



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E148 OF 2020**

**MWIKI PSV SACCO SOCIETY LTD.....APPELLANT/APPLICANT**

**VERSUS**

**SIMON KARANGU.....1<sup>ST</sup> RESPONDENT**

**WILSON GITAU GAKUBU .....2<sup>ND</sup> RESPONDENT**

**MARGARET WANGARI MWANGI .....3<sup>RD</sup> RESPONDENT**

**PETER MAINA WAMBUGU .....4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Chief Magistrates Court at Milimani Commercial Courts of Hon. E. M Kagoni (Mr.))*

*Delivered on 11/8/2020 in Nairobi CMCC No. 1078 of 2020)*

**RULING**

1. This ruling is precipitated by the notice of motion dated 22/3/2021 brought by the appellant/applicant under the provision of **Rule 3 of the High Court (Practice and Procedure) Rules, Section 1A, B, 3A of the Civil Procedure Act Article 159 of the Constitution and Order 51 Rule 1 of the Civil Procedure Rules**. The applicant sought the for the following orders;

**a) Spent**

**b) That pending the hearing and determination of this application inter-parties, the Honorable court be pleased to issue ordered of temporary stay of execution pending appeal of the order issued on the 19/3/2021 by Hon E.M Kagoni.**

**c) That pending the hearing and determination of this application inter-parties, the honorable court be pleased to call for the original court file in CMCC NO. 1078 OF 2020.**

**d) That costs be provided for.**

2. The application is based on the grounds set out on the face of it and on the supporting affidavit of Joshua Githinji, the current chairman of the appellant who deponed that they risk being arrested if the orders dated 19/3/2021 are executed.

3. He indicated that the trial court had granted mandatory injunction compelling the applicant to release the registration documents to prepare and execute a discharge and transfer in respect of motor vehicles registration numbers: KCG 987K, KCG 511M, KCG 661, KCF 559E, KCJ 833A, KCH 506B, KCG 680H, KBK 178J, KCG 204Y and KAU 536L pending the hearing and determination of the suit.

4. The applicant/appellant averred that it is aggrieved because the said ruling and order rendered the whole suit nugatory and that it risks losing its security on the assets held by loan defaulters and that the trial court failed to consider its grounds of objection dated 16/3/2020, the respondent's affidavit sworn on 16/3/2020, and the supplementary affidavit sworn on 21/7/2020.

5. The applicants further averred that if the order sought herein are not granted it would render the appeal nugatory.

6. The application is opposed by the respondents who filed the replying affidavit of Simon Mbirua Karangu sworn on 3/5/2021.

7. The respondents argued that the application lacks merit and manifests dishonest behavior from the applicant in a clear attempt to

circumvent justice. The deponed averred that the issues that the applicant has raised were addressed by the lower court in its ruling delivered on 11/8/2020.

8. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. The issue which arise for determination is **whether to grant a stay of execution pending the hearing and determination of the appeal?**

9. Under **Order 42 Rule 6(2)** of the Civil Procedure Rules, the principles that the court should consider while deciding an application for stay of execution pending appeal are stated as follows: -

**“No order for stay of execution shall be made under sub rule (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.”**

10. In **Civil Appeal No.107 of 2015, Masisi Mwita v. Damaris Wanjiku Njeri (2016) eKLR**, the Court held interalia that: -

**“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that: -**

**“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.**

**In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows: -**

**“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”**

**These twin principles go hand in hand and failure to prove one dislodges the other”**

11. **Firstly**, the Applicant must show that he will suffer substantial loss. It is evident from the above provisions of law that the Court has discretion to issue an Order for stay of execution. However, the said discretion must be exercised judicially. In the case of **Canvass Manufacturers Ltd v Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, the Court held that: -

**“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.**

12. Further in the case of **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that: -

**“For the court to order a stay of execution there must be: -**

**i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay**

**iv. Security and the grant of stay is discretionary”.**

13. On the first issue of sufficient cause it was the applicant’s argument that they intend to argue that the trial court failed to consider their pleadings and which therefore led to the delivery of wrong ruling and orders.

14. On the 2<sup>nd</sup> issue of substantial loss, the applicants argued that if the orders sought herein are not granted it would render this appeal nugatory and are at risk to lose security on assets held by loan defaulters in this case, the respondents herein with the exception of the 3<sup>rd</sup> respondent who has since completed her loan repayment. This court agrees with the applicants as the subject of this matter are loan facilities that were taken out by the respondents and if the securities are released back to the respondent it is likely that the appellants would suffer substantial loss.

15. On the 3<sup>rd</sup> issue of unreasonable delay, the subject of this application is a ruling delivered on 11/8/2020 and orders granted on 19/3/2021. This application having been filed on 22/3/2021 shows that there was no unreasonable delay in filing the instant application.

16. In light of the above this court finds that the application has merit. Consequently a temporary stay of execution pending appeal of the order issued on the 19/3/2021 by Hon E. M Kagoni is granted. Costs shall abide by the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF JUNE, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent