



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E071 OF 2021**

**FAMILY BANK LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**MASHUDI NDEGWA KOMBO (*Suing as the legal representative of the Estate***

***of the late HAMISI NDEGWA MASHUDI*).....1<sup>ST</sup> RESPONDENT**

**SOLOMON MWANGI MBURU.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal against the orders and ruling of Hon. Kyambia, CM delivered on the 28<sup>th</sup> of May, 2021 in Mombasa CMCC 365 of 2010 – Mashudi Kombo –vs- Solomon Mwangi Mburu & Family Bank Limited)***

**RULING**

1. The subject of this Ruling is the Applicant's **Notice of Motion** dated **2<sup>nd</sup> June, 2021**. The Applicant seeks for orders of:-

**a) Spent;**

**b) Spent;**

***c) That pending hearing and determination of the appeal, this Honourable court be pleased to grant stay of execution of the Judgment delivered on the 15<sup>th</sup> of November, 2019 in Mombasa CMCC No.365 of 2010, Mashudi Ndegwa Kombo –vs- Solomon Mwangi and Family Bank Limited, the decree thereof and of other consequential orders;***

***d) That costs of the application be provided for.***

2. The application is premised on the grounds set out on its face and **Supporting Affidavit** sworn on **2<sup>nd</sup> June, 2021** by **M/S JOYCE KARARIA**, the Applicant's legal officer. It has been deponed that aggrieved by a Judgment delivered against them herein on **15<sup>th</sup> November, 2019**, vide **Mombasa CMCC No.365 of 2010**, the Appellant/Applicant filed an application dated **1<sup>st</sup> December, 2020** seeking for a stay of execution thereof but the same was dismissed with costs on **28<sup>th</sup> May, 2021**. The Appellant found this dismissal as having paved way for the Respondent to proceed with an illegal execution process and denying them an opportunity for their case to be heard and determined on merit, hence has appealed the same. According to the Appellant/applicant, they have demonstrated cause for grant of stay of execution in their affidavit of support.

3. The 1<sup>st</sup> Respondent through their counsel, **M/S Sherman Nyongesa & Mutubia**, opposed the application vide **Grounds of Opposition** dated **8<sup>th</sup> June, 2021** in which they stated that it is misconceived, fatally defective, bad in law, incompetent and otherwise a gross abuse of the court process, since the judgment entered was valid and regular. The 1<sup>st</sup> Respondent has also stated that the application does not satisfy the test for grant of stay of execution pending appeal in respect of the money decree and has only been sought with the sole aim of delaying the quick and just conclusion of the case so as to frustrate the 1<sup>st</sup> Respondent from enjoying the fruits of the valid Judgment.

4. When the matter came up for interparties hearing, the parties consented to having the application canvassed by way of written submissions. The Applicants filed written submissions in support of their application dated **20<sup>th</sup> September, 2021** while the 1<sup>st</sup> Respondent filed their written submissions on **24<sup>th</sup> September, 2021**.

5. In its submissions, the Applicant has given a brief background of its case as a basis for demonstrating that they have met the threshold for stay orders as per the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. Reliance has been placed on these cases being:-

*i. Butt –vs- Rent Restriction Tribunal [1079]eKLR;*

*ii. Tasam Logistics Ltd –vs- David Macharia & Ano.[2018]eKLR;*

*iii. Victory Construction –vs- BM (a minor suing through next friend PMM) [2019]eKLR.*

6. The Applicant’s counsel has submitted that the application was filed timeously hence the delay was not unreasonable since the Ruling being appealed against was delivered on **28<sup>th</sup> May, 2021** and the application filed on **2<sup>nd</sup> June, 2021**.

7. On substantial loss, the Applicants’ counsel has submitted that having been condemned and then being required to pay the decretal amount, the Applicant will have been condemned without being granted a chance to be heard. Counsel for Applicant has gone on to submit that the 1<sup>st</sup> Respondent has proclaimed the Appellants’/Applicants’ tools of trade which position is illegal as it violates the provisions of **Section 44(1) (iii)** of the **Civil Procedure Act** and also renders the Appellants branch in operative. Counsel has relied on the case of **Butt – vs- Rent Restriction Tribunal [1979]eKLR** to buttress the fact that the issues it has raised amount to special circumstances to be considered in regard to substantial loss.

8. As for the requirement that the Applicant provides security for the due performance of the decree, the Applicants’ counsel has submitted that the appeal is not with regard to the merits or demerits of the Judgment of the trial court, but the same is on an application which sought to have a Judgment of the trial court set aside for the reason that it was entered on an ex parte basis. They have reiterated that the Appellant deserves the right to be heard and that requiring the Appellant to deposit the entire decretal sum would be unfair and unjust, but stated that it is willing to abide by any reasonable condition as to security.

