REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 692 OF 2004

STANDARD CHARTERED BANK LIMITED.....PLAINTIFF

VERSUS

ALI NOOR ABDI.....1ST DEFENDANT

WETANGULA & COMPANY.....2ND DEFENDANT

KARIANGO INVESTMENTS LIMITED.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 6th November 2019 seeks to stay execution of Judgment of this Court of 24th September 2019 pending the hearing and determination of an intended appeal therefrom. It is principally brought under the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.

2. An outcome of the Judgment sought to be stayed was an order that the 1st and 2nd Defendants jointly and severally release a sum of Kshs.20,000,000/= now held in deposit under the order of Court to the Plaintiff. The 2nd Defendant firm is aggrieved by this part of the decision and the decision of costs and has lodged a Notice of Appeal under Rule 75 of the Court of Appeal Rules on 8th October 2019. It is also the 2nd Defendant which brings the current Motion.

3. The 2nd Defendant firm argues that the monies frozen and deposited by this Honourable Court are client funds and that so far the clients have excused the firm on the simple reason that the monies are held jointly and earning a good interest. That should the money be released, then the clients may run out of patience, demand the money and even initiate disciplinary proceedings, a thing that will injure the reputation of the firm.

4. The law firm further asserts that the subject matter is safely secured between the Plaintiff and itself and there is no prejudice to be suffered by the Plaintiff.

5. The Plaintiff opposed the application and filed both grounds of opposition and an affidavit of one Davidson Mwaisalia sworn on 20th November 2019.

6. In a nutshell the Plaintiff raises the following grounds. That the Applicant has not demonstrated sufficient cause for grant of stay as there is no danger that the 2nd Defendant's appeal will be rendered nugatory. Second, that the Applicant has not shown that the appeal is arguable. Further, that the subject of the intended appeal being monetary in nature, the Applicant is unlikely to suffer prejudice as the Plaintiff being one of the largest financial institution is willing and able to pay back any sums that will ultimately be due to the Applicant firm.

7. On another front it is asserted there has been delay in filing the present Application as it was not brought immediately upon the lapse of the 45 days stay granted by Court at the delivery of the Judgment.

8. Lastly the Court was urged to consider the prejudice that the Plaintiff would suffer by being kept out of the fruits of its Judgment in a case that has taken almost 15 years to conclude.

9. On agreement of parties and with the concurrence of the Court the Motion was canvassed on the basis of written submissions which this

Court has considered.

10. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules:-

> **Stay in case of appeal.**
>
> **6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, 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.**
>
> **(2) No order for stay of execution shall be made under subrule (1) unless—**
>
> **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
>
> **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

11. The manner of applying the provisions is not controversial and was restated as follows by the Court of Appeal in **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR**:-

> **"Thus, the Superior Court's discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."**

12. As is clear from the provisions themselves it is not for the Court to consider the arguability of the intended appeal. There is good reason for this. The prospects of a Court evaluating its own Judgment so as to discover whether an appeal from it is arguable is embarrassing. For that reason the opposition to the application on the ground that it does not demonstrate an arguable appeal will not be considered at all.

13. Let me start by the timing of the application. Is it brought with unreasonable delay as contended by the Plaintiff? Upon delivering the impugned Judgment on 24th September 2019, the Court on an oral application granted a stay for 45 days. Although the Plaintiff states that the informal stay lapsed on or about 8th October 2019 (See ground 7), that is not so. The informal stay lapsed on or about 8th November 2019. Perhaps the Respondent got its arithmetic wrong!

14. It would be expected that a diligent suitor for a more expanded stay would move the Court before the end of the informal stay. So an application brought any time before 8th November 2019 would be timely. Now, the Motion before Court was filed on 11th November 2019, a Monday. Since 8th November 2019 was a Friday, I am unable to find that a one day delay is undue or inordinate.

15. It is common ground that some Kshs.20,000,000/= is now preserved in an interest earning account in the joint names of the lawyers for the Plaintiff and the Applicant firm. The firm tells Court that this money is client's money and that the clients have upto now been patient as it is preserved in an interest earning account and that should the same be released then they would call upon the Plaintiff to pay them. It is submitted that the firms operation will be adversely affected with the possibility of collapse.

16. In answer the Plaintiff submitted that the Court has made a finding that it is the one entitled to the deposit and it is not therefore client's monies. Secondly, that the money has not been available for use by the firm and the contention that it would cripple the firm's operation is false and misleading. Further that the 2nd Defendant has failed to demonstrate that the release of the monies will result in a state of affairs that will irreparably affect the core of the Applicant.

17. From the evidence and common position of parties, the amount frozen and which is currently preserved by an order of Court was from the client's account of the law firm. Although this Court has found that the same should be released to the Plaintiff, that finding will, certainly be at the heart of the intended appeal by the Applicant. This is evident from the Notice of Appeal itself in which Applicant specifically states that it is aggrieved by the release order. The Court of Appeal may well reach a different decision from this Court.

18. For that reason the apprehension that the release of the money could cause jitters and uneasiness amongst the firm's clients who it states lays a claim on these funds is understandable. There is no knowing what action they would take against the law firm. The firm fears that they may initiate disciplinary proceedings against it. Such action is a recourse open to a complaining client and the anxiety of the firm may not be farfetched. Such proceedings come with reputational risk on the part of an advocate. This is in my view, can lead to substantial loss because a law firm's reputation is perhaps its greatest strength. In an article found at Kevin.lexblog.com, the author quotes a research which reported that:-

> **"The reputation of the individual is the single most important factor when deciding which law firm to use, according to the latest benchmarking research".**

19. The possibility of reputational erosion is, in the view of the Court, a risk of substantial loss to any law firm. In so far the Applicant firm has demonstrated that the release of the money now may lead to that path this Court is willing to hold that the firm has demonstrated that substantial loss may result if the stay is not granted.

20. Of course there is the concern of Plaintiff that grant of a stay will result in delay in it enjoying the fruits of a Judgment which has taken 15 years coming. But that has to be weighed against the adverse effects the law firm may suffer if stay is not granted. This Court thinks that the scales tilts in favour of postponing the Plaintiff's access to the funds than in allowing the firm to suffer substantial loss. This is so because the funds are currently preserved in an interest earning account jointly controlled by the lawyer for the Plaintiff and the Applicant itself. The Respondent does not say that there is any risk involved in this arrangement.

21. Which then leads this Court to a discussion as to whether the firm needs to furnish further or different security. I think not. The money which would satisfy any ultimate order once the appeal is disposed of is in a good place. There can be no need for further or alternative security.

22. The Court is inclined to grant the order but must consider one further request by the Plaintiff's Bank. The Bank urges the Court to consider directing the release of the interest accrued, if the Court were to be minded to allow the application. This Court is reluctant to impose such condition because the interest that the deposited money has attracted is intimately connected with the principal sum. Whoever is entitled to the principal sum is also entitled to the interest. As this is a matter that the Court of Appeal shall eventually decide, let both the principal sum and interest remain preserved until the hearing and determination of the said Appeal.

23. The Application of 6th November 2019 is allowed with the money currently held in the joint account continue to be held pending the hearing and determination of the Appeal.

Dated, Signed and Delivered in Court at Eldoret this 2nd Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Kirimi for the Respondent.

No appearance for the Applicant.