



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 43 OF 2018

EQUITY BANK KENYA LIMITED.....APPELLANT

VERSUS

JERIOTH NYAWIRA MAMBO.....RESPONDENT

RULING

1. Before me is a Motion on notice dated 24th May, 2018 brought under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The applicant seeks an order of stay of execution of the judgment and/or decree made on 9th May, 2018 in **Githongo Senior Magistrate's Court Civil Case No. 20 of 2017** pending the hearing and determination of the appeal.

2. The grounds upon which the Motion is grounded are set out in its body and the supporting affidavit of Simon Akubu, senior legal manager of the appellant sworn on 24th May, 2018. It is contended that being dissatisfied with the judgment entered on 9th May, 2018, the applicant has appealed to this court and unless there is a stay of execution of that judgment, the appeal would be rendered nugatory. That the appellant stands to suffer substantial loss.

3. It was contended that the respondent was advanced a loan by the appellant vide a letter of offer dated 20th December, 2010 to be repaid in 72 equal monthly installments at the rate of 1.34% per month. In the event of default, the rate of 6% per annum and such other charges as detailed in the letter of offer were to be levied.

4. On 9th November, 2011, the bank notified the respondent, vide a notice in local dailies and through writing, of the increase in the effective interest rates charged by the bank up to 25% per annum effective 15th November, 2011. The increase was necessitated by the market price forces of which the interest changes cut across the banking industry upon which the Kenya Bankers Association (KBA) issued circulars and press briefings advising the public on interest rate changes.

5. It was further contended that according to the letter of offer, the bank was at liberty to revise the interest rates without any prior reference to the borrower. This is because the changes in the interest rates were in compliance with the law. That in the premises, the appeal has high chances of success and the orders of stay sought should be granted.

6. The application was opposed vide a replying affidavit of Jerioth Nyawira Mambo sworn on 4th June, 2018. She averred that if the court is to order a stay of execution, the appellant should immediately refund all sums deducted from her salary as from the date of judgment and also that the appellant should pay a sum of Kshs.19,800/- being her salary deductions as ordered by the court at Githongo.

7. She contended that the appellant had illegally demanded further loan repayments from and listed her with the Credit Reference Bureau despite the loan being cleared. That while the suit in the lower court was pending, the appellant commenced deductions from her salary through the check-off system in recovery of arrears. She amended her claim and sought that the appellant be restrained from making further deductions through her salary and that the appellant be ordered to refund the amounts deducted from her salary, of which the trial court agreed with her. That despite as aforesaid, the appellant continues to deduct her salary up to now of which they have failed to disclose. That if the order is granted the appellant will continue to make deductions from her salary which will be to her detriment.

8. I have considered the averments on record, the submissions of learned counsel and the authorities relied on. This is an application for stay of execution pending appeal. Under **Order 42 Rule 6 of the Civil Procedure Rules**, the principles applicable to an application for stay pending appeal are well known. That the application should be made timeously, that the applicant must demonstrate that unless the stay sought is granted, the applicant will suffer substantial loss and that the applicant should give security for the due performance of the decree that will be ultimately be binding on him.

9. *The power of the court to grant or refuse a stay of execution is purely a discretionary one that ought to be exercised in a manner that*

would not render an appeal nugatory. The applicant must demonstrate that it will suffer substantial loss if the stay is not granted. The court however, must be alive to the fact that a successful party ought not to be unreasonably prevented from enjoying the fruits of his judgment.

10. In Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63, Court of Appeal held:-

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

11. In this case, the trial court held that the increase of the interest charges was harsh, illegal, unconscionable, unreasonable, unfair, oppressive and vague; that the respondent did not default on the loan payment and stood discharged. Accordingly, the court gave a mandatory injunction compelling the defendant to ensure that the erroneous negative information disseminated by the appellant to the Credit Reference Bureau be corrected. It also gave a permanent injunction restraining the defendant from making further deductions from the respondent’s salary or seeking in any other way to recover from the respondent and to refund the sum of KShs.19,880/-.

12. Through “*JNMI*”, the respondent has shown that after the judgment was delivered on 9th May, 2018, the appellant has continued to make deductions from the respondent’s salary despite the court order to the contrary.

13. From the foregoing, it is clear that the orders given by the trial court tend to halt the acts of the appellant from making any recoveries from the respondent on the alleged monies she owes them. The judgment also declares her discharged of the loan obligations and compels the applicant to disseminate information that will delist the respondent from the Credit Reference Bureau.

14. The question that lingers in the mind of this court is, what will be the effect of the applicant succeeding on appeal? It has not been deposed that the respondent will be unable to repay whatever the applicant is demanding. In any event, the applicant did not disclose to this court what it is demanding from the respondent as arrears and or outstanding amount. Can this court then make orders blindly? I do not think so.

15. In Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR the court stated:-

“In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent - that is execution is carried out - in the event the appeal succeeds, the Respondent would not be in a position to pay -reimburse- as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.”

16. It is clear from the foregoing that proof of substantial loss is the corner stone for an order of stay under **Order 42 of the Civil Procedure Rules**. The question that arises is, what substantial loss would be occasioned to the applicant if the stay is not granted? The applicant did not specify any such loss. It is not enough to state that substantial loss will be occasioned if a stay is not granted. An applicant must specifically demonstrate the kind of substantial loss that will be occasioned before a court can prevent a successful litigant from enjoying the fruits of his judgment under **Order 42 Rule 6**.

17. In the present case, the applicant was only being directed to correct the erroneous negative information communicated to the Credit Reference Bureau and to discontinue deductions of Kshs.2,485/= per month from the respondent’s salary. As I have already stated, the applicant did not indicate the alleged amount outstanding from the respondent. If that order is not stayed, how will the applicant suffer substantial loss? This was not demonstrated and the court does not think there will be any that will be suffered by the applicant.

18. Substantial loss goes hand in hand with rendering the appeal nugatory. Failure to prove substantial loss does not render the appeal nugatory. In Hassan Guyo Wakalo vs Straman EA Ltd [2013] Eklr, the Court of Appeal:-

“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”.

19. The upshot is that applying the foregoing test, I find the application to be unmeritorious and hereby dismiss the same with costs to the respondent.

Signed at Meru by me

A.MABEYA

JUDGE

DATED and DELIVERED AT MERU THIS 4TH DAY OF OCTOBER, 2018

F. K. GIKONYO

JUDGE