



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. 276 OF 2011

CHRISTOPHER ORINA KENYARIRI PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD..... 1ST DEFENDANT

CREDIT BUREAU AFRICA LIMITED..... 2ND DEFENDANT

RULING

1. The Plaintiff **Christopher Orina Kinyariri** obtained a monetary judgment against the 1st Defendant **Barclays Bank of Kenya Limited**. The 1st Defendant being aggrieved by that judgment filed a Notice of Appeal. The 1st Defendant also filed a Notice of Motion Application dated 3rd December 2018. By that application the 1st Defendant seeks order that:

· There be a stay of execution of the judgment of 29th November 2018. Pending the hearing and determination of the intended appeal.

2. The application and the order sought is premised on the grounds that the 1st Defendant is dissatisfied with the whole of the said judgment and intends to appeal against it; that the 1st Defendant has an arguable appeal; that the Plaintiff may execute the judgment rendering the 1st Defendant's appeal nugatory; that the Plaintiff's income is unknown and if he does execute the decree the Defendant shall suffer irreparably, if it succeeds with its appeal; and that the 1st Defendant is willing to comply with the conditions/terms as to provision of security ordered by the Court.

3. The Plaintiff opposed that application by arguing that the High Court does not have the power to grant stay of execution of the judgment in this matter. That the stay of execution is the preserve of the Court of Appeal. The Plaintiff based his argument on the provisions of Order 42 Rule 9 of the Civil Procedure Rules (hereinafter the Rules). That Rule provides:

“The powers conferred by rules 6 and 7 shall be exercisable where an appeal may be or has been preferred not from a decree but from an order made in execution of such decree.”

4. The Plaintiff also submitted that the 1st Defendant had not sought typed proceedings from this Court for the purpose of filing an appeal.

5. The application was also opposed by the 2nd Defendant.

6. It needs to be stated that the Plaintiff's case against the 2nd Defendant was dismissed but it is the 1st Defendant that was ordered to pay the 2nd Defendant's costs.

7. The 2nd Defendant's opposition to the 1st Defendant's application was on the ground that the order stay of executions of its costs, which are yet to be taxed, would be contrary to Section 94 of the Civil Procedure Act.

DISCUSSION AND DETERMINATION

8. I will begin by considering the Plaintiff's submission, in support of his objection, on the basis of Rule 9 of the Order 42 of the Rules. That order is reproduced above.

9. I must begin by saying that the Plaintiff's submission, on that Rule, is a misapprehension of that Rule.

10. Rule 9 refers to power conferred under Order 42 Rule 6 and 7. What do those Rules provide?

Rule 6 refers to the power of the Court to "stay of execution or proceedings under a decree or order appealed from." Rule 7 refers the power of the Court to order from security where an appeal is pending.

11. It is clear from those two Rules that the Court has power to stay execution of a decree.

12. In order to understand Rule 9, now highlighted by the Plaintiff, it is important to consider the margin notes thereof. Those notes provide;

"[Order 42, Rule 9.] Exercise of powers in appeal from order made in execution of decree."

13. A close consideration of those margin notes and of Rule 9 will reveal that what the Court is empowered to do is to grant stay of an order in execution of a decree, not stay of a decree. That is what is 1st Defendant, by its present application has sought. Stay of the order of execution of a decree.

14. The Plaintiff in my view erred in his interpretation of Rule 9. This Court has power to stay an order of execution of a decree as provided under Order 42 Rule 6 and 7 of the Rules.

15. The only requirement for stay of execution of a decree to be granted is that an applicant must meet the conditions under Order 42 Rule 6. That is the Court must be satisfied that substantial loss will result to the applicant unless the order is granted; the application for stay must have been made without unreasonable delay and the applicant must meet the security as the Court would order for due performance of the decree.

16. On substantial loss the 1st Defendant deponed, through the Supporting Affidavit, that the Plaintiff's income is unknown and if execution of the decree is not stayed it would suffer irreparably in the event its appeal did succeed.

17. That deposition did not receive substantial response from the Plaintiff, yet it is only the Plaintiff who could have allayed 1st Defendant's concerns. This indeed was the holding of the Court of Appeal decision in the case: **NATIONAL INDUSTRIAL CREDIT BANK LTD V AQUINAS FRANCIS WASIKE & ANOTHER [2006] eKLR** where the Court of Appeal stated:

"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or the lack of them. Once an applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

18. The Plaintiff having failed to respond to the 1st Defendant's allegation that it would suffer loss if stay was not granted means that the 1st Defendant proved the First Limb of Rule 6.

19. The Second Limb of that Rule 6 is also satisfied because the 1st Defendant filed its application within 4 days of this Court's judgment. It follows that application was filed without unreasonable delay.

20. Since this is a money decree I am of the view that the 1st Defendant should be ordered to provide the decretal amount and the same be deposited in joint interest earning account of the Plaintiff and the 1st Defendant's Advocates.

21. I am of the view that the stay sought by the 1st Defendant cannot extend to staying the taxation of the 2nd Defendant. But the 2nd Defendant erred in relying on Section 94 of Cap 21. Section 94 gives the Court discretion to permit execution of a decree before taxation and is therefore not relevant to 2nd Defendant.

22. In the end the orders of the Court are;

(a) There shall be stay of execution of the decree passed on 29th November 2018 pending the appeal by the 1st Defendant on the following conditions;

(i) The Plaintiff's decretal sum be deposited in 30 days into an interest earning Bank account in joint names of the Plaintiff and the Advocates of the 1st Defendant. In the absence of such deposit, if at the default of the 1st Defendant, execution of the decree to proceed.

(ii) The 1st Defendant shall settle within 30 days the Plaintiff's auctioneers fees, as agreed, and in absence of such agreement to be determined by the Court.

(b) For avoidance of doubt the stay granted hereof shall not stay the taxation nor the settlement of the 2nd Defendant's costs.

(c) The costs of the Notice of Motion dated 3rd December 2018 shall abide with outcome of the pending 1st Defendant's appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT