



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 154 OF 2019

CONSOLIDATED BANK OF KENYA.....APPELLANT

VERSUS

KEN MURIUKI & PETER KIRIMI MBOGO

t/a MBOGO & MURIUKI ADVOCATES.....RESPONDENT

RULING

[1] Before me is a Motion dated 26/12/2019 which is expressed to be brought pursuant to **Order 42 Rule 6 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law**. The applicant seeks amongst other orders stay of execution of the decree arising from the judgment in the Chief Magistrates Court at Meru Civil Suit No. 122 of 2018 delivered on 30/10/2019 pending appeal.

[2] The grounds upon which the application is premised are set out in the application and supporting affidavit of Earnest Manyara sworn on 26/11/2019. It is argued that the law firms of Mbogo & Muriuki Advocates and Mithega & Kariuki Advocates opened a fixed deposit account No. [xxxx] for the amount of Kshs. 588,320/- for a period of six (6) months attracting interest at 7.5% per annum with the applicant. The said amount was deposited through cheque dated 29/6/2016. Upon maturity of the deposit in March 2017 the principal amount was transferred to Overdue Deposits Account and thereafter the principal amount was loaded with accrued interest less withholding tax and net amount due was Kshs. 606,918.60/-. The customers did not thereafter instruct the applicant to renew the account thus the monies did not earn additional interest.

[3] On 20/6/2018 when the applicant came to liquidate the account the funds could not be traced because some appellant's unscrupulous employees had withdrawn the money. Once the appellant became aware of it acted quickly and issued the respondent with a banker's cheque dated 28/6/2018. The trial court erred in awarding the respondent Kshs. 1,000,000/- general damages on a claim for breach of contract whereas the law on the same only provided for grant of special damages which must be pleaded and proved. Moreover, the amount awarded was excessive for an inadvertent delay of eight days in releasing a lesser sum. Thus, the appeal has higher chances of success which the applicant stands to suffer substantial loss if stay is not granted. Moreover, the respondent will not suffer any prejudice if the orders sought are granted.

[4] This was opposed by the respondent vide its grounds of opposition dated 2/12/2019. It is contended that the appellant has not satisfied the conditions set out under **Order 42 Rule 6** on stay of execution. The appellant has failed to demonstrate that it will suffer substantial loss unless stay of execution is granted. They consider the respondent as an entity of immense financial means and therefore will not suffer any such loss. In any event, they argued that the appeal has no chances of success.

ANALYSIS AND DETERMINATION

[5] The issue for determination is *whether stay of execution pending appeal is merited*.

[6] Under **Order 42 Rule 6 (2) of the Civil Procedure Rules** the court may order stay of execution pending appeal where sufficient cause is shown. While the court should take the wider sense of justice in determining whether sufficient cause has been established, the following considerations relevant, to wit: -

- 1. Whether substantial loss will occur to the applicant unless the order was made;**
- 2. Whether the application was made without unreasonable delay; and**
- 3. Order for such security for the due performance of such decree or order as may ultimately be binding on the applicant.**

[7] The second consideration is simple. Looking at when the application was filed, it is not difficult to see that it was filed without unreasonable delay. The major hurdle is on substantial loss occurring to the applicant. In money decrees, the applicant should show that the respondent may not be able to refund the decretal sum should the appeal succeed. Such eventuality constitutes substantial loss for it would render the applicant mere holder of barren decree in the appeal. In other words, the appeal is rendered nugatory or academic exercise. Merely stating that the applicant would suffer substantial loss does not suffice. The respondent is a firm of advocates and nothing has been placed before the court to show that they will not be in a position to refund the decretal sum or that may warrant filing of affidavit of means. The applicant has not shown it will suffer substantial loss.

[8] The foregoing notwithstanding, I am acutely aware that both parties have rights; the respondent has the right to immediate enjoyment of the fruits of the judgment whilst the appellant the right of appeal. Where rights compete for recognition, a judicial balancing act becomes imperative. The Applicant is able and willing to furnish security. Accordingly, in order to balance and secure the rights of parties herein I make the following orders: -

a) I order stay of execution of the decree herein subject to the applicant (1) paying ½ of the decretal sum to the respondent (2) depositing the other ½ of the decretal sum in an interest earning account in the joint names of the parties at a bank agreed upon by the parties within the next 30 days.

b) Failure to comply with (a) will result in automatic lapse of stay of execution issued herein. For the avoidance of doubt, there will be no need of applying for discharge of this order in the event of default.

Dated, signed and delivered at Meru in open court this 5th day of February, 2020

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F. GIKONYO

JUDGE

IN PRESENCE OF

Muriuki for respondent

Oundu for applicant – absent

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F. GIKONYO

JUDGE