



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO 485 OF 2019**

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

**VERSUS**

**PHILIP MWANGI WANDERI.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated 4<sup>th</sup> July 2019 and filed on 8<sup>th</sup> July 2019, the Applicant sought an order for stay of execution of the judgment that was delivered against it on 21<sup>st</sup> June 2019 in **MilimaniCMCC No 6807 of 2012 Philip Mwangi Wanderi vs Co-operative Bank of Kenya Limited for the sum of Kshs 162,500/=** pending hearing and determination of the appeal herein. Its said application was supported by the Affidavit of its Manager Credit Management Division, Joel Amenya Okindo that was sworn on 4<sup>th</sup> July 2019.

2. It pointed out that it had filed its present application without undue delay. 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 reaching a contradictory finding that there was a valid contract between the parties herein on one hand and on the other hand that the Memorandum of Sale was invalid for mis-description of the property and non-execution by the Respondent herein.

3. It was its averment that it was willing to abide by such reasonable conditions as may be set by the court and urged it to allow its present application.

4. In opposition to the said application, on 16<sup>th</sup> July 2019, the Respondent's advocate, Lawrence Kinuthia, swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 19<sup>th</sup> July 2019.

5. He averred that the Applicant had misinterpreted the contents of the judgment that was delivered and that there was no urgency or prejudice that would occur as the money could be refunded back. He added that it had not met the threshold of being granted an order for stay of execution pending appeal and that it ought to have first sought the orders from the lower court.

6. He pointed out that the Respondent paid the deposit of Kshs 162,500/= to the Auctioneers and commenced arrangements for settling the balance through his bankers, Consolidated Bank of Kenya only to realise later that the Memorandum of Sale had made reference to a different property and consequently, the Memorandum of Sale dated 15<sup>th</sup> September 2019 was null and void for mis-description of the property as Mweiga Block 11/434 instead of Mweiga/ Block 2/434.

7. The court carefully considered the Written Submissions and the case law that the Respondent relied upon and wished to point out that the arguability of an appeal is not a ground for granting an order for stay of execution pending appeal at the High Court. That is a ground to be considered when an applicant is making an application for stay of execution pending appeal to the Court of Appeal under Rule 5 (2) ( b) of the Court of Appeal Rules, 2010. The said Rule 5(2) (b) of the Court of Appeal Rules stipulates that:-

**“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”**(emphasis court)

8. In the High Court, however, in exercising its discretion to grant an order for stay of execution pending appeal, the court adopts different considerations in granting an order for stay of execution pending appeal. It is only expected to 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, 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. It is also important to point out that this order for stay of execution pending appeal can either be granted by the court from which an appeal is preferred or by the court to which an appeal is preferred. It is not mandatory as the Respondent had argued that the Applicant herein must have first made an application seeking an order for stay of execution from the court it was appealing from.

11. Indeed, Order 42 Rule 6 (1) of the Civil Procedure Rules provides 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), 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.**

12. The Respondent’s submissions that the Applicant ought to have first sought the order for stay of execution pending appeal from the Trial Court as per Order 42 Rule 5 of the Civil Procedure Rules did not represent the correct position of the law and in any event, the said Order 42 Rule 5 of the Civil Procedure Rules appeared irrelevant in the circumstances of the case herein as the same provides that:-

**“Where there is more than one plaintiffs or defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.”**

13. Having settled the issue that an appellate court could grant an order for stay of execution pending appeal in the first instance, this court noted that judgment was entered in favour of the Respondent against the Applicant herein for the sum of Kshs 162,500/=. It was not a colossal amount of money. However, 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.

14. 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.”**

15. 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.

16. The decision the Applicant intended to appeal was delivered on 21<sup>st</sup> June 2019. The present application was filed on 8<sup>th</sup> July 2019. It 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.

17. 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.

18. 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.

19. The grounds of appeal that the Applicant had 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**

20. 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 Milimani CMCC No 6807 of 2012 Philip Mwangi Wanderi 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 162,500/= 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 20(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.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 7<sup>th</sup> day of May 2020

J. KAMAU

JUDGE