



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL APPLICATION NO 545 OF 2019**

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

**VERSUS**

**JAMES MBUGUA KIMUNYA.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated 14<sup>th</sup> August 2019 and filed on 15<sup>th</sup> August 2019, the Applicant sought an order for stay of execution of the judgment that was delivered against it on 12<sup>th</sup> July 2019 in **Milimani CMCC No 6427 of 2013 James Mbugua Kimunya vs Co-operative Bank of Kenya Limited for the sum of Kshs 500,000/= general damages and Kshs 60,000/= being special damages pending the hearing and determination of the appeal herein.** Its said application was supported by the Affidavits of its Legal Manager, Caroline Ngugi that were sworn on 14<sup>th</sup> August 2019 and 9<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 contended amongst many other grounds of appeal that the Learned Trial Magistrate erred in law and fact in awarding the Respondent a sum of Kshs 500,000/= general damages yet the contractual dispute was a sum of Kshs 60,000/= which it asserted was withdrawn with the consent of the Respondent and not as he had averred.
3. It was its averment that it was willing to abide by such reasonable conditions as may be set by the court and this urged this court to allow its present application.
4. In opposition to the said application, on 13<sup>th</sup> September 2019, the Respondent swore a Replying Affidavit. The same was filed on 16<sup>th</sup> September 2019.
5. He averred that there had been inordinate delay in the filing of the present application by the Applicant herein and that since there was no appeal that had been preferred herein, the orders it had sought were merely to frustrate him. He added that it had also failed to demonstrate what substantial loss it would be occasioned to it if the order it had sought was not granted.
6. It was contention that the present application was misplaced, hollow, lacking in any basis at all and unmerited thus lending it for dismissal with costs.
7. The court carefully considered the Written Submissions and the case law that the Respondent relied upon and respectively took a different view from the one that was taken by Nyakundi J in **Abraham Lenaula Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR** to the effect that an applicant would need to have filed a memorandum of appeal before it could file an application for the grant of an order for stay of execution pending appeal.
8. This court determined that it could grant the order for stay of execution before an appeal had been filed because Order 42 Rule 6 (1) of the Civil Procedure Rules provides, 2010 provides that a court to which an appeal is preferred to can grant an order for stay of execution pending appeal.
9. Indeed, 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.

10. Parties were agreed as to when an order for stay of execution pending appeal could be granted. This court did not therefore deem it necessary to analyse the cases they had relied upon as the case law is now well settled. Suffice to state that 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 that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules:-

- 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.**

11. 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.

12. The Applicant submitted that it would suffer substantial loss if it paid the Respondent the decretal sum of Kshs 560,000/= for a dispute that arose out of an account. Whereas the same 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 Applicant 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 Applicant the decretal sum without any hardship, this court was satisfied that the Applicant would suffer substantial loss. The Applicant had thus satisfied the first condition of being granted a stay of execution pending appeal.

15. The decision the Applicant intended to appeal was delivered on 12<sup>th</sup> July 2019. The present application was filed on 15<sup>th</sup> August 2019. The same was filed without undue delay and thus the Applicant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

16. The Applicant had indicated that it was willing to abide by any conditions of the court. It was therefore the considered opinion of this court that the Applicant had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

17. Weighing the Applicant’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 Applicant if it was denied an opportunity to ventilate its Appeal on merit.

18. The court noted that the Applicant was aggrieved by the award of general 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 Applicant’s Notice of Motion application dated 4<sup>th</sup> July 2019 and filed on 8<sup>th</sup> July 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 decree in MilimaniCMCC No 6427 of 2013 James Mbugua Kimunya vs Co-operative Bank of Kenya Limited on condition that the Applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the Respondent, the sum of Kshs 560,000/= within thirty (30) days from the date of this Ruling.**
2. **For the avoidance of doubt, in the event, the Applicant 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 7<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**