



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL SUIT NO. 12 OF 2018

JOYSTAR CEREALS COMMODITIES LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

GROFIAN SGB KENYA LTD.....DEFENDANT/RESPONDENT

RULING

The application dated 12/3/2021 is premised on the Judgement and Decree dated 25/2/2021. The applicant's suit dated 27/8/2018 was dismissed with costs to the defendant. The applicant seeks the following orders:-

i. Spent.

ii. Spent

iii. The Honourable Court be pleased to grant an order of stay of execution of the Court of judgement and decree dated 25/2/2021 pending hearing and determination of this appeal;

iv. Costs do abide the appeal.

The grounds upon which the application is premised are in the body of application and the supporting affidavit of the Managing Director of the applicant, **Anne Wangechi Michael**. It is the applicant's contention that she is aggrieved with the entire judgement issued by the trial court and she instructed her advocates on record to prefer an appeal; that there was no informal stay of execution of the judgement and decree for 30 days; that it is necessary for this court to issue stay orders to enable the appeal to be heard and determined on merit; that if the execution takes place, the applicant will suffer substantial loss; that the applicant is ready and willing to abide by any conditions that this Honourable Court may deem fit to issue in the circumstances. In respect of the security for due performance of the decree herein it is urged; that the respondent would not suffer any prejudice if the orders sought are granted as it would be compensated by costs and interest, should the appeal herein be eventually dismissed.

The application was opposed. The respondent through its Chief Administration Manager **Martha Esiromo** filed a replying affidavit dated 31/3/2021 on 9/4/2021. The respondent deponed that she has been advised by her advocates on record that the applicant's application is misconceived, incompetent and an abuse of the process of the court and only meant to scuttle the respondent's efforts in realizing the security provided by the applicant who is in default of the repayment of the loan; that there is nothing to be stayed in view of the fact that the judgement did not give a positive order but rather it dismissed the applicant's suit; that the applicant lacks sufficient cause that merits stay of execution of judgement and does not meet the threshold for grant of such orders; that the applicant has not come to this court with clean hands as it has defaulted in repayment of the loan which stood at Kshs. 69,237,521 as at 31/3/2021 and it continues to accrue interest.

The respondent further deponed that it has the right to exercise its statutory power of sale as the applicant defaulted in repayments of its loan and the sale is proper and just; that the applicant is aware of the consequences of offering the suit property herein as security for a loan and is estopped from claiming that the exercise of the statutory power of sale in the circumstances would cause it harm; that the applicant has admitted before this court that it is undergoing financial crisis and is therefore unable to settle the loan; that it is the respondent who will suffer substantial loss and harm in the event the appeal is unsuccessful as it would not be in a position to recover the loan arrears from the applicant and that the loan cannot be fully paid through costs and interest; that the applicant will suffer no loss as it is the one indebted to the respondent and not servicing the loan; that the application has no merits and should be dismissed with costs.

On 18/3/2021, the court directed that the application be canvassed by way of written submissions. Both parties duly complied.

The applicant's submissions are centred around the principles for grant of an order of stay of execution as outlined under **Order 42 Rule 16 of the Civil Procedure Rules, 2010**. The applicant submitted that the present application is rightly before court and there is sufficient cause as there is an intended appeal on grounds of a promissory note. The applicant further relied on the provisions of **Order 22 rule 22 of the Civil Procedure Rules**.

The applicant further contended that it is likely to suffer substantial loss as the suit property is valued at Kshs. 41,000,000/= and the respondent wants to sell it at a throw away price of Kshs. 15,000,000/= and still go after the applicant to offset the balance thereof. The applicant relied on the case of **Butt vs Rent Restriction Tribunal (1979)** where the court held that granting a stay of appeal is discretionary and it should be exercised in such a way so as not to prevent an appeal if successful, from being rendered nugatory.

Further to the foregoing, the applicant submitted that in exercising its discretion, the court should consider special circumstances of the case and its unique requirements; that the promissory note given to the respondent served as consent of the proposed schedule of payment. To buttress this point, the applicant relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012)**.

The respondent outlined one issue for determination: whether the judgement of this Honourable Court issued on 25/2/2021 is capable of being stayed. The respondent submitted that it is common ground that stay orders can only be granted where there are positive orders and relied on the cases of **Western College of Arts & Applied Sciences vs EP Oranga & 3 Others (1976) eKLR**, **Catherine Njeri Maranga vs Serah Chege & Another (2017) eKLR**, **Co-operative Bank Ltd vs Banking Insurance & Finance Union (Kenya) 2015 eKLR**, **Kenya Commercial Bank Ltd vs Tamarind Meadows Limited & 7 Others and Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah (2008) eKLR** in which cases the courts addressed the principle of negative orders.

The respondent urged this court to find that the judgement issued by this court on 25/2/2021 is incapable of being stayed and the application should be dismissed with costs to it.

The application before me is one for stay of execution pending the hearing and determination of an intended filed in the Court of Appeal.

An application for stay of execution pending an appeal is brought under **Order 42 Rule 6 Criminal Procedure Rules**. The instant application has been brought under the provisions of **Order 11** which provide for pre-trial directions, that notwithstanding, the applicant has discussed the proper provisions to support his application at length in its submissions. This court being guided by the objectives of the overriding principles and the provisions of Article 159 (2) of the Constitution, will apply the same and determine the application.

The two issues for determination are:-

- a) **Whether the Judgement and Decree dated 25/2/2021 can be stayed.**
- b) **What are the appropriate and just orders to be given in the circumstances.**

By a plaint dated 27/8/2018, the applicant sought the following prayers: -

- a. **An order/injunction permanently restraining the Defendant jointly and severally either by itself, its servants, agents or whomsoever is acting on its instructions/belief from in any way carrying out the intended auction of L.R. No. BUKIRA/BUHIRIMONO/1109 on 5/9/2018 or any other day.**
- b. **A declaration that the Promissory note issued by the Defendant is binding.**
- c. **Costs.**

In its judgement, the court found as follows: -

“I do find that the plaintiff has not met the threshold required for the granting of an injunction as prayed. The suit lacks merit and is hereby dismissed with costs.”

The Court of Appeal in the case of **Ndungu Kinyanjui v Kibicho Kugeria Services & Another (2007) eKLR** referring to its earlier decision in **David Thiong’o T/A Welcome General Stores vs Market Fancy Emporium (2007) eKLR** held:-

“This Court has repeatedly stated in previous decisions, among them, David Thiong’o T/A Welcome General Stores v. Market Fancy Emporium, Civil Application No. NAI. 47 of 2007...that in an application under rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this Court to enforce or to restrain by injunction...The decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

Further, the Court of Appeal in the case of **Sonalux Limited & another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR** the court dismissed an appeal from a Chamber Summons application seeking an injunction which was not granted by the superior court. In agreeing with the findings of the court the Learned Judges held: -

“...As regards the matter before us all we can say is that the ruling of the superior court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.”

Section 2 of the Civil Procedure Act defines a decree holder as one with an order/decree that is capable of being executed. It gives a positive

tenor.

In the instant suit, the effect of the final orders of the trial court did not require any party to do or abstain from doing anything. The court merely dismissed the suit with no orders as to costs. There was nothing positive emanating from the judgement that is capable of being stayed.

For the above reasons and this court being duly guided and fortified by the decisions from the Superior Court, it has no reason to further entertain the merits of this application for stay.

In view of the fact that the Judgement and Decree of 25/2/2021 was a negative order, and that there is nothing to be stayed, the upshot is that the applicant's Notice of Motion dated 12/3/2021 is without merit and is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 15TH DAY OF JULY, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Ms. Biyaki for the Applicant

Ms. Kihencho for the Respondent

Evelyne Nyauke Court Assistant