



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISC APPL NO. 70 OF 2017**

**BENEAH WANGULU .....APPLICANT/APELLANT**

**VERSUS**

**EQUITY BANK LIMITED .....1<sup>ST</sup> RESPONDENT**

**PAWABA AUCTIONEERS .....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. The applicant/appellant herein has filed an application dated 3<sup>rd</sup> November 2017 seeking for orders that:

1. *This application be certified as urgent to be heard exparte in the first instance*
2. *This honourable court be pleased to stay all the proceedings together with any intended taxation and executions in SPMCC No.109 of 2013 pending hearing and final determination of this application and this appeal or until further orders of this honourable court.*
3. *The costs of this application be awarded to the applicant.*

2. The application is premised on the grounds on the face thereof and supported by the affidavit of the applicant. The grounds in support of the application are that the applicant had sued the respondents in the lower court seeking for restraining orders against the respondents from attaching and selling his goods by public auction on the grounds that the applicant had failed to pay money loaned out to him by the 1<sup>st</sup> respondent. After a full hearing, the trial court dismissed the case. The applicant filed the appeal herein but the respondents proceeded to file an application for taxation of bill of costs despite the existence of the appeal. The applicant then filed the application herein. He is seeking for stay of proceedings in the lower court pending the hearing and determination of the application and the appeal.

3. The application was opposed by the respondents through the replying affidavit of one **Robert Shioso**, the branch manager of the 1<sup>st</sup> respondent's Mumias branch. The said deponent says in his affidavit that the case for the applicant was dismissed by the trial court. That they filed a bill of costs dated 16<sup>th</sup> August 2014 which was served on the applicant. The bill was taxed on 20.12.2017 and assessed at Kshs.57,250/= . A decree was drawn. The 1<sup>st</sup> respondent proceeded to execute. On 16th January 2018, the 1<sup>st</sup> respondent took out a notice to show cause which was properly served on the applicant. He did not appear in court. A warrant of arrest was issued against him on 31<sup>st</sup> January 2018.

4. The deponent says that the application herein has been overtaken by events as the taxation of the bill

of costs has been done. That there has been no orders staying the proceedings in the lower court. The deponent annexed to his replying affidavit copies of taxation notices, the bill of costs, the decree and the notice to show cause.

5. The application dated 3<sup>rd</sup> November 2017 was seeking to stay, first the taxation of the bill of costs pending the hearing of the application, and secondly the execution proceedings pending the hearing and determination of the appeal. The order seeking to stay the taxation of the bill of costs has been overtaken by events as taxation has already been done. What is remaining now is the execution of the decree. A notice to show cause has already been issued against the applicant. The question is whether the court should stay the execution proceedings pending the hearing and determination of the appeal.

6. The grounds under which a court may grant stay of execution pending appeal were set out in the case of ***Patani & Another –vs- Patani*** (2003) KLR where the Court of Appeal held that:

***“The principles on which this court grants stay are well settled. The applicant must show that he has an arguable appeal and that the same would be rendered nugatory if a stay is not granted”:***

7. The conditions for stay pending appeal are stated in order 42 Rule 6(2) of the Civil Procedure Rules which provides that no order for stay shall be made pending appeal 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.*

8. These principles were re-stated in ***Elena D. Korir –vs- Kenyatta University*** (2012) eKLR where it was held that:

*“ The application must meet a criteria set out in precedents and the criteria is best captured in the case of ***Halal & Another –vs- Thornton & Turpin Limited*** where the Court of Appeal (Gicheru JA, Chesoni & Cockar (AG JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions namely: **Sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.***

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in ***Hassan Guyo Wakalo –vs- Straman EA Limited (11)(2013)*** as follows:*

*“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.*

9. The advocate for the applicant, Onindo Onindo Associates made submissions in the case but their submissions touched on the main appeal and were not in respect to the application dated 3.11.2017. The advocates for the respondents did not make any submissions.

10. The main ground for the application for stay of execution pending appeal is that the applicant is not the one who borrowed the money from the 1<sup>st</sup> respondent and therefore that judgment should not have been made against him.

11. The case for the 1<sup>st</sup> respondent was that the applicant applied for an agricultural loan from the 1<sup>st</sup> respondent and he was granted a loan of Kshs.10,000/=. The security for the loan was cane proceeds from Mumias Sugar Company Limited, livestock and household goods. That the applicant signed a letter

of offer that indicated the security offered for the loan as cane contract with Mumias Sugar Company and chattels mortgage over household items and livestock. There was a loan guarantor form that was signed by a guarantor. There was an irrevocable undertaking form from Mumias Sugar Company. That when the cane was harvested, it did not raise sufficient money to pay the loan. The 1<sup>st</sup> respondent instructed its auctioneers to recover the money from the security. The applicant then moved to court.

12. The case for the applicant was that he took a loan of Kshs.10,000/= from the 1<sup>st</sup> respondent. That the security was cane proceeds from Mumias Sugar Company with whom he had a cane contract. That before the cane was harvested auctioneers went and attached his goods which were not part of the security. The cane was later harvested. He later received a statement that there was no money from the cane proceeds to pay the loan. He stated that he only offered cane proceeds as security and did not offer his household goods and livestock as security. He argued that it is Mumias Sugar Company who were supposed to pay the loan.

13. The applicant does not deny that he was advanced a loan by the 1<sup>st</sup> respondent. His argument is that he did not offer the proclaimed household goods as security. The trial court found that the applicant signed the chattels mortgage that indicated the household goods that were listed as security. It also found that the listed items are the same ones that were proclaimed by the auctioneer.

14. Has the applicant then established that he has an arguable appeal that will be rendered nugatory if stay of execution is not granted? I am afraid that he has not done so. The applicant admits that he was advanced the loan. He admits that the loan is unpaid. He admits that he signed the chattels mortgage form that indicated that he had also placed his household goods as security. The applicant has then not shown that the attachment of his goods was not in accordance with the loan contract.

15. The applicant argued that it is Mumias Sugar Company who were supposed to pay the loan. He did not indicate which part of the contract indicated so.

16. In view of the above, the applicant has not established that he has an arguable appeal.

17. The applicant has not offered to deposit any security as required by order 42 Rule 6(2). He, in addition, has not shown that he will suffer substantial loss if the orders sought are not made. There is no sufficient cause for the court to grant the orders sought.

In the foregoing the application dated 3.11.2017 is unmerited. The same is dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 17<sup>th</sup> day of October, 2018.

**J. NJAGI**

**JUDGE**

In the presence of :

No appearance .....for applicant

No appearance .....for respondent

Parties:

Applicant .....absent

Respondents .....absent