



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 262 OF 2018

AFRICAN BANKING CORPORATION LIMITEDAPPLICANT

VERSUS

RAJAN RAJNIKANT DHANANI.....RESPONDENT

RULING

1. The application dated 11th June, 2018 principally seeks orders that this court be and is hereby pleased to grant a stay of execution of the partial decree issued on 4th June, 2018 in Milimani CMCC No. 9277 Rajan Rajnikant Dhanani v African Banking Corporation Limited pending the hearing and determination of the Appeal.
2. Secondly, that this court be and is hereby pleased to stay proceedings in Milimani CMCC No. 9277 of 2017 Rajan Rajnikant Dhanani v African Banking Corporation Limited pending the hearing and determination of the Appeal.
3. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by Winnierohi Wafula. It is stated that upon being served with summons, the Applicant instructed it's advocates who entered appearance. That the court file was reported missing and the statement of defence was filed late. That a perusal of the court file revealed that judgment had been entered.
4. It is further averred that an application to set aside the judgment was dismissed on a date that the Applicant was not notified of. That subsequently a partial decree was issued. It is contended that the Applicant is dissatisfied with the ruling of the trial magistrate and intends to appeal. It is further stated that the Applicant stands to suffer substantial loss as the alleged rent is Ksh.12,500,000/= yet it's a third party who is in occupation of the premises the subject of the suit and without any proof of the income from the premises. It is stated that the Applicant has an arguable appeal with high chances of success which will be rendered nugatory if the application is not allowed. The Applicant is willing to abide with the conditions set by the court.
5. The application is opposed. It is stated in the replying affidavit that the Applicant entered appearance but failed to file its defence, hence the request for judgment. That the statement of defence filed by the Respondent was received under protest as it was filed out of time. That the ruling the subject of the appeal herein was delivered after issuance of notice by the court. That following the dismissal of the Applicant's application, judgment was entered for the Respondent and a partial decree issued for the sum of 12,500,000/=.
6. It is further averred that the decree herein being a monetary one, the Respondent is capable of refunding the same in the event that the appeal is successful. That no security for the due performance of the decree has been placed before the court. That the appeal has no chances of success and no plausible reasons have been given for the delay.
7. I have considered the application, the response to the same and the submissions made by the counsel for the respective parties herein.
8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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.”**

9. The ruling the subject of the appeal herein was delivered on 28th May, 2018. The application at hand was filed on 12th June, 2018, a period of about two weeks. There was no unreasonable delay. The decree is for the sum of Ksh.12,500,000/=. There's threat of execution. To balance the competing interests of both parties, this court is inclined to allow the application but upon terms and conditions.

10. With the foregoing, the application is allowed on condition that the sum of Ksh.12,500,000/= be deposited in a joint interest earning bank account of the counsels for both parties herein or in court or deposit security for the same amount within 30 days from the date hereof. The appeal to be fixed for directions within 90 days from date hereof. In default the appeal to stand dismissed.

Date, signed and delivered at Nairobi this 14th day of Nov., 2018

B. THURANIRA JADEN

JUDGE