



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. E011 OF 2020

KENYA WOMEN FINANCE TRUST.....APPLICANT

VERSUS

RAPHAEL OKEYO SANGRA.....1ST RESPONDENT

KEPHAS OCHIENG MWITA.....2ND RESPONDENT

RULING

Kenya Women Finance Trust (the applicant), being dissatisfied with the judgement entered against it in favour of the 1st Respondent, filed a the Notice of Motion application dated 4/12/2020 evenly seeking the following orders:-

a. Spent.

b. Spent.

c. That the applicant be granted leave to file and serve an appeal out of time against the judgement and decree delivered on the 14/10/2020 in terms of the annexed Memorandum of Appeal;

d. That pending the hearing and determination of the intended appeal, there be stay of execution of the judgement and/or decree of the Honourable Court delivered on 14/10/2020 in Migori CMCC No. 246 of 2018 Raphael Okeyo Sangra vs Kephas and Kenya Women Finance Trust Bank, and all subsequent and incidental proceedings thereto;

e. That upon grant of prayers No. 2 and 3 above, the Honourable Court be pleased to order that 2 fuel dispensers (pumps) the subject matter of the appeal herein be preserved pending hearing and determination of the suit.

f. Any such orders the court may deem fit.

g. Costs to abide the outcome of the appeal.

The grounds upon which the application is premised are in the body of application and the supporting affidavit sworn by **Charles Ondigo**, the applicant's Regional Manager in the South Nyanza Region. It is the applicant's contention that after the delivery of the judgement, he called for a copy of the same to enable him and his superiors be advised on the matter; that he was informed by his advocate on record that he wrote to the court asking for a copy of the typed judgement which request elicited no response; that his advocates did another reminder which has never been responded to, to- date; that his advocates decided to follow up on the handwritten judgement but the same was not legible enough for him to decipher its contents; that based on an opinion given to him by his advocates, they instructed him to file the intended appeal; that the applicant is aggrieved by the judgement of the trial court in issuing a permanent injunction against it and payment of costs.

The applicant further deponed that the fuel pumps worth Kshs. 900,000/= the subject of the registered chattels mortgage are in danger of being wasted and in the absence of a preservative order, the applicant will not be able to recover anything; that the intended appeal raises important matters of law and fact and has a high chance of success; that the applicant will suffer irreparable loss if the orders sought are not granted; that it is in the best interest of justice that the orders sought should be granted.

The application was opposed. The 1st respondent **Raphael Okeyo Sangra** filed a replying affidavit sworn on 2/3/2021. The respondent deponed that he was aware that judgment was delivered in Migori CMCC No. 246 of 2018 on 14/10/2020 in his favour; that the said

judgment was delivered in the presence of advocates representing both parties; that the applicant's advocate knew the nature of the judgement but elected not to make any informal application for stay; that in the absence of stay orders the Respondent was at liberty to deal with the subject matter in any way he deemed fit; that on 9/11/2020, he disposed of the property to a third party; that he no longer has control or ownership of the property; that the present application has been overtaken by events; that the value of the subject property stood at 900,000/= at the time of the execution of the instrument in 2016 and that by their nature, the said chattels are subject to massive wear and tear and that upon the sale of the subject matter hereof, he invested in a sisal business worth Kshs. 6,000,000/= with a return of Kshs. 200,000/= per month.

The 1st respondent further deposed that he has been advised by his advocates that for an order of stay to be granted, the applicant has to show that he stands to suffer substantial loss; that the applicant has not disclosed to court the balance owed to it on the loan by the 2nd respondent on which basis the court would determine the extent of loss that he may suffer in the event that the orders are not granted; that in the unlikely event that the intended appeal succeeds and the value of the property is required to be restituted, he can comfortably repay the same; that the applicant has not offered any security for the due performance of the decree hence, is not entitled to the prayers sought; that the present application has been brought as an afterthought and there was inordinate delay; that the application lacks merit and should be dismissed with costs.

On 17/2/2021, the applicant filed his submissions dated 10/2/2021 while the 1st respondent filed his submissions dated 12/4/2021 on 13/4/2021.

