



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 886 OF 2015

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT

VERSUS

PETTER OLOOO ARINGO.....1ST DEFENDANT/RESPONDENT

TRANS NATIONAL BANK LIMITED.....2ND DEFENDANT/APPLICANT

VYATU LIMITED.....3RD DEFENDANT/RESPONDENT

WILSON GACHANJA.....4TH DEFENDANT/RESPONDENT

RULING

The 2nd Defendant filed a Notice of Motion dated 3rd March 2020 seeking orders that there be stay of the judgment and decree delivered herein on 28th February 2020 pending the hearing and determination of the intended appeal, that costs of the application be borne by the Respondents, and any other orders that the court maybe pleased to make. The Applicant states that on 28th February 2020, the court in its order directed that the 2nd Defendant refund the 3rd Defendant Kshs 3,300,000/= plus interest from the day of filing suit. The application is based on the grounds that the Applicant has lodged a notice of appeal being dissatisfied with the decision of the court in compliance with Rule 75 of the Court of Appeal Rules 2010.

The 3rd Defendant neither pleaded nor sought via a counterclaim a refund of the Kshs 3,300,000/= plus interest from the date of filing, therefore the Applicant was not privy to the same and consequently was not granted a fair hearing and/or an opportunity to tender evidence or participate in the court proceedings. The Applicant prayed for but was not granted orders of stay by this court on 28th February 2020 and the Applicant is apprehensive execution shall ensue by the 3rd Defendant, rendering the intended appeal nugatory and that the Applicant stands to suffer substantial loss and damage unless the orders sought are granted. That the Respondent shall not suffer any prejudice if the orders sought are granted.

In his supporting affidavit, Silas Aluku, the legal and securities officer of the 2nd Defendant, stated that the 3rd Defendant was also likely to be unable to refund the award if paid to them and the intended appeal succeeds.

3rd Defendant's Response

The Director of the 3rd Defendant filed a replying affidavit in opposition to the application which the 3rd Defendant termed as frivolous, vexatious and an abuse of the process of the law which should be dismissed.

The Director stated that the 2nd Defendant had not proved how it would suffer loss should execution proceed against it, and that it is the 3rd Defendant who is being denied the fruits of its successful litigation, through bad faith and unnecessary delay on the part of the 2nd Defendant. That the appeal lacks merit and should not be the basis for granting the orders sought.

The Director asserted that natural justice dictates that litigation should come to an end and therefore the decretal sum amounting to Kshs. 16,636,550.93/= should be released to the 3rd Defendant.

That the 2nd Defendant had not offered any security as a condition for grant of the stay orders. That the 3rd Defendant proposed that the decretal sum be deposited in a joint account held between the Advocates for the 2nd and 3rd Defendants within 30 days as a condition for the

grant to stay pending the hearing and determination of the 2nd Defendant's appeal.

Applicant's Supplementary Affidavit

The legal and securities officer of the Applicant swore a further affidavit in response to the 3rd Defendant to the effect that the Applicant was willing and able to deposit as security Kshs. 3,300,000/= in a joint interest earning account in the name of the counsels for the 2nd and 3rd Defendants, and in its preferred choice of bank being either Trans National Bank Ltd or Kenya Commercial Bank Ltd. That the issue of depositing the interest was untenable and tantamount to infringing the Applicant's right to appeal especially in light of the final orders sought. That the interest chargeable was simple interest and not compounded interest, according to the judgment. The application proceeded by way of written submissions.

Applicant's Submissions

Counsel for the Applicant submitted that Order 42 Rule 6 of the Civil Procedure Rules as clothing this court with the jurisdiction to hear and determine the application.

Counsel cited *Joseph Mung'aya Makotsi v Kenya Power & Lighting Company Ltd & another* [2018] eKLR enumerating the conditions for granting stay pending appeal – application brought with undue delay, risk of substantial loss and security for the due performance of the order or decree.

Counsel submitted that the application was lodged in a timeous fashion. That the Respondent had failed to demonstrate its financial ability to allay the Applicant's concerns that it is an insolvent company and would therefore not be in a position to refund the decretal sum and rendering the appeal nugatory.

On the issue of depositing both the decretal sum and the interest, Counsel submitted that the issue of depositing interest was totally discretionary and should not be granted in light of the intended appeal. That in its final orders the court did not state when the interest should start running and substantive justice demands that interest shall run from the date of the decree.

Counsel submitted that Section 26 (2) of the Civil Procedure Act provided that where a decree is silent with respect to the payment of further interest, the court shall be deemed to have ordered interest at 6% per annum. Counsel referred to the case of *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR. Counsel also cited *Barclays Bank Kenya Limited v William Mwangi Nguruki* [2014] eKLR for the holding that interest is calculated at simple interest. Counsel, without prejudice to his earlier submission, also took note of the holding in *Highway Furniture Mart Limited v Permanent Secretary Office of the President & another* [2006] eKLR where interest was charged at 14% as per the Chief Justice Practice Directions.

3rd Defendant's Submissions

Counsel for the 3rd Defendant submitted that the Applicant had not demonstrated the substantial loss it would suffer should the stay orders not be granted, and that the 3rd Defendant had the means to refund the money should the intended appeal be successful.

Counsel submitted that the application was aimed at delaying the 3rd Defendant from enjoying the fruits of its judgment. Counsel cited *Mohamed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* [2013] eKLR for the proposition that the right of appeal must be balanced against an equally weighty right of a party to enjoy the fruits of the judgment delivered in his favour.

Counsel submitted that the alternative of depositing the decretal sum and interest should be in any other bank and not the Applicant's own bank as the same would defeat the purpose of a condition of granting the stay of execution.

Issues for Determination

1. Conditions for granting stay of execution pending appeal

Order 42 Rule 6 (2) provides that the following conditions shall be met before stay pending appeal is granted:

“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.”

Substantial loss under Order 42 Rule 6(2) has to be demonstrated by the Applicant, as held in *JAMES WANGALWA & ANOTHER V AGNES NALIAJA CHESETO* [2012] eKLR:

“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, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case... emphasized the centrality of substantial loss 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 nugatory.”

The Court in *Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR* held that:

“The substantial loss under order 42 rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift... There must cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the Applicant intends the court to believe.”

2. Whether the Applicant stands to suffer substantial loss

The Applicant has not tendered any evidence to show that the Respondent would be unable to refund the decretal sum plus interest should the intended appeal succeed. Merely making the averment that the decretal sum is a colossal amount and alleging that the Respondent is a potentially insolvent company does not suffice.

Further, the Applicant only broached the issue of availing security for the performance of the decree as an afterthought and in reaction to the pleadings of the 3rd Respondent. However Applicant's belated offer of availing the decretal sum as security still does not cure the deficiency of a demonstration of substantial loss if the orders sought are not granted.

3. Relevant Orders

The application ought to be, and is hereby dismissed. On the issue of interest due on the decretal sum, Section 26 (2) of the Civil Procedure Act provides that where the decree is silent on the rate of interest, it shall be deemed to be at 6%. According to Section 26 (1), it is within the discretion of the court to award interest from the date of the suit to until payment in full. In the circumstances of this case, the interest should be adjudged from the date of the decree. The Court of Appeal in *Barclays Bank Kenya Limited v William Mwangi Nguruki [2014] eKLR* also held that “Interest at court rates is calculated on a simple interest and not on compounded basis.”

DATED AT KISUMU THIS 28th DAY OF MAY 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE