REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 18 OF 2019

CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT/APPLICANT

VERSUS

SIMON KIPLAGAT BIWOTT.....PLAINTIFF/RESPONDENT

RULING

The applicant filed the present application dated 27/3/2019 seeking the following orders;

a) Interim stay of execution orders pending hearing of the application inter partes

b) The court set aside the orders of the court in Eldoret CMCC 377 of 2017 made on 1/3/2019 granting stay and execution pending hearing and determination of this appeal on condition that three quarters of the decretal sum be paid to the respondent and the other third be deposited in a joint interest earning account in the names of both counsels on record.

c) The court grants stay of execution on the condition that the entire decretal amount be deposited in a joint interest earning account in the names of both counsels on record pending the hearing and determination of this appeal.

The application was based on the grounds stated in the application and supported by the affidavit sworn by Daniel Kimosop, the applicant's branch manager.

APPLICANT'S CASE

In his supporting affidavit the branch manager of the applicant averred that the appeal has an overwhelming chance of success and if three quarters of the sum is paid to the respondent who is a man of straw he will not be able to refund the amount if the appeal succeeds. He further averred that the appellant was ready and willing to deposit the entire decretal amount into a joint interest earning account as a condition for stay pending appeal. Further, that the respondent will not suffer any prejudice if the application is allowed.

The applicant submitted that the application is brought under Order 51 Rule 1 which was erroneously indicated as Order 50 Rule 1 and 2. It is also premised on order 42 rule 6 which was inadvertently left out.

The appellant further submitted that no application should be refused for reason of failure to comply with the requirement of citing the correct enabling provisions. Reliance was placed on Order 51 Rule (10) 1 & 2 of the Civil Procedure Rules. Order 42 Rule 6 is applicable in situations where a party is seeking for orders in case of a pending appeal. The application herein has been made on an appeal and the issue whether an appeal exists is not in question.

The applicant relied on the case of Mawji v Arusha General Store (1970) EA on failure to cite provisions not being a ground for dismissal of a case.

The applicant submitted that the lower court order was that stay be granted on condition that three quarters of the decretal sum be paid to the respondent and the other third be deposited into a joint interest earning account. The applicant contended that the objective of stay pending appeal could be defeated if almost the entire amount is released to the respondent. They relied on Order 42 Rule 6(1) to buttress this point.

The application has not breached the provisions of section 1A & 3 of the Civil Procedure Act. They relied on the case of Patrick Kalava Kulamba & Anor v Philip Kamusu & Roda Ndanu Philip (Suing as the legal rep of the estate of Jackline Ndinda Philip) [2016] eKLR the applicant further cited section 1A (3) of the Civil Procedure Act.

The applicant has revealed to the court the previous orders in the lower court and hence seeking further refuge from the court.

The applicant submitted that it had met the requirements of Order 42, Rule 6 of the Civil Procedure Rules. The decree herein is for kshs. 15,000,000/- and therefore substantial loss may result unless the orders for stay are granted and the respondent herein is a man of straw and may not be in a position to refund in case the appeal succeeds.

The respondent in his replying affidavit has deponed being a man of means and has annexed a valuation report of houses worth kshs. 30,000,000/-. This is not enough for the court to release the entire amount as recovery of the same will not be an instant event. The appellant prayed that the court finds that depositing the entire decretal amount into a joint interest earning account is sound.

The application has been made without unreasonable delay as the judgment was read on 1/2/2019 wherein 30 days' stay was granted on 1/3/2019 and the application was filed on 28/3/2019 while those orders were still in force. The appeal was lodged vide memorandum of appeal dated 6/2/2019.

With regards to security the applicant stated that it is willing to have the entire amount deposited in a joint interest earning account. It relied on the case of Amuanaum Sam vs. Opopot Daniel MA No. 3 of 2014 on this point.

RESPONDENT'S CASE

The respondent submitted that the application is bad in law as it does not reflect the provisions under which the superior court is supposed to exercise its jurisdiction to entertain the same. The applicant has not laid down any factual basis to enable the court exercise its discretion to set aside the orders made by the magistrate court. The jurisdiction of the superior court on a second application for stay after the trial court has made a determination has been settled to be original.

The respondent cited order 42 rule 6 of the Civil Procedure Rules. He further cited Carter & Sons Ltd. v Deposit Protection Fund Board & 2 others NBI Civil Appeal No. 291 of 1997. The applicant has failed to establish the requirement of substantial loss as it only expressed fear that the respondent is a man of straw which has been countered by tendering the valuation reports in respect of land parcels valued at a total of kshs. 30,500,000/-. He further cited the authority of Equity Bank Ltd. V Taiga Adams Company Ltd. Civil Appeal no. 722 of 2000.

The respondent submitted that the appellant cannot allege that the respondent is a man of straw when it has been ordered by the court to refund money he had deposited with it for purposes in a fixed account. He cited the case of Machira T/A Machira & Co Advocates v East Africa Standard (No.2) (2002) KLR 63.

