



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 72 OF 2012**

**FUAD MAHAMOUD MOHAMED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**DIAMOND TRUST INSURANCE AGENCY LTD.....2<sup>ND</sup> DEFENDANT**

**(CONSOLIDATED WITH MOMBASA HCCC NO.16 OF 2011)**

**FUAD MAHAMOUD MOHAMED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT**

**RULING**

1. This **Ruling** is in respect of application dated **2<sup>nd</sup> March, 2021** by 1<sup>st</sup> Defendant/Applicant seeking for the following orders: -

1. *Spent;*
2. *Spent;*
3. *Spent;*
4. *THAT the Honourable Court be pleased to extend the time within which the 1<sup>st</sup> Defendant may file a Notice of intention to appeal against its judgment and decree delivered on the 25<sup>th</sup> January, 2021 pursuant to section 7 of the Appellant Jurisdiction Act;*
5. *THAT this Honourable Court be pleased to grant stay of execution of the judgment and decree delivered on the 25<sup>th</sup> January, 2021 and all consequential proceedings pending the hearing and determination of the intended appeal;*
6. *THAT the costs of this application be in the cause.*

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit** sworn on **2<sup>nd</sup> March, 2021** by **Jackson Muema Kisinga**, the Applicant's/1<sup>st</sup> Defendant's Counsel.

3. **Mr. Jackson Muema Kisinga** has deponed that a **Judgment** was delivered on **25<sup>th</sup> January 2021** by Hon. P.J. Otieno in favour of the Plaintiff for the of **Kshs.82,129,963** together with interest at 16.25% while the Applicant's/1<sup>st</sup> Defendant's Counterclaim for **Kshs.35,940,514.49 & Kshs.877,753.68** was allowed together with interest at 16.25% subject to provisions of the **Section 44(D)** of the

## **Banking Act.**

4. He stated that being aggrieved by the **Judgment** delivered on **25<sup>th</sup> January 2021**, the Applicant's /1<sup>st</sup> Defendant proceeded to instruct his firm **Madhani Associates LLP** to file an Appeal and they proceeded to file a **Notice of Appeal** on the **29<sup>th</sup> January, 2021** and the same was served as per the requirements of **Rule 75 (2)** of the **Court of Appeal Rules 2010**.
5. According to the Applicant/1<sup>st</sup> Defendant, on **18<sup>th</sup> February, 2021** while preparing the **Memorandum of Appeal** he noticed that the **Notice of Appeal** dated **28<sup>th</sup> January, 2021** had erroneously indicated that the Applicant/1<sup>st</sup> Defendant was appealing '**part**' of the Judgment instead of the '**whole**' of the Judgment delivered on **25<sup>th</sup> January 2021**.
6. The Applicant avers that the error was inadvertent and due to human error on the part of Counsel and thus ran afoul of the provisions **Rule 75 (3)** of the **Court of Appeal Rules 2010**.
7. That upon realizing the **Notice of Appeal** dated **28<sup>th</sup> January, 2021** was defective and could not be amended, Counsel for the Applicant/1<sup>st</sup> Defendant filed a **Notice of Withdrawal** of the same dated **19<sup>th</sup> February, 2021**, on the **22<sup>nd</sup> February, 2021**.
8. The Applicant/1<sup>st</sup> Defendant claims that attempts to file this application were unsuccessful as the court file could not be traced at the court registry. The Applicant/1<sup>st</sup> Defendant further claims that it stands to lose substantially assets worth **Kshs.127,038,465.13/=** as the Plaintiff/Respondent has commenced the execution process via the **Proclamation Notice** dated the **1<sup>st</sup> March, 2021**.
9. According to the Applicant/1<sup>st</sup> Defendant it has an arguable Appeal and that he has moved this court without unreasonable delay and it ought not to be driven from the seat of justice due to the inadvertent error of their Advocate. That further the Respondent will not suffer any prejudice considering that the Applicant/1<sup>st</sup> Defendant has filed a **Notice of Appeal** against the said Judgment and is also ready and willing to provide a Bank Guaranty as security or any other security as may be ordered by this Court.
10. The Applicant prays that the application be allowed as it is equitable and just to ensure that a deserving litigant is accorded their day in court.
11. The Respondent opposed the application vide a **Replying Affidavit** sworn on **15<sup>th</sup> March, 2021** by **Fuad Mahmoud Mohamed** together with **Grounds of Opposition** dated **16<sup>th</sup> March, 2021**.
12. The Respondent's case is that the Applicant has not provided any evidence to show in which way it would suffer prejudice if an Order of Stay of Execution is not granted.
13. It was deponed that this court should disregard the **Affidavit** sworn by **Jackson Muema Kisinga**, Advocate as it raised general and unsubstantiated statements since he is not an employee or authorized person to adduced evidence on behalf of the Applicant.
14. According to the Respondent, he sent various notices to the Applicant demanding for payment, all of which were ignored and they did not acknowledge the draft decree, hence they cannot claim that there is presently a looming threat of execution.
15. The Respondent has averred that he is not a man of straw as he owns several properties will be able to compensate the Applicant in the event that the Appeal succeeds. He has stated that he owns property known as **3420/Sec 1/MN, Nyali Mombasa** worth **Kshs.250,000,000/=** situated at a prime central business area and he will be able to compensate the Applicants. The property's worth can be evidenced by the **Valuation Report** dated **13<sup>th</sup> March, 2021**.
16. Also, the Respondent has averred that apart from applying for certified copies of proceedings and Judgment, there is no evidence that the Applicant is desirous to pursue the Appeal, which conduct is undeserving of any of the orders as prayed.
17. The Respondent has urged this Court to dismiss the Applicant's application and be allowed to enjoy the fruit of success in the matter herein.
18. The Applicant further filed a **Further Affidavit** sworn on **13<sup>th</sup> April, 2021** by **Amaan Kassam**, the Applicant's Legal Manager. He has deponed that **Jackson Muema Kisinga**, Advocate was duly authorized to swear the **Supporting Affidavit** on behalf of the Bank as the issues arising therein, are within his knowledge.
19. It has been deponed that the Applicant holds a charge of the property known as **3420/Sec 1/MN, Nyali Mombasa** dated the **29<sup>th</sup> September, 2009** and that the valuation of the said property is below **Kshs.250,000,000/=** as per the **Valuation Report** dated the **2<sup>nd</sup> September, 2009**. Further, that as at **9<sup>th</sup> April, 2021** the property is valued at **Kshs.140,000,000/=** and a forced sale of **Kshs.105,000,000/=** and not the alleged **Kshs.250,000,000/=**.
20. According to the Applicant, the charged property cannot therefore satisfy the decretal sum of **Kshs.127, 036, 215. 13/=** as the same has a value of **Kshs.105,000,000/=** for a forced sale.
21. Further, the Applicant avers that in the event the Appeal succeeds, the amount sought under the Charge plus interest accrued will have exceeded the value of the charged property hence the Applicant will suffer substantial loss.

