay the onus was on the Applicant to provide appropriate security for the performance of the decree.

10. The court has considered the application in light of the parties' respective material and submissions and proposes to first deal with the prayer for enlargement of time for filing an appeal.

11. Section 79G of the Civil Procedure Act provides that:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."**

12. The successful applicant must demonstrate **"good and sufficient cause"** for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."**

13. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

14. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

> **"(T)he underlying principles a court should consider in exercise of such discretion include;**
>
> **1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**
>
> **4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
>
> **5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
>
> **6. Whether the application has been brought without undue delay.**
>
> **7. ....."**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017[e KLR.**

15. The delay in this case is about five months. While the lower Court judgment had been delivered on 13th March 2020, it seems that it was not until 3rd June 2020 that Applicant's advocate wrote to request copies of proceedings and in August 2020 filed the instant application. No explanation has been given for the advocate's non-attendance on the date of delivery of the judgment. Even though it is true that by early March 2020, it had become apparent that the COVID-19 disease had been detected in the Kenya, the scaling down of court operations happened from mid-March 2020. The Applicants should openly admit that they failed to attend the judgment and explain why rather than blame the onset of COVID-19. Be that as it may, the delay in this case is not inordinate as the scaling down of court operations from mid-

March 2020 affected the ability of Courts to provide proceedings on time. Therefore, while the delay of 3 months since March to June, 2020 (when the Applicant sought proceedings) has not been well accounted for, it is reasonable to believe that after mid-March 2020 it was difficult for parties to obtain typed proceedings from the Courts.

16. Besides, it appears that it took only two months after June 2020 for the instant application to be lodged. The Applicant has since moved with alacrity by filing the Memorandum of Appeal as well as the record of appeal. In the circumstances, there may not be much further delay and the Respondent will not be unduly prejudiced. The Court therefore allows the prayer for enlargement of time to appeal and deems the appeal filed in **HCCA No. E 279 of 2020 First Community Bank Ltd. v Osman Abdi Kassim** as duly filed.

17. Moving on to the Applicant's prayer for stay of execution pending appeal , this is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **(2) No order for stay of execution shall be made under subrule (1) unless—**
>
> > **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant".**

18. The first question is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] e KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2,3 and 4 of the **Shell** case are especially pertinent. These are that:

> **"1. …..**
>
> **2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**
>
> **3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**
>
> **4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.**
>
> **5. ….."**

19. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> "**The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts…(</u>**<u>emphasis added</u>**<u>)</u>"**

20. The learned Judge continued to observe that:-

> **"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. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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</u>."** (emphasis added)

21. Earlier on, **Hancox JA** in his ruling observed that:

"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,… render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

See also **Butt V Rent Restriction Tribunal [1982] KLR 417.**

22. **The court has already found that the delay in filing the instant motion is not inordinate given the obtaining circumstances. On the issue of substantial loss, the Court notes that the judgment of the lower court awarded the Respondent some Shs. 6.4 million odd and interest thereon for a period of over 3 years, at Court rates. This is by no means a modest sum, and the Applicant has expressed apprehension that if paid out to the Respondent, he may be unable to make a refund, thus exposing the Applicant to substantial loss and rendering the appeal nugatory. For his part, the Respondent asserts that he has the wherewithal to refund these sums in the event the succeeds. However, these statements were made from the Bar in submissions, as the Respondent had not tendered evidence of his means in his replying affidavit.**

23. In the oft-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

24. The Court is of the view that given the substantial amounts in the decree, and in the absence of proof of the Respondent's financial means, it may well be that if the decretal sum is paid out, the Applicant may not be able to recover the sums in the event of the appeal succeeding, thereby rendering the appeal nugatory. As stated in the Shell case, substantial loss is what must be prevented. The Applicant has indicated willingness to deposit security for the performance of the decree. The Applicant is a financial institution and has the means to provide adequate security to safeguard the Respondent's interests pending appeal.

25. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR,** citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff……

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"

26. The Court is therefore satisfied that the prayer for stay of execution pending appeal is merited. The said prayer is granted on condition that within 30 days of today's date, the Applicant furnishes a bank guarantee for the entire decretal sum and that the said guarantee is deposited into court as security. In the result, the application dated 17th August,2020 is allowed. Costs are awarded to the Respondent in any event.

Delivered and signed electronically on this 13TH Day of May 2021.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Moindi.

For the Respondent: Mr Muoki h/b for Mr. Kanjama.

C/A: Carol