The respondent submitted that no substantial loss has been established and relied on the case of Nairobi Court of Appeal Civil Application no. NAI 97 of 1986 – Kenya Shell Limited v Benjamin Karuga Kibiru & Another.

The applicant has not placed any material before the court to buttress the fact that there would be substantial loss.

The applicant has not adduced any evidence on its assets and audited accounts being exhibited.

On the assertion of substantial loss not being proven, the respondent cited the case of Andrew Kuria Njuguna v Rose Kuria (Nairobi HC Civil Case 224 of 2001) unreported.

The respondent submitted that the appellant has not demonstrated sufficient cause to warrant stay as the appeal has no chance of success. He cited the case of The Hon. Attorney General V The Law Society of Kenya & Another, Civil Appeal No. 133 of 2011.

The grant of stay will occasion an injustice as the appellant has kept away the money for 2 years and jurisdiction cannot be exercised in favour of a party who is in contempt of court. It failed to comply with the court order of the magistrate court requiring the payment of ¾ of the decretal sum. The appellant is in breach of Section 1A (3) of the Civil Procedure Act and the court ought not to grant it audience until it fully complies with the order of the Magistrate Court. He relied on the case of Hunker Trading Company Limited v Elf Oil Kenya Limited, (2010) eKLR.

The application has not been made without delay as no explanation has been given as to why the appellant did not move the court immediately the ruling of the magistrate court was given on 1/3/2019. The appellant failed to comply with the orders of the court and rushed to the superior court 28 days later. He relied on the case of Jaber Mohsen Ali & Another v Priscilla Boit & Another ELC No. 200 of 2012 (2014) eKLR.

ISSUES FOR DETERMINATION

a) Whether the application is bad in law for want of relying on the correct enabling provisions.

b) Whether the prerequisites of Order 42 Rule 6 have been met.

c) Whether the orders of the CM's court of conditional stay should be set aside

WHETHER THE APPLICATION IS BAD IN LAW FOR WANT OF RELYING ON THE CORRECT ENABLING PROVISIONS

The application has been indicated on the title to have been brought under Section 3A and 63(e) of the Civil Procedure Act and Order 50 Rules 1 and 2 of the Civil procedure rules.

Order 51 Rule 10 of the Civil Procedure Rules states;

> **Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

In the case of **Scooby Enterprises Ltd v Kisii County Assembly Service Board [2016] eKLR** the court held;

> **In view of the provisions of Order 51 Rule 10 (1) (2), cited above, my finding is that even though the instant application was filed under the wrong rules, the same is not fatally defective and this court is still bound to deliver its ruling on the substance of the application…**

It therefore follows that the application is not fatally defective for citing the wrong provisions.

WHETHER THE PREREQUISITES OF ORDER 42 RULE 6(2) HAVE BEEN MET

Order 42 rule 6(2) of the Civil Procedure Rules 2010 states;

> **(2) No order for stay of execution shall be made under sub rule (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**.

Substantial loss

The burden of proof on whether the respondent will be able to reimburse the decretal sum falls on him upon any concerns raised by the Applicant that he is unable to do the same.

The court is guided by the finding in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where the court held;

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.

The respondent has provided valuation reports of land parcels to the total value of kshs. 30,500,000 as proof that he is in a position to reimburse the decretal sum.

In the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER –VS- AGNES NALIAKA CHESETO** the court held that:

"The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..''

The decretal sum is kshs. 15,000,000/-. The applicant submitted that property is capable of being converted easily. Further, the applicant has not proven that substantial loss will be suffered in the event that stay is not granted.

Whether the application was made without unreasonable delay

Judgment was read on 1st February 2019 and 30 days' stay was granted, further orders were granted by the magistrates' court on 1st march 2019 and the application was filed on 28th March when the orders were still in force.

In the circumstances, I find that the application was made without unreasonable delay.

Security

The applicant is willing to deposit the decretal sum in a joint interest earning account in the name of both parties' advocates.

I find that 2 of the prerequisites have been met. The applicant has however not demonstrated that substantial loss shall be occasioned on itself if stay is not granted.

WHETHER THE ORDERS OF THE CM'S COURT SHOULD BE SET ASIDE

Order 42 Rule 6(1) states;

> **(1) 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, 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.**

The upshot of the foregoing is that the order can be set aside by this court if it deems it just.

The court is in a position to grant the orders of stay on conditions it deems just as they are discretionary orders. The respondents' contention that the money has been kept away from him for 2 years is misleading as judgment was delivered in 2019 and therefore the time he has been denied the opportunity to enjoy the fruits of his judgment runs from the date of judgment.

The bottom line is that the application is merited. The applicant is hereby directed to deposit the entire decretal amount in a joint interest earning account, in the name of both Advocates, pending hearing and determination of the appeal. This way the position of both sides will be secure irrespective of the outcome of the appeal. Parties to comply within 30 days from the date of this ruling. Cost in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of July, 2019.

In the presence of;

Miss Mibei holding brief for Miss Koech for the Applicant

Mr. Mogambi for the Respondent

Ms Sarah - Court assistant