



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 373 OF 2019**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**SAMSON OWINO OLENDO.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated and filed on 28<sup>th</sup> October 2019, the Appellant sought an order for stay of execution of the judgment that was delivered against it on 4<sup>th</sup> June 2019 **for the sum of Kshs4,000,000/= general damages for loss of reputation, aggravated damages in the sum of Kshs 500,000/=, interest and cost of the suit pending the hearing and determination of the appeal herein.** Its said application was supported by the Affidavit of its Legal Counsel, Stephen Kariuki, that was sworn on 28<sup>th</sup> October 2019.
2. It pointed out that it had filed its present application without undue delay and that it had already applied for certified copies of the proceedings to enable it lodge an appeal. It was apprehensive that if it was not granted the orders it had sought, then its appeal, which was arguable and had high chances of appeal, would be rendered nugatory. It added that it would suffer substantial loss if the order it had sought was not granted for the reason that the Respondent was a person of unknown and undisclosed financial means.
3. It was its averment that it was willing to deposit the decretal sum either in a joint interest earning account or to abide by any conditions set by the court and thus urged this court to allow its present application as prayed.
4. In opposition to the said application, on 6<sup>th</sup> November 2019, the Respondent swore a Replying Affidavit. It was filed on the same date together with Grounds of Opposition of even date.
5. It was his contention that the present application was frivolous, vexatious, misconceived, incompetent and a flagrant abuse of the court process made in bad faith with the intention of denying him justice.
6. He pointed out that the Appellant had filed a similar application in the lower court which was allowed on condition that it paid him a sum of Kshs 2,250,000/= within twenty one (21) days and issue a bank guarantee for the balance within the same period. He stated that the Appellant duly informed his advocates that the said monies would be released to him on 28<sup>th</sup> October 2019. He averred that contrary to its said assertion, it filed the present application and it was therefore not being honest.
7. Both parties were agreed on the conditions under which an application for stay of execution pending appeal could be granted. In this regard, the Appellant relied on several cases amongst them, the case of **Rhoda Mukuma vs John Abuoga (1988) KLR**. On his part, the Respondent placed reliance on the case of **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema [2012] eKLR** amongst other cases to buttress his arguments.
8. In exercising its discretion to grant an order for stay of execution pending appeal, the court must be satisfied that the applicant has demonstrated the following conditions as has been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-
  - a. **That substantial loss may result unless the order is made.**
  - b. **That the application has been made without unreasonable delay.**
  - c. **Such security as the court orders for the due performance of the decree has been given by the applicant.**
9. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed.

The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

10. An appellate court can entertain an application for stay of execution pending appeal whether an application for such stay shall have been granted and/or refused by the court appealed from. Notably, Order 42 Rule 6 (1) of the Civil Procedure Rules stipulates that:-

**“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, (emphasis court) 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.**

11. It was therefore the view of this court that notwithstanding that the lower court had granted the Appellant herein an order for stay of execution pending appeal, this court could still consider the present application as it was filed before the order for stay of execution that had been granted by the lower court had lapsed. The spirit of this provision was to avoid unnecessary delays by fast tracking similar applications where parties would have felt aggrieved by conditions that were imposed by the court to be appealed from at the time of being granted an order for stay pending appeal. The present application was therefore properly before this court.

12. The Appellant submitted that it would suffer substantial loss if it paid the Respondent part of the decretal sum in the sum of Kshs 2,250,000/= as had been ordered by the lower court for the reason that he was not a person of known financial means. Whereas the said sum may not have been a colossal amount of money, the Respondent did not file an Affidavit of Service to demonstrate his ability to refund the Appellant the money in the event it was successful in its Appeal.

13. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

14. In the absence of proof that the Respondent would be able to refund the Appellant the decretal sum without any hardship, this court was satisfied that the Appellant would suffer substantial loss. It had thus satisfied the first condition of being granted a stay of execution pending appeal.

15. The decision the Appellant intended to appeal against was delivered on 4<sup>th</sup> June 2019. The present application was filed on 28<sup>th</sup> October 2019. A period of four (4) months could not be said to have been inordinate. This court was thus satisfied that the present application was filed without undue delay and thus, the Appellant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

16. The Appellant had indicated that it was willing to deposit the decretal sum in a joint interest earning account in the names of its advocates and those of the Respondent or to abide by any conditions to be imposed by the court. It was therefore the considered opinion of this court that the Appellant had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

17. Weighing the Appellant’s right to have its dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if it was denied an opportunity to ventilate its Appeal on merit.

18. The court noted that the Appellant was aggrieved by the award of general and aggravated damages that was made by the Learned Trial Magistrate in favour of the Respondent against it. The grounds of appeal that it raised did not appear frivolous necessitating it to be given a conducive environment to ventilate its appeal on merit without its intended appeal being rendered nugatory.

## **DISPOSITION**

19. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated and filed on 28<sup>th</sup> October 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

**1. THAT there shall be a stay of execution of the judgment that was entered in favour of the Respondent herein against the Appellant herein on 4<sup>th</sup> June 2019 on condition that the Appellant shall deposit into an interest earning account in the joint names of its advocates and advocates for the Respondent, the sum of Kshs 4,500,000/= within thirty (30) days from the date of this Ruling.**

**2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 19(1) hereinabove, the conditional stay of execution shall automatically lapse.**

**3. Either party is at liberty to apply.**

**4. Costs of the application will be in the cause.**

20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**