22. The Applicant has emphasized that this application has been made without undue delay and they are willing and ready to provide a Bank Guaranty as security for the Appeal or any other Appeal as ordered by the court.

23. Following the directions given by the court, the matter was disposed of by way of written submissions. The Applicant's submissions are dated the **13<sup>th</sup> April, 2021** and filed on **14<sup>th</sup> April, 2021** whilst the Respondent's submissions are dated and filed on **16<sup>th</sup> March, 2021**. The Respondent further filed supplementary submissions dated **28<sup>th</sup> April, 2021** and filed on **29<sup>th</sup> April, 2021**.

24. Parties highlighted and relied on their submissions in their entirety.

#### **Analysis and determination**

25. Having considered all the pleadings and written submissions by the parties, the issues that arise for determination are: -

**a. Whether this Court can extend time for the 1<sup>st</sup> Defendant/Applicant to file a Notice of Intention to Appeal against the Judgment and Decree dated 25<sup>th</sup> January, 2021**

**b. Whether this Court can grant Stay of Execution of the Judgment and Decree delivered on the 25<sup>th</sup> January, 2021 pending hearing and determination of the intended appeal.**

**a. Whether this court can extend time for the 1<sup>st</sup> Defendant/Applicant to file a Notice of Intention to Appeal against the judgment and decree dated 25<sup>th</sup> January, 2021**

26. The Judgment in this case was delivered on **25<sup>th</sup> January, 2021**. The Applicant filed its **Notice of Intention to Appeal** to the Court of Appeal on the **29<sup>th</sup> January, 2021**. **Rule 75 (2) of the Court of Appeal Rules, 2010**, requires that a **Notice of Appeal** be lodged within fourteen days of the date of Judgment.

27. It is apparent that the Applicant in this matter filed the **Notice of Appeal** timely. However, on realizing that it had erroneously indicated that it intends to appeal against '**part**' of the Judgment instead of the '**whole**' Judgement, withdrew the said **Notice of Appeal** filed on **29<sup>th</sup> January, 2021**.

