



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 7'B' OF 2016

BARCLAYS BANK OF KENYA.....APPELLANT/APPLICANT

V E R S U S

CHARLES WAWERU.....1ST RESPONDENT

ALEXANDERKABERIA.....2ND RESPONDENT

EDDIE MUGO.....3RD RESPONDENT

KEFA N. KARIUKI.....4TH RESPONDENT

R U L I N G

1. This application dated 20/07/2016 seeks for orders for stay pending hearing and determination of this appeal. It is supported by the affidavit of one Waweru Mathenge who describes himself as the Head of Legal and Secretarial Services of the applicant and deposes that he is seized of this matter and as such competent to swear this affidavit.
2. The deponent states that the company was aggrieved by the judgment of Embu Resident Magistrate in CMCC No. 64 of 2016 and thus lodged this appeal. The applicant states that he has already filed a notice of appeal dated 19/01/2016 and has requested for proceedings. That there is risk of the 1st respondent attaching the applicant's property thus rendering this appeal nugatory. It is further argued that no prejudice will be caused to the 1st respondent if the orders are granted.
3. The application was opposed by the 1st respondent in his replying affidavit sworn on 25/07/2016.
4. It is deposed that the appeal against the respondent is misplaced because the applicant had claimed for indemnity and or contribution against the 3rd party and its remedy therefore lay against the said 3rd party for indemnity and/or contribution.
5. The respondent contends that the applicant has not complied with Order 42 of the Civil Procedure Rules. The delay of 7 months in filing this application has not been explained by the applicant.
6. The respondent's opinion that the payment of the decretal amount to him shall not render the appeal nugatory. He states that he is a man of means owing several properties including motor vehicles and land.
7. He further states that the applicant had offered to settle the decretal amount before the lower court and was given 30 days stay to satisfy the decree.
8. According to the respondent, this application is brought in bad faith and calculated to delay the respondent from enjoying the fruits of his judgment. He urges the court to dismiss the application for lack of merit.
9. This application is brought under Order 42 Rule 6 which sets out the conditions to be satisfied by the applicant as follows:-
 - (a) That the application is filed without unreasonable delay.
 - (b) That in the event that the orders are denied, the applicant will suffer substantial loss.
 - (c) That security for the due performance of the decree is provided.

10. The parties filed submissions to support their arguments in this application.

11. On delay the applicant did not give any explanation in its affidavit. In its submissions it was stated that immediately after delivery of judgment, the respondent filed a bill of costs in the lower court and the ruling was only delivered on 27/04/2016. I do not see the relation between the bill of costs and the filing of the appeal. The applicant had a counsel who must have advised it on what was expected. The applicant was to appeal against the judgment delivered on 21/02/2015 which he says he was aggrieved with.

12. It was alleged that the applicant had offered to settle the decretal amount and obtained 30 days stay for that purpose. This was not disputed by the applicant. The 30 days stay granted on 27/04/2016. This confirms that the applicant had decided to settle the decretal amount but may have changed its mind later. This application was filed on 21/07/2016 which was seven (7) months after the delivery of the judgment.

13. The issue is whether such delay is excusable under Order 42 Rule 6. There was no explanation for the delay given in the supporting affidavit. Even after the respondent raised it in the replying affidavit, the applicant did not file a supplementary affidavit to give his explanation. An explanation given in the submissions is not explanation for it has no legs to stand on.

14. It was held in the case of **PAMELA AKINYI OPUNDA VS BARCLAYS BANK LTD [2011] eKLR** that:-

No order for stay of execution shall be made under sub rule (1) unless:-

(a) The court is satisfied 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 as been given by the applicant.

15. It was held in the same case that:-

...an appeal cannot be rendered nugatory in a monetary decree if payment is made and it is not just to deny a successful party the benefit of judgment merely because he is poor.

16. In the same case of Corporate Insurance the case of **STEPHEN WANJOHI VS CENTRAL GLASS INDUSTRIES LIMITED Nairobi High Court Civil 6726/91** was cited with approval:-

Financial ability of a decree holder solely is not a reason for allowing a stay. It is enough that the decree holder is not a dishonourable miscreant without any form of income.

17. For the applicant to disregard giving an explanation for delay while he is well aware that it is a requirement under Order 42(6) demonstrates lack of seriousness in bringing this appeal.

18. It is my considered view that the prolonged unexplained delay is inexcusable.

19. The applicant has offered to give a bank guarantee as security for the due performance of the decree. Such a guarantee coming from a reputable bank or institution is acceptable in that it is not likely to be dishonoured. The applicant has therefore satisfied the second requirement.

20. On substantial loss, the respondent stated on oath that he is a man of means owing valuable assets such as land and vehicles. He is financially sound and is capable of refunding the decretal amount in the event of a successful appeal.

21. The decretal amount was Kshs.126,700/= which may have increased due to accruing interest for the last three (3) years plus costs of the suit. It was shown in the warrant of attachment addressed to Quickline Auctioneers at the time of filing this appeal as Kshs.393,754/=. The document is an annexure to this application.

22. There was no evidence from the applicant to controvert that of the respondent that he is possessed of the financial capacity to refund the amount. It remains that the applicant has not shown that the respondent is incapable of refunding the decretal amount in the event of a successful appeal.

23. The applicant has failed to show that he is willing or is likely to suffer substantial loss should the orders sought be denied.

24. I find that the applicant has failed to demonstrate to this court that his appeal has merit.

25. I hereby find it unmeritorious and dismiss it with costs.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ngige for Ms. Kimaru for Appellant

Ms. Muthoni for Mwangi for 1st Respondent