



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 497 OF 2013

KAJULU HOLDINGS LIMITED (In Receivership).....1ST PLAINTIFF

COMMERCIAL BANK OF AFRICA LIMITED.....2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

RULING

1. This Ruling is in respect to the application by Diamond Trust Bank Kenya Limited (DTB), the Defendant, DTB seeks stay of execution of the judgment of this Court dated 4th June 2018. By that judgment this Court awarded Kajulu Holdings Limited (in Receivership), the 1st Plaintiff, and Commercial Bank of Africa Limited (CBA) the 2nd Plaintiff Kshs. 89,502,424 plus interest at Court Rate from the date of filing suit until payment in full.

BACK GROUND

2. CBA and the 1st Plaintiff's claim was in respect to money, that is Kshs. 89,502,424 paid to the directors of the 1st Plaintiff while the 1st Plaintiff was under Receivership. The defence offered by DTB was that the 1st Plaintiff were permitted to withdraw or operate its account by an order of the Court. Justice Ochieng by his judgment dated 4th June 2018 found for the Plaintiffs.

NOTICE OF MOTION

DATED 1ST NOVEMBER 2018

3. DTB by its application dated 1st November 2018 (the application) seeks an order that pending the filing, hearing and determination of the appeal there be a stay of execution of the decree herein.

4. That application is supported by the affidavit of Amaan Kassam, DBT's Legal Officer. He deponed that a Notice of Appeal was filed, by the Defendant, on 13th June 2018. The letter to the Deputy Registrar, requesting for typed proceedings, was filed in Court on the same date.

5. He further deponed that DTB, by letter dated 11th October 2018, proposed to the Plaintiff's advocate that stay of execution be issued, by consent, on terms. That proposal was rejected by the Plaintiff's advocate by letter dated 18th October 2018.

6. That the application for stay, pending appeal, was made by the DTB without undue delay after the Plaintiffs threatened to execute the decree.

7. That if stay is not granted DTB will suffer substantial loss because the decree is for a substantial amount of DTB capital, and payment of that "**amount might destabilize the functions of**" DTB. That in comparison DTB, if called upon to pay the decretal amount, will suffer more than the Plaintiffs.

8. The application was opposed by the Plaintiffs through the affidavit of Jacob Owour Ogola, the Head-Remedial Management Unit of CBA.

9. By that affidavit Ogola exhibited DTB's financial statement, which are available on the internet, which he stated showed the net assets of DTB to be Kshs. 44,769,721,000. They also showed DTB's profit before tax to be Kshs. 4,303,596,000. That the capital strength of the Defendant was above the statutory requirement. Ogola therefore surmised that the payment, by DTB, of the decretal sum, Kshs. 138,000,000

would not threaten the stability of DTB.

ANALYSIS AND DETERMINATION

10. Both parties filed their submissions, which I have considered.

11. The relevant law, in respect to an application for stay of execution pending appeal, is Order 42 Rule 6(1) and (2) of the Civil Procedure Rules (the Rules). Sub-rule (1) of that order provides that a Court appealed may for sufficient cause order stay of execution of a decree. Sub-rule (2) provides:

“No order for stay of execution shall be made under sub-rule (1) (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.”

12. The first hurdle DTB must overcome is to satisfy the Court that substantial loss may result to it.

13. DTB relied on the case **JOSEPH CHEGE –V- GIKURI HEHO (2008) eKLR** where it was stated:

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is real worth or value as distinguished from a loss without value or a loss that is merely nominal”

14. DTB submitted that the Plaintiffs were attempting to apply mathematical formula to the issue of substantial loss. That if the decretal sum is paid it will be paid from DTB working capital. DTB termed that as a loss in value.

15. DTB further submitted that even if the Plaintiffs are capable of refunding the decretal sum it should be considered that DTB had offered to provide security, such as providing irrevocable bank guarantee in favour of the Plaintiffs.

16. The Plaintiffs relied on the case **MACHIRA –V- EAST AFRICAN STANDARD** thus:

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled.”

17. The Plaintiff submitted that the substantial hardship, as deponed by the Legal Officer of DTB, was not a test set out under Order 42 Rule 6.