9. The 1<sup>st</sup> Respondent on the other hand, has submitted that the Applicant has failed to establish how it has suffered and is likely to suffer

substantial loss if stay of execution is denied. He has submitted that it is common practice that a party seeking for orders of stay of execution, the Applicant is supposed to provide security for the due performance of a decree but in this case the Applicant has failed to do so. As for costs of the suit, it is the 1<sup>st</sup> Respondent’s submissions that it is entitled to costs since costs always follow the event. He has urged the court to dismiss the application which he finds is only meant to deny him from enjoying the fruits of his valid Judgment.

#### **DETERMINATION**

10. I have carefully read through and considered the application dated **2<sup>nd</sup> June, 2021**, the Affidavit in Support thereof, Respondents’ Grounds of Opposition, rival submissions filed by both counsel for the parties and all the cited law. I find that the only issue for determination is whether the Applicant has demonstrated that it deserves the grant of the orders of stay of execution sought in the application dated **2<sup>nd</sup> June, 2021**.

11. It is now trite that the principles upon which a court may grant or refuse to grant stay of execution of orders pending hearing and determination of an appeal, are well settled by statute and case law. The power to grant or refuse to grant stay of execution is discretionary and the principles are that:-

*i. An Applicant must demonstrate the likelihood that he/she will suffer substantial loss if the order is denied.*

*ii. An applicant must furnish security for the due performance of the decree in the court that the appeal does not succeed.*

*(See Order 42 Rule 6(2) of the Civil Procedure Rules and he case of Butt –vs- Rent Restriction Tribunal [1979]eKLR.)*

12. On the first issue of approaching the court timeously, the same was not challenged by the Respondent in both its Grounds of Opposition or written submissions. And clearly, the Ruling delivered on **28<sup>th</sup> May, 2021** and the application filed on **2<sup>nd</sup> June, 2021**, is a demonstration that there was no undue delay by the Applicant in bringing the application for stay of execution herein.

13. With regard to substantial loss, an Applicant is expected not only to state that he/she is likely to suffer substantial loss but must also prove that he/she will suffer the loss. This court is guided by the decision of Platt, Ag. JA (as he then was) in the case of **Kenya Shell Limited –vs- Kibiru [1986]KLR 410 at page 416**, where he expressed himself as follows:-

*“It is usually a good rule to see if Order XLI rule 4 (now Order 42 Rule 6(2) of the Civil Procedure Rules can be substantiated. 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 say why the respondents should be kept out of their money.”*

*On the part of Gachuhi, Ag JA (as he then was) at 417 he stated-*

***“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”***

14. What amounts to substantial loss is further discussed in the case of James Wangalwa & Ano. –vs- Agnes Naliaka Cheseto [2012] eKLR as entailing:-

***“The application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail”.***

15. In consideration of the arguments by both parties, I find that the fact that the application subject matter of this appeal, having sought to have an exparte Judgment set aside and evidence of proclamation (attachment) proceedings having been commenced against the Applicant by the 1<sup>st</sup> Respondent for a decree that was obtained on exparte basis, as sufficient evidence to demonstrate that the Applicant may suffer substantial loss.

16. With regard to the issue of the Applicant providing security, it is the duty of a court to do justice to both parties in an application for stay of execution pending appeal by bearing in mind that while an Applicant/Appellant is entitled to be heard on appeal in an adversarial system such as ours, it should be alive to the fact that the Respondent who has a Judgment is equally entitled to enjoy the fruits thereof.

17. The Applicant/Appellant has submitted that the appeal is not on the merits or demerits of the Judgment of the trial court declining to set aside the said Judgment which was obtained from an exparte hearing, so that requiring that they deposit the entire decretal amount would be unfair and unjust before they are heard. The Applicant has however indicated willingness to abide by any condition imposed by court in the matter. The Respondent on the other hand has asked for the decretal amount to be deposited in a joint account.

18. In my view, the decretal amount herein did not arise out of a normal debt. It is an amount which was awarded at the discretion of the trial court, having heard the case exparte. It is always in the interest of justice that parties be heard on merit so that a fair and just determination is arrived at.

19. I therefore proceed to allow the application dated 2<sup>nd</sup> June, 2021 on condition that the Applicant deposits a bank guarantee for the decretal sum of Kshs.1,010,200/= in court within thirty (30) days from today, failure to which the stay order to lapse and execution to proceed.

20. On the issue of costs of this application, I order that the same abide the outcome of the appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Muliru counsel for Appellant/Applicant

No appearance by counsel for Respondent

Court Assistant – Gitonga