I have duly considered both submissions. There will be no need to rehearse them again. The issues arising therefrom are:

- a. Whether stay of execution of the decree and judgement in Migori CMCC No. 246 of 2018 Raphael Okeyo Sangra vs Kephias & Kenya Women Finance Trust Bank pending appeal should be granted;**
- b. Whether the preservative orders of the subject matter should be granted;**
- c. Whether there was unreasonable delay in bringing this application;**
- d. Whether leave should be granted to file appeal out of time;**
- e. Whether the applicant has an arguable appeal.**

On the first issue for determination, **Order 42 Rule (6) (1) and (2)** of the Civil Procedure Rules 2010 makes provision for stay pending appeal as follows: -

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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."**

The four (4) salient ingredients that the applicant should establish before an order of stay of execution can issue are: -

- a. That Substantial loss shall be suffered if stay is not granted;**
- b. That the application has been filed without unreasonable delay;**
- c. The applicant is willing to furnish security for the due performance of the decree;**
- d. The applicant has an arguable appeal.**

I shall address the first and second issues simultaneously that is; **whether substantial loss shall be suffered in the absence of stay and whether preservative orders on the subject matter should be issued.**

The substantial loss the applicant is likely to suffer is if the preservative orders of the subject matter are not granted. Unfortunately, the applicant has not addressed or demonstrated to this court how it is likely to suffer substantial loss (if any) if the orders sought are not granted. The 1st respondent submitted that the onus of proving that substantial loss will be suffered lies on the applicant and he relied on the case of **Migori HCCA No. E3 of 2020 Nicholas Washington vs Karoli Auma Oulo.**

The importance of demonstrating how substantial loss is likely to be suffered was emphasized in **Kenya Shell Limited v Benjamin Karuga Kiburu & Another (1986) eKLR Plat Ag JA**, stated:-

“The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory...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. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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.”

As stated in the case of **Kenya National Highways Authority v Ahmednasir Maalim Abdullahi (2020) eKLR:-**

“It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court’s discretion in his favour.”

In his replying affidavit, the 1st respondent annexed ‘**ROS1**’ a copy of a sale agreement between himself and one **Caleb Owino Oduogo** showing the sale of the subject matter for a consideration of **Kenya Shillings One Million Three Hundred Thousand Only (Kshs. 1,300,000)**. The applicant has not controverted this evidence. This being the case, the court cannot issue preservative orders since the subject matter is no longer in possession of the 1st respondent. There is nothing to be preserved.

It is trite law that court orders cannot be issued in vain. If there was substantial loss (if any) to be suffered by the applicant, the same has already been suffered. The application has already been overtaken by events. There is no need for the court to further pronounce itself on those two issues as they fail.

However, it is the 1st respondent’s submission although in the absence of any documentary evidence on the form of bank statements or affidavit of means that in the event the appeal succeeds, he shall be able to resituate the applicant.

On the third and fourth issues the judgement was read on 14/10/2020. The application ought to have been filed within thirty (30) days, i.e by 15/11/2020. The application for stay was filed on 04/12/2020 about 18 days since time lapsed; Exhibited to the application are letters dated 14/10/2020 and 10/11/2020 requesting for typed proceedings. I note that the first letter requesting for typed proceedings was written and received in the registry on the same date when the judgement was read.

On the allegations that Counsel for the applicant did not make any informal application for stay pending appeal at the time of delivery of the judgement, this court cannot verify that fact since it has not had the opportunity to peruse the court record. However, all circumstances considered, I find that the time lapse of bringing this application is not unreasonable.

Sections 79G and 95 of Civil Procedure Act deal with filing of appeals from the subordinate courts and enlargement of time to file appeal. Section 79 G Civil Procedure Act provides as follows:-

“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 such period any time which the lower court may certify as having been requisite the preparation and delivery to the appellant of a copy of the decree or order.”

Section 95 Civil Procedure Act provides as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

The principles to be considered in exercising the court’s discretion whether or not to enlarge time to file appeal were set out in **First American Bank of Kenya Ltd vs Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65:-**

- 1) The explanation if any, for the delay;***
- 2) The merits of the contemplated action, whether the appeal is arguable;***
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.***

In Leo Sila Mutiso vs Rose Hellen Wangari Mwangi (supra) the court, when considering the exercise of discretion to extend time, had this to say:-

“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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

The court has already considered the cause of the delay. The delay was due to the delay in obtaining the typed judgement to enable Counsel advise his client appropriately. This court does find that the delay was beyond the circumstances and control of Counsel of the applicant and a delay of less than a month is not inordinate.

Whether the applicant has an arguable appeal: the applicant is disputing the interpretation of the entire Loan Agreement by the Trial Magistrate. This is arguable.

In that regard, I will find that the application to file appeal out of time is merited.

In the end, I make the following orders: -

- a. Application has failed to demonstrated that it is deserving of the stay order. The same is declined.**
- b. Leave is hereby granted by the applicant to file and serve its appeal out of time;**
- c. The appeal be file and served within Sixty (60) days hereof;**
- d. The Record of appeal be filed and served within 60 days of serving the appeal.**
- e. Costs of this application to abide the appeal.**

Dated, Delivered and signed at Migori this 8th day of July, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant.

No appearance for the 1st Respondent.

Nyauke Court Assistant.