



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 436 OF 2017**

**BETWEEN**

**JOHN MUGAMBI T/A**

**MUGAMBI & COMPANY ADVOCATES.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE KARIUKI T/A**

**BEATRICE KARIUKI & ASSOCIATES..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHOWCASE PROPERTIES LIMITED..... DEFENDANT**

**RULING NO. 8**

1. This is the 8<sup>th</sup> ruling in this matter and it concerns the Notice of Motion dated 13<sup>th</sup> May 2021 filed by the Defendant seeking to stay the orders issued on 13<sup>th</sup> May 2021 (“Ruling No. 7”) allowing the Plaintiffs’ Notice of Motion dated 15<sup>th</sup> April 2021 on the following terms:

*(a) The Bank shall release the sum of KES. 5,000,000.00 to the Plaintiffs forthwith upon presentation of an indemnity in its favour executed by the Plaintiffs in the form approved by it.*

*(b) The Defendant shall bear the costs of the application.*

2. The Notice of Motion is made, *inter alia*, under **Order 42 rule 6** of the **Civil Procedure Rules** and is supported by the deposition of the Defendant’s director, Francis Muhoro Gachanja sworn on the same date. In opposition thereto, the Plaintiff’s filed a Notice of Preliminary objection dated 18<sup>th</sup> May 2021. Both parties have made written submissions which I do not intend to rehash because the basis on which the court grants stay pending are well known.

3. In my view, whether or not to grant an order of stay depends on an understanding of the circumstances which I will repeat as I have done in the previous decisions. On 24<sup>th</sup> August 2020, I delivered a ruling allowing the Defendant’s application to set aside default judgment on terms that it procures a bank guarantee for KES. 5,000,000.00 in favour of the Plaintiffs within 30 days. The Defendant applied for and the Bank issued the guarantee as evidenced by the agreement dated 13<sup>th</sup> October 2020 and referenced as EBKL/039/OBG00003620 (“the Guarantee”). Before the lapse of the period for compliance, the Defendant filed an application seeking extension of time to comply with the said order directing it furnish the Guarantee, which I allowed on 3<sup>rd</sup> November 2020 by extending time for compliance and deemed the Guarantee issued by the Bank to have been furnished within the time so limited.

4. The Defendant then filed a Notice of Motion dated 10<sup>th</sup> September 2020 seeking to review the court’s ruling of 24<sup>th</sup> August 2020 which I dismissed by the ruling dated 2<sup>nd</sup> October 2020. In the meantime, and by a letter dated 12<sup>th</sup> October 2020, the Plaintiffs’ advocates addressed the Deputy Registrar requesting the court to issue a decree which was done on 13<sup>th</sup> November 2020. The Defendant opposed the issuance of this Decree through the Chamber Summons dated 17<sup>th</sup> February 2021 by stating that the said Decree was irregular and ought to be set aside. By the ruling dated 17<sup>th</sup> March 2021, I held that the Defendant had failed to comply with one of the conditions of the court in its ruling dated

24<sup>th</sup> August 2020 by not filing and serving its Defence within 14 days from the date of the ruling. The effect of the ruling was to dismiss the application and uphold the Decree issued in favour of the Plaintiffs.

5. The Defendant, being dissatisfied with the ruling affirming the Decree and dismissing its application, evinced its intention to appeal the same and filed an application seeking leave to appeal. I dismissed the application for leave to appeal on 26<sup>th</sup> March 2021 on the ground that the Defendant did not lay out a factual basis upon which the court could exercise discretion in its favour. The Plaintiffs thereafter filed the Notice of Motion dated 15<sup>th</sup> April 2021 seeking to enforce the Guarantee. This resulted in Ruling No. 7 which is the subject of this application.

6. From the aforesaid rendition of facts, it will be seen that the order to enforce or liquidate the Guarantee is a direct consequence of the ruling dated 24<sup>th</sup> August 2020 where I allowed the Defendant to defend the suit on terms. Those terms have not been complied with and each subsequent decision confirms this fact. More particularly, the ruling dated 17<sup>th</sup> March 2021 affirmed the decree. That decision is still pending appeal although I declined to grant leave to appeal, it is open for the Defendant to apply for leave in the Court of Appeal. Since the Decree is valid and capable of execution, how can the court be called upon to stay execution of part of the Decree which is secured by the Guarantee as has been done in the application herein? The orders given on 13<sup>th</sup> May 2021 are merely consequential upon the Decree, which remains valid, hence I do not see how I can stay execution when nothing has been done about the Decree.

7. I think the Defendant raises a more fundamental issue in its Notice of Preliminary objection, whether in fact there is a right of appeal against the order of 13<sup>th</sup> May 2020. It is true that the Defendant has filed a Notice of Appeal but it did not seek leave to appeal from this court within 14 days hence the court would be acting in vain if it granted a stay of execution. The orders sought in the application dated 15<sup>th</sup> April 2021 were under **section 63(e)** of the *Civil Procedure Act* and **Order 51** of the *Civil Procedure Rules*. The orders made under those provisions do not fall within the indicative list set out under **section 75** of the *Civil Procedure Act* as read with **Order 43 rule 1** of the *Civil Procedure Rules* which provide the instances where appeal as of right.

8. As the end of the day, I am not convinced that the Defendant has made out a case for the grant of order of stay pending appeal. Consequently, the Notice of Motion dated 13<sup>th</sup> May 2021 is dismissed with costs. For avoidance of doubt, any order of stay in force are hereby discharged.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.