REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL, ADMIRALTY AND TAX DIVISION

CIVIL CASE NO. 339 OF 2011

JAMES JUMA MUCHEMI & PARTNERS LTD….....APPLICANT

-VERSUS-

BARCLAYS BANK OF KENYA LIMITED….....…1ST RESPONDENT

TURSKER MATRESSES LIMITED….....2ND RESPONDENT

RULING

1. This Ruling relates to a notice of motion application dated 10th July 2017, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, the inherent power of the Honourable court and enabling provisions of the law.

2. The Applicant is seeking for the following orders;

a) That there be a stay of execution of the Judgment entered on the 4th of May 2017 and the resultant decree pending the hearing and final determination of the intended Appeal.

b) That Applicant be at liberty to apply for further orders and/or directions as this Honourable court may deem fit and just to grant.

c) That the costs of this Application do abide the outcome of the appeal.

3. The Application is supported by an affidavit dated 10th July 2017, sworn by Juma Muchemi, a director of the Applicant's company. He deposes that, the Applicant is aggrieved with the decision rendered on the 4th May 2017, by the court as a Judgment herein and intends to appeal against it.

4. That the intended appeal is meritorious and raises several issues for determination as shall be detailed in the Memorandum of Appeal and if the application is not granted, and the decree is executed, he will suffer substantial loss and irreparable damage, if and the sum of Ksh.30, 050,000.00 is paid, the 2nd Respondent is not be in a position to refund it.

5. That the Applicant is ready and willing to provide security of the decretal sum in form of L.R No. E. Bukusu/S.Kanduyi/416, valued at Kenya Shillings Thirty Million (Kshs. 30,000,000.00) only and is ready and willing to abide by any other conditions that may be imposed by the court pending the hearing and determination of the intended appeal.

6. However, the application was opposed by the 2nd Respondent through the grounds of opposition which states that;

a) The Application is misconceived and without merit

b) The Applicant's intended appeal has no chance of success given that, the Applicant committed to paying the sum of Ksh20,000,000.00, together with interest of Ksh10,050,000.00, vide the Agreement dated 14th September 2007 and further admitted owing the same through the testimony of Pw 1 who is the Plaintiff's Managing Director.

c) The Application does not satisfy the legal conditions for the grant of a stay of execution pending appeal as the Applicant is truly and legally indebted to the Respondent and therefore no substantial loss will be incurred by the Applicant if the order for stay of execution is not granted.

d) In any case, the 2nd Respondent having advanced the principal amount of Kshs 35,942,725.46, to the Applicant the2nd Respondent, is in a position to refund the same should be Court direct so.

7. The parties deposed of the application by filing the submissions thereto, whereupon the Applicant submitted that the grant of a stay order is entirely discretionary and all that the Applicant needs to demonstrate is that: he will suffer substantial loss, the Application was brought without unreasonable delay, there is sufficient cause to grant the stay and the Applicant will provide security.

8. The Applicant reiterated that the decretal sum of Ksh 30,050,000.00, is a colossal amount, which may not be recovered should the appeal be successful and that the 2nd Respondent has failed to answer the Applicant's pleas as to whether, indeed it is able to refund the decretal sum if the appeal succeeds as such there is no guarantee of recovery if paid.

9. The Applicant relied on the case of; *Kenya Orient Insurance Limited –vs- Paul Mato & Another, High Court Civil Appeal 40 of 2014* , where it was stated:

> "*The burden of proof that the Respondent can refund the decretal sum if the appeal succeeds, shifts to the Respondent the moment Appellant states that it is unaware of Respondent's resources."*

10. It was argued that, in this case, the Respondent has not disclosed nor furnished the court with any documentary evidence to prove their financial standing. Further reliance was placed on the case of; *National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike & Another, Civil Appeal No. 238 of 2005 (Uir44/2005),* where it was stated as follows;

> "*…this court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegations that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or the lack of them."*

11. Finally, the case of; *Thabiti Insurance Brokers –vs- Joseph Ogero Obonyo, Nairobi Civil Application Number 102 of 2002,* was cited where it was held that;

> "*We think there is substance in the Applicant's contention that if the money is paid out to the Respondent, he might not be in a position to refund if he were to be required to do so."*

12. The Applicant further submitted that, based on the case of; *Butt vs Rent Restriction Tribunal [1979] eKLR,* a stay ought not to be refused simply because a better remedy may become available to the Applicant at the end of the proceedings. That he will undergo difficulties in keeping its businesses a float and will have to disengage its dealing if compelled to realize the decretal amount to the Respondents herein. That the Honourable court granting stay of execution means that the status quo should remain as it were just until the intended appeal is hear and determined.

