



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 361 OF 2018

JEREMY ARIMBI MURORI.....APPELLANT

VERSUS

STANDARD CHARTERED BANK (K) LTD.....1ST RESPONDENT

MARTIN KINOTI KINYUA.....2ND RESPONDENT

(Being an appeal from Judgment of the Chief Magistrate's Court at Milimani by Hon E.Wanjala (Ms), Senior Resident Magistrate delivered on 6th July 2018 in CMCC No 7281 of 2009)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 20th March 2019 was filed under Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6(1) and (2), Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. Prayers Nos (1) & (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the Honourable Court be pleased to set aside the orders arising from the Ruling issued on 21st February, 2019 by the Magistrate's Court in Nairobi CMCC No 7281 of 2009 and substitute thereof with an order of stay of execution of the Judgment/decree delivered on the 6th July, 2018 pending hearing and determination of the instant appeal.

4. THAT further or other orders be made as will favour the ends of justice.

5. THAT the costs of the application be provided for.

2. His Written Submissions were dated and filed on 9th May 2019 while those of the Respondents were dated and filed on 22nd May 2019.

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

THE APPELLANT'S CASE

4. The Appellant swore an Affidavit in support of his present application on 20th March 2019. He swore his Further Affidavit on 9th May 2019. The same was filed on the same date.

5. He stated that he wished to appeal against the decision of the Learned Trial Magistrate Hon E. Wanjala that was delivered on 6th July 2018

in Milimani CMCC No 7281 of 2009 wherein judgment was entered against him in favour of the 1st Respondent for the sum of Ksh 1,142,859.20/= together with interest thereon at eighteen point seven five (18.75%) per cent with effect from 17th September 2009.

6. He pointed out that he had offered his parcel of land comprising L.R. No Nairobi/Block 162/345 (hereinafter referred to as “the subject property”) as security to satisfy the decretal amount in the event his appeal was unsuccessful, which request was dismissed on the ground that he had not provided a Valuation Report.

7. He averred that he had retired from his career as a lecturer and having no alternative income, he could not be able to deposit the entire decretal sum. He was still emphatic that he was willing to offer the aforesaid subject property as security by deposit in court its title documents.

8. He urged this court to allow his present application which he averred had been made without undue delay and which was in the interests of justice, that it be allowed.

THE 1ST RESPONDENT’S CASE

9. In opposition to the said application, on 23rd April 2019, the 1st Respondent’s Manager at the Collections and Recovery Unit, Boniface Machuki, swore a Replying Affidavit on behalf of the 1st Respondent herein. It was filed on 24th April 2019.

10. The 1st Respondent was emphatic that the Appellant had never appealed against the orders of the lower court regarding the deposit of the decretal sum and consequently, his application herein was an abuse of the court process.

11. It also contended that he had failed to establish that he was likely to suffer substantial loss or irreparable damage if he was not granted an order for stay of execution pending appeal for the reason that it was a publicly traded Bank with assets of over Kenya Shillings Two Hundred and Eighty Five Billion (Kshs 250,000,000,000/=).

12. It was categorical that he had not offered any security which was a pre-requisite of being granted an order for stay of execution pending appeal.

13. It averred that it had been ten (10) years since it started pursuing repayment of liabilities he owed it and consequently, it urged this court to dismiss his application with costs to it.

LEGAL ANALYSIS

14. Both parties were agreed that Order 42 Rule 6(2) of the Civil Procedure Rules sets out the conditions when an applicant can be granted an order for stay of execution pending appeal. The applicant 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.

15. In this regard, the Appellant relied on the cases of Tassan Logistics Ltd vs David Macharia & Another [2018] eKLR and Focin Motorcycle Co Ltd vs Ann Wambui Wangui & Another [2018] eKLR. It also relied on the case of John Mark Obure vs Fidelity Security Ltd [2006] eKLR where O.K. Mutungi J (as he then was) granted an order for stay of execution pending an appeal on condition that the appellant therein deposited either a Title Deed or deposited the decretal sum.

16. On the other hand, the 1st Respondent relied on the cases of Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR where the conditions to be met before an order for stay of execution pending appeal could be granted were emphasised.

17. It further placed reliance on the cases of Kenya Shell Ltd vs Kabiru & Another [1986] KLR 410 and Masisi Mwita vs Damaris Wanjiku Njeri (Supra) where the holdings were that an order for stay of execution pending appeal will not be granted in money decrees unless an applicant demonstrates that the respondent was a man of straw and who would not be able to repay the decretal sum in the event the appellant were to be successful on his appeal.

18. It also referred this court to the case of Winfred Nyawira Maina vs Peterson Onyiego Gichana [2015] eKLR in which Gikonyo J declined to grant the applicant therein a stay of execution pending appeal despite having offered her land as security because he had already found that she would not suffer any substantial loss.

19. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6(2) of the Civil Procedure Rules cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

20. Notably, parties were not agreed whether or not the Appellant was entitled to an order for stay of execution pending appeal.

21. The 1st Respondent was emphatic that it was a public traded institution and would thus be able to refund the Appellant the decretal sum

in the event he was successful in his Appeal herein.

22. On his part, the Appellant submitted that substantial loss could be discerned where it was demonstrated that a respondent would be unable to repay the decretal sum and where execution threatened the very existence of the appellant as was observed in the case of **Tassan Logisticts Ltd vs David Macharia & Another** (Supra).

