



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 471 OF 2018**

**CHARLES MITHIKA.....APPELLANT**

**VERSUS**

**JOSEPH MUREITHI.....1<sup>ST</sup> RESPONDENT**

**EQUITY BANK LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Ruling of Hon O.A. Ocharo (Mr) Senior Resident Magistrate on 19<sup>th</sup> September 2018 in Chief Magistrate's Court at Nairobi Civil Case No 7969 of 2017)**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated 3<sup>rd</sup> October 2018 and filed on 4<sup>th</sup> October 2018 was filed pursuant to Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A,1B,3A and 63(c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159 (1) of the Constitution of Kenya. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT there be a stay of execution of the Ruling in Nairobi Milimani CMCC Civil Suit No 7969 of 2017 made by Hon. O.A. Ocharo (Mr) SRM on 19<sup>th</sup> September 2018 and all consequential orders pending the hearing and determination of this Appeal.**

**4. THAT costs of this application be provided for.**

**5. Any other orders that meet the ends of justice.**

2. His Written Submissions were dated and filed on 13<sup>th</sup> November 2018. He had also filed other Written Submissions and Supplementary Affidavit on 2<sup>nd</sup> November 2018. The 1<sup>st</sup> Defendant's Written Submissions and Bundle of authorities were dated and filed on 13<sup>th</sup> November 2018. The 2<sup>nd</sup> Defendant's Written Submissions were dated 16<sup>th</sup> November 2019 and filed on 19<sup>th</sup> November 2018. It had also filed its List of Authorities dated 13<sup>th</sup> October 2018 on 15<sup>th</sup> October 2019.

3. Parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

4. The Appellant's present application was supported by his Affidavit and Supplementary (sic) Affidavit that he swore on 3<sup>rd</sup> October 2018 and 1<sup>st</sup> November 2018 respectively.

5. In opposition to the said application, the 1<sup>st</sup> Respondent swore a Replying Affidavit on 25<sup>th</sup> October 2018. It was filed on 26<sup>th</sup> October

2018.

6. On its part, the 2<sup>nd</sup> Respondent's Credit Manager, James Gitau, swore a Replying Affidavit on 13<sup>th</sup> October 2018 on its behalf. It was filed on 15<sup>th</sup> October 2018.

7. This court carefully perused the respective parties' Written Submissions and noted that they were all agreed on the circumstances under which an order for stay of execution pending appeal could be granted. It wholly concurred with their Written Submissions and cases they each relied upon in this regard. What they were not agreed upon, was whether or not the Appellant was entitled to the orders he had sought.

8. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**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."**

9. An applicant seeking a stay of execution must demonstrate:-

**a. That he will suffer substantive loss if the order for stay is not granted;**

**b. That he had filing his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

10. 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.

11. It was evident that the Ruling the Appellant intended to appeal against was delivered by Hon O.A. Ocharo (Mr) Senior Resident Magistrate on 19<sup>th</sup> September 2018. He filed the present application on 4<sup>th</sup> October 2018. The 2<sup>nd</sup> Respondent submitted that the two (2) weeks the Appellant took to file the present application amounted to inordinate delay.

12. Appreciably, "**equity aids the vigilant and not the indolent.**" However, it was the view of this court that a delay of about two (2) weeks was not inordinate. This court did not see the prejudice the Respondents suffered in the filing of the present application. If they did, they did not demonstrate the same to the court.

13. Notably, every person is entitled to have a fair trial as envisaged under Article 50(1) of the Constitution of Kenya. The said Article 50(1) of Constitution of Kenya provides as follows:-

**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

14. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

15. Having said so, the court must be satisfied that the Appellant had met the other two (2) remaining conditions because the conditions are conjunctive and not disjunctive before being granted the order.

16. The Appellant did not demonstrate what substantial loss he was going to suffer if the order for stay of execution pending appeal that he had sought was not granted. Although in his affidavit evidence he seemed to suggest that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had colluded to defraud him as he was given a wrong loan account, it appeared to this court that the present application was merely to buy time so that he could pay the decretal sum.

17. On 19<sup>th</sup> November 2018, the Appellant's advocates informed this court that Appellant had paid a sum of Kshs 900,000/- to the 2<sup>nd</sup> Respondent. They urged this court to defer its Ruling and to mention the matter in three (3) months to confirm payment of the entire sum.

18. This court agreed to the request and fixed the matter for mention on 6<sup>th</sup> December 2018 for purposes of recording a consent. However, at the request of the Appellant's Counsel, the court listed the matter for mention on 4<sup>th</sup> February 2019 for the same purposes.

19. On 4<sup>th</sup> February 2019, the Appellant's counsel told this court that an amicable settlement was yet to be arrived at. On this day, counsel for the 2<sup>nd</sup> Respondent indicated that the outstanding balance out of the decretal sum stood at Ksh 484,827/= as at 5<sup>th</sup> February 2019. Parties then sought a further mention with a view to recording a consent. The mention was fixed for 13<sup>th</sup> May 2019.

20. On 13<sup>th</sup> May 2019, counsel for the Appellant informed this court that they were yet to arrive at a consent and that the matter ought to be mentioned in two (2) months time. Counsel for the 1<sup>st</sup> Respondent and counsel for the 2<sup>nd</sup> Respondent objected to any more mentions.

21. This court entirely agreed with them that the Appellant's conduct showed that he owed the monies that had been demanded herein. It therefore rejected further mentions and reserved this matter for Ruling as by this time, all the parties had already filed their respective written submissions.

22. The Appellant had engaged the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on how to clear the outstanding monies which continued to accrue interest. Having considered his conduct during the court proceedings, it was clear to this court that the present application was intended to stall any execution proceedings against him as he organised his finances to repay the decretal sum.

23. Court processes are not avenues for buying time. They are there to dispense justice and to do so swiftly and justly. This court thus came to the firm conclusion that the Appellant had not met the other two (2) prerequisites to be granted an order for stay of execution and consequently, his application had to fail. The Respondents herein must be given the opportunity to safeguard their interests by realising their fruits of the decision of the Learned Magistrate. This is because the sword of justice cuts both ways.

#### **DISPOSITION**

24. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 3<sup>rd</sup> October 2018 and filed on 4<sup>th</sup> October 2018 was not merited and the same is hereby dismissed with costs to the Respondents.

25. It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of October 2019**

**J. KAMAU**

**JUDGE**