18. The Plaintiff also submitted that DTB had brought the application after unreasonable delay, from the date of judgment.

19. The response DTB submitted that there was no delay because the application was filed before taxation of costs and execution by the Plaintiffs.

20. Judgment, as stated before, was entered on 4th June 2018.

21. In my consideration of the application for stay I need first to consider whether DTB has met the first criterion in Order 42 Rule 6(1) of the Rule. DTB had shown sufficient cause. Sufficient cause was defined in the case of **WACHIRA KARANI –V- BILDAD WACHIRA [2006] eKLR** Viz:

“Sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously”

22. DTB did not move the Court from 4th June 2018 until the application which was filed in Court 1st November 2018. The Plaintiffs extracted the decree, which DTB’s advocate made an input into, on 28th September 2018. The Plaintiffs, thereafter, filed their bill of costs and on 27th September. Taxation was set to take place 7th November 2018. The Notice of taxation on being served on DTB, DTB presented its application on 1st November 2018.

23. It would seem to me that there was want of bona fides on the part of DTB. It seems DTB brought its application on the eleventh hour to circumvent the taxation of the Plaintiff’s bill of costs.

24. In my view DTB having failed to explain sufficiently why it filed its application late, when the bill of costs was due to be taxed shows that it failed to show sufficient cause.

25. The other criterion to meet is that DTB was to show that if the application was not granted it would suffer substantial loss. The Plaintiffs were correct in their submission that DTB had to show substantial loss and not substantial hardship.

26. DTB stated that if it made payment of the decree DTB would be destabilized. DTB did not sufficiently set out what destabilization it would suffer. With its failure to spell out what destabilization meant, and in view of the fact that Mr. Ogola by his affidavit of 19th November 2018 showed the net asset of DTB, DTB failed to prove substantial loss. This is in view of the Court of Appeal case **KENYA SHELL LIMITED VS. KIBIRU [1986] KLR** where it was held:

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of te fruits of his judgment.”

27. DTB was also obligated to say what loss it would suffer if stay was not granted as was stated in the case:

KIPLAGAT KOTUT V ROSE JEBOR KIPNGOK [2015] eKLR as follows:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

28. DTB’s Legal Officer only stated that it would be destabilized if it paid decretal sum. He stated no more on what that destabilization would be. The advocate of DTB attempt to bolster that statement by saying, in the submissions that DTB would, if stay was not granted, have to pay the decretal sum from its working capital. That statement by DTB’s advocate is attempt to give evidence at the bar and it is rejected.

29. The Court of Appeal expressed itself on the importance, of a party seeking stay, to prove substantial loss. This expression was captured in the case **TABRO TRANSPORTERS LTD VS ABSALOM DOVA LUMBASI** thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugater.”

30. The term ‘*nugatory*’ is not in the Rules but it can be equated to that which defeats an appeal.

31. DTB failed to prove it would suffer substantial loss if stay was not granted. DTB accepts that CBA would not fail to refund the amount if stay was not granted.

32. I am also of the view that DTB failed to give reason for delay in seeking stay from 4th June 2018 to 1st November 2018. It was not enough for DTB to say that it filed the application before execution began. It did to explain why it had failed to move the Court for 5 months. It did not.

33. I therefore find that there was unreasonable delay in filing the application, by DTB, which delay remained unexplained.

34. I am aware that DTB has offered to provide whatever security will be ordered by the Court, but having failed to meet the other criterions in Order 42 Rule 6 (1) and (2) there is no basis of ordering security.

35. In the end the application fails. This is a case, in my view, where costs must follow the event. DTB will therefore meet the costs of the application.

36. The orders of the Court are the Notice of Motion dated 1st November 2018 is hereby dismissed with costs, thereof, being awarded to both the Plaintiffs.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the Presence of:

Sophie..... COURT ASSISTANT

..... COUNSEL FOR THE 1ST PLAINTIFF

.....**COUNSEL FOR THE 2ND PLAINTIFF**

..... **COUNSEL FOR THE DEFENDANT**