28. **Section 7** of the **Appellate Jurisdiction Act** provides as follows:

#### **Power of High Court to extend time**

**“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”**

29. The above provisions of **Section 7** of the **Appellate Jurisdiction Act** leave no doubt that the High Court, and indeed all courts with the status of the High Court, have jurisdiction to extend the time for filing a Notice of Appeal in respect a Judgment of the court.

30. The Applicant has thus approached this Court seeking extension of time to file a fresh **Notice of Intention to Appeal**. Extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat –Vs- Independent Electoral and Boundaries Commission & 7 Others [2014]Eklr**, lay down the following general principles to guide the courts in applications for extension of time: -

**“...This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:**

- 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time...”**

31. On the basis of the principles in **Nicholas Kiptoo Arap Korir Salat (supra)**, the Applicant has not wasted any time whatsoever in their cause of action.

32. It should be noted that the Applicant detected what they viewed to be an error on their part and have taken judicious steps to correct them. I have taken into consideration that the **Notice of Appeal** dated the **28<sup>th</sup> January, 2021** was filed in a timely manner and were it not of the error on the face of it, the Appeal would have been set down for hearing.

33. The Applicant as a matter of right should be allowed to appeal against *'part'* or the *'whole'* of the Judgment and this Court cannot be seen to curtail such right. The conduct of the Applicant can only be described as an exercise of diligence.

**b. Whether this Court can grant Stay of Execution of the Judgment and Decree delivered on the 25<sup>th</sup> January, 2021 pending hearing and determination of the intended Appeal**

34. **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

**a. Substantial loss may result to the applicant unless the order was made;**

**b. The application was made without unreasonable delay; and,**

**c. Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the applicant.**

35. An Applicant seeking Stay of Execution pending hearing and determination of an Appeal must demonstrate that *substantial loss which will result if Stay is not granted and that the application has been made without unreasonable delay*. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another [1986]eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. Further, the Applicant is required to give such security as the court may order for the due performance of the decree.

36. The Applicant's main averment is that a sum of **Kshs.127,038,465.13/=** is such a huge sum that the Respondent will not be able to compensate in the event that the Appeal succeeds. The Applicant attached a **Valuation Report** that the property relied on by the Respondent is the property known as **3420/Sec I/ MN, Nyali Mombasa** as at **9<sup>th</sup> April, 2021** is valued at **Kshs.140,000,000/=** and a forced sale of **Kshs.105,000,000/=**. The Applicant insisted that the charged property cannot satisfy the decretal sum of **Kshs.127,038,465.13/=** as the same is higher than the amount of the forced sale.

37. The Respondent on the other hand maintained that the property known as **3420/Sec I/ MN, Nyali Mombasa** as at **13<sup>th</sup> March, 2021** is valued at **Kshs.250,000,000/=** and they are able to repay the Applicant in the event the Appeal is successful.

38. In this regard the court is unable to without a doubt establish the value the property known as **3420/Sec I/ MN, Nyali Mombasa** as both parties have brought before this Court conflicting amounts. The court is thus convinced that the Respondent has not proved how they will compensate the Applicant if the Appeal succeeds.

39. It is also the Applicant's concern that the Respondent will commence execution of the Decree to their detriment. The Appellant is convinced that should the Decree be executed, their Appeal will be rendered nugatory.

40. Regarding security, it has clearly come out that the Applicant is ready and willing to provide a Bank Guaranty or any other security as ordered by this Honourable Court. Hence, without going into details, the Applicant has satisfied the condition required for the grant of stay of execution pending appeal.

41. In view of the foregoing, I make the following orders: -

**a. Time for giving Notice of intention to Appeal from the Judgment of this Court delivered on 25<sup>th</sup> January, 2021 is extended by 7 (Seven) days.**

**b. Pending the hearing and determination of the intended Appeal to the Court of Appeal, there be Stay of Execution of the Judgment of this Court delivered on 25<sup>th</sup> January, 2021 and the Decree arising therefrom.**

**c. The Stay is conditional in that Applicant shall within 30 days from the date hereof provide a bank guarantee of the sum adequate to cover the entire Decree of Kshs.100,000,000.00/= within 30 days from today.**

**d. The Stay Orders shall, if the Applicants timeously comply with the condition in (c) above, remain in force for a period of only 1 (one) year from the date of delivery of this Ruling, unless otherwise extended by the Court of Appeal.**

**e. Cost shall abide by the outcome of the Appeal.**

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3<sup>RD</sup> DAY OF JUNE, 2021**

**D. O. CHEPKWONY**

**JUDGE**