23. He stated that he was a retiree and was thus unable to raise the decretal sum in full within the period that was granted by the court. He urged this court to accept the subject property he was offering as security so as to be granted the orders he had sought.

24. As can be seen hereinabove, the 1st Respondent was emphatic that the Appellant would not suffer any loss as the decree herein was a money decree and that it had the means to refund him the money in the event he was successful in his Appeal herein.

25. Whilst noting the above, this court has, in previous decisions held the view that any difficulties in recovering the decretal sum upon an appeal succeeding would be deemed to amount to substantial loss. (See **China Wu Yi Co Limited vs Ronald Musingsi Okari [2019] eKLR**). It is not uncommon for institutions to have stringent processes before monies are paid out to third parties. Whereas the 1st Respondent would have the means to refund the Appellant as it was a public traded company, he would nonetheless have to institute recovery proceedings in the event he was successful in his Appeal herein and it failed to refund him his monies. Any efforts in this regard would in the mind of this court, amount to substantial loss.

26. This court was therefore satisfied that the Appellant had satisfied the first condition under Order 46 Rule 6(2) of the Civil Procedure Rules for being granted an order of stay of execution pending appeal.

27. Going to the second prerequisite, the 1st Respondent argued that the inordinate delay between 21st February 2019 and 20th March 2019 when the present application was filed was not satisfactorily explained by the Appellant and hence, was unreasonable.

28. The Appellant submitted that it filed the present application without any delay. It pointed out that the lower court delivered its Ruling on 21st February 2019 and it filed the present application on 20th March 2019 after it obtained the Valuation Report.

29. Appreciably, **“equity aids the vigilant and not the indolent”** However, it was the view of this court that a period of one (1) month did not constitute any inordinate delay. In any event, while there was delay, the same was not inordinate and did not cause the 1st Respondent any prejudice. If it suffered prejudice, then it did not demonstrate the same.

30. In respect of the third pre-requisite condition, the Appellant contended that he was a retiree and could not therefore deposit the entire decretal sum within the time he was given.

31. It is clear from Order 42 Rule 6(2) (b) of the Civil Procedure Rules that the security to be deposited by an applicant for the due performance of the decree or order as may be ultimately binding upon him need not be security in monetary terms. It is such **security as the court orders for the performance of such decree or order** (emphasis court).

32. In the case of **Winfred Nyawira Maina vs Peterson Onyiego Gichana** (Supra), Gikonyo J observed that the offer of a parcel of land as security for the due performance of the decree as may have been ultimately binding on the appellant therein was a good gesture but that the same could not assist the appellant therein as she had not demonstrate that she would suffer substantial loss.

33. The Learned Magistrate herein pointed out in her Ruling that although the Appellant had attached a copy of the Title Deed, he had not attached a Valuation Report. It did appear to this court that she would have considered the same had the Appellant attached a Valuation Report.

34. It was therefore the considered view of this court that the subject property the Appellant was offering as security would be sufficient security for purposes of being granted an order for stay of execution pending appeal. This court was therefore satisfied that the Appellant had satisfied the third condition under Order 42 Rule 6(2) of the Civil Procedure Rules.

35. Going further, the Appellant was not shut out from seeking orders from this court as Order 42 Rule 6(1) of the Civil Procedure Rules provides that:-

“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.”

37. In any event, 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.”

37. No person should 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.

38. Accordingly, having considered the parties' affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Appellant being denied an opportunity to ventilate its case on merit.

DISPOSITION

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 20th March 2019 was merited and the same is hereby allowed in terms of Prayer No 1 on the following conditions:-

1. THAT the Appellant shall deposit into court the original Title Deed in respect of LR No Nairobi/Block 62/345 within thirty (30) days from today i.e. by 13th December 2019.

2. THAT the Appellant shall furnish the 1st Respondent and deposit into court the original and/or certified copy of search relating to the said property from the lands office within thirty (30) days from today i.e. by 13th December 2019.

3. THAT the Appellant shall deposit into court all the relevant documentation duly signed by him and the relevant authorities, if any, as would be sufficient to facilitate the disposal of the subject property in the event he was unsuccessful in his Appeal herein within thirty (30) days from today i.e. 13th December 2019 and in the absence of the deposit of the decretal sum of Ksh 1,142,859.20 into court as stated hereinbelow.

4. THAT in the alternative to orders in Paragraph 39(1), (2) and (3), the Appellant shall deposit into a joint interest earning account in the names of his advocate and those of the 1st Respondent, the sum of Kshs 1,142,859.20 within ninety (90) days from the date of this Ruling herein i.e. by 28th February 2020.

5. THAT the 1st Respondent be at liberty to do a valuation of the subject property to ascertain the valuation that has been given by the Appellant herein, if need be.

6. In default of Paragraph 39 (1), (2) and (3) or in the alternative Paragraph 39 (4), the conditional stay shall automatically lapse on 28th February 2020.

7. The Appellant is hereby directed to file and serve its Record of Appeal within ninety (90) days from today i.e by 28th February 2020.

8. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Paragraph 39 (7) hereinabove.

9. Costs of the application herein shall be in the cause.

10. Either party is at liberty to apply.

40. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of November 2019

J. KAMAU

JUDGE