13. The Applicant further relied on the case of; *Job Kilach vs Nation media Group & 2 Others Civil Application No. Nairobi 168 of 2005* where the court cited the case of; *Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited Civil Application No. Nairobi 358 of 1999* where it was held that;

> "*where there is a decree against the Applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenya standards very few individuals will be in a position to pay without being overly destabilized. Therefore where there is a large sum of money involved the court may take that in consideration in an Application for stay of execution. Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes a central issue. The Court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory."*

14. The Applicant referred to the case of; *Nduhiu Gitahi –vs- warugongo [1988] KLR 621; 1 KAR 100 [1988-92]2 KAR 100* where the Court of Appeal while dealing with the issue of adequacy of security expressed itself as follows;

> "*The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected. It is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into courts are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an Application for stay pending appeal the court is faced with a situation where Judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so…the aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the Defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it"*

15. The Applicant argued that the Respondents herein have not stated and/or demonstrated that they will be prejudiced in any manner, if the proposed security of the decretal sum is allowed to be deposited with the court. Reliance was placed on the case of; *Shakespeare Investments & Another –Vs- Paul Kipsang Kosgei [2004] eKLR*, where the court observed;

> *"The Judgment Debtor seeks indulgence of the Court. He must show sufficient reason for the indulgence sought. In this regard, the court will take into consideration the particular circumstances of the case, including the financial position, the conduct and bona fides of the Judgment Debtor…"*

16. Finally on the issue of delay, it is the Applicant's submission that the Application herein was filed within reasonable time and the same served upon the 2nd Respondent in good time. It is made in good faith and the intended appeal is genuinely being pursued. Moreover, the Applicant has already filed a notice of appeal dated 30th May, 2017 and served the same upon the 2nd Respondent, hence making the parties cognizant of the intended appeal.

17. The Applicant relied on the case of; *Caltex Oil Limited –vs- Evanson Wanjihia Civil Application No. Nairobi 190 of 2009* , where it was stated that;

> *"Before we set out the terms of the conditional stay it is important to state that in our view, the powers of this court have recently been enhanced by the incorporation of an overriding objective in Sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and Sections 1A and 1B of the Civil Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No. 6 of 2009). The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes. Although the overriding objective has several aims the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective."*

18. However, the Respondent reiterated that, the Appeal has no chance of success as the Applicant has admitted the debt as stated herein. That the Court of Appeal in the case of *National Bank of Kenya Ltd –vs- Pipe plastic Samkolit (K) Ltd and Another[2002] EA 503* stated as follows:

> *"…a court of law cannot rewrite a contract between the parties. The parties are bund by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the Clause."*

19. The Respondent submitted that, it is clear that, both the present Application and the intended appeal are meant to deny the 2nd Respondent immediate access to the fruits of the Judgment. Further, the Applicant does not stand to suffer any loss because it has only been ordered to pay that which it already owes the 2nd Respondent.

20. That in the case of; *Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR*, the court observed that;

> *"no doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR.....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."*

21. The Applicant also cited the case of; *Machira t/a Machira & Company Advocates vs East African Standard (No. 2) (2002) KLR 63*, where it was stated;

> *"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars...where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."*

22. Further reliance was held in the case of; *Antoine Ndiaye vs African Virtual University (2015) eKLR*, where the court held that;

> *"Therefore, in a money decree like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant, follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed."*

23. The Respondent argued that it is totally baseless and ridiculous for the Applicant to content that the 2nd Respondent may not be able to refund the amount due, owing to its colossal nature given that the evidence and the submissions is that, it is the 2nd Respondent who actually advanced the Applicant the principal sum of Kshs. 35,942,725.46. The facts and evidence in the case point towards the reality that the 2nd Respondent is in a position to refund the Applicant in the unlikely event of a successful appeal.

24. That the Applicant attempts to shift the burden of proof to the 2nd Respondent by stating that, it is for the 2nd Respondent to prove their financial standing and prove that it is indeed capable of repaying the decretal amount, is unfounded, as it is the Applicant who is purportedly

alleging that the 2nd Respondent is not a position to repay the sum and who then has to prove the same. That this only goes to show that the Applicant is not able to sustain the argument that, the 2nd Respondent is not in a capacity to refund the sum.

25. On the issue of security, the 2nd Respondent submitted that, the only appropriate security the Applicant ought to deposit in this case is the decretal sum of Kshs. 30,050,000.00. That the Applicant has not shown that it is willing to do that. The deposit of collateral as proposed by the Applicant is neither appropriate nor adequate.

26. The parties disposed of the Application by filing submissions which I have considered. The procedural provisions that govern the grant of an order of stay of execution pending appeal are provided for under Order 42, Rule 6 of the Civil Procedure Rules 2010, which provide as follows:

> ***"6(2) No order of 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 due performance of such decree or orders as may ultimately be binding on him has been given by the applicant."***

27. In the same vein the legal principles applicable to an application for a stay of execution pending appeal are very well settled. **In the case of *Butt Vs. Rent Restriction Tribunal [1982] KLR 417***, the Court of Appeal considered the applicable provisions of; Order 41 rule (4) (2) which are similar to those of Order 42 Rule 6(2)), and laid the following guiding principles:–

> **(a)** ***The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;***
>
> ***(b) The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion;***
>
> ***(c) A Judge should not refuse a stay if there are grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings;***
>
> ***(d) The court in exercising its discretion whether to grant and refuse an application for stay of execution will consider the special circumstances of the case and unique requirements.***
>
> ***(e) The court in exercising its powers under Order XLI rule 4(2)(b) (now Order 42(6)(b) of the Civil Procedure Rules,, can only order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.***

28. Similarly, in the case of; *Hammond Suddard Solicitors vs Agrichem International Holdings Ltd, (2001), EWCA Civ. 2065*, the court held that, **the grant of a stay order is discretionary and the court needs to balance the risks of injustice which may be occasioned by the grant or refusal of a stay. The obvious risk of injustice if the stay is refused is that the appeal may be stifled.** The obvious risk if it is granted is that, after an unsuccessful appeal, the Respondent will be unable to enforce the judgment.

29. It also suffices to note that, in New South Wales jurisdiction, the requirement that, the judgment creditor can be denied the "fruits of victory" by Judgment debtor, when "special" or "exceptional" circumstances warrant the imposition of a stay pending appeal, no longer applies. It is therefore sufficient that, the e Applicant for the stay must demonstrate a reason or an appropriate case to warrant favourable exercise of the discretion, (see: *Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685 at 694)*

30. Thus the decisions of the courts referred to herein enumerate a number of relevant principles summarized as follows:

> *a) The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties;*
>
> *b) The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus;*
>
> *c) The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties;*
>
> *d) Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may refuse a stay;*
>
> *e) Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay;*
>
> *f) The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time; and*

g) As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security.

31. However, it is important to appreciate the legal effect of a stay order. A motion for stay pending appeal is filed when a party wants to stay or stop all proceedings in a case where an appeal has been filed. Therefore, a court order of stay pending appeal temporarily suspends court proceedings or the effect of a judgment.

32. I have considered the evidence that was adduced in this case at the trial, being that the amount awarded to the 2nd Respondent was indeed advanced by the 2nd Respondent to the Applicant to assist him in the construction of the premises. In my considered opinion therefore, the argument that if the sum is paid, will not be recoverable if the Appeal succeeds is neither here nor there in the circumstances of the case herein.

33. I have further considered that, the legal principles that govern stay of execution require that the interests of both parties must be taken into account. The evidence adduced before the court indicates that, this suit was filed in court on 4th August 2011, thus it has been in court for a period of over seven (7) years. Further evidence revealed that, the alleged sum of Kenya Shillings Twenty million (Kshs. 20,000,000) was advanced to the Plaintiff/Respondent vide an agreement dated 14th September 2007. That is a period of over ten (10) years ago. It was alleged that the Plaintiff/Respondent repaid Kenya Shillings Fifteen Million (Kshs. 15,000,000) from the initial sum of Kenya Shillings Thirty Five Million (Kshs 35,000,000) leaving the balance stated above. It would therefore be in the interest of justice to protect the rights of the Respondent as the court accords the Appellant an opportunity for the Appeal to be heard on merit.

34. The Applicant has offered a security in form of LR No. E.Bukusu/S.Kanduyi/416. The Respondent have declined the security offered and suggested that the court considers a different form of security. The transfer of interest in real property involves a long and complex process. For the Respondent to acquire a legal interest in the said property it must be transferred in their favour. In the absence of direct consideration, it will be inappropriate to order for stay on the security provided. In that case the prayer for stay of execution of the judgment herein is allowed on the ground that, the Applicant will deposit the total decretal sum in the joint names of the counsels representing the parties within thirty (30) days of the date of this order. In default of compliance, the order staying execution will automatically lapse and the Respondent will be at liberty to proceed with execution.

35. Costs of the application are awarded to the 2nd Respondent.

36. Those then are the orders of the Court.

Dated, delivered and signed in an open court this 14th day of December 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mwaniki Gachoka & Company Advocates for the Applicant

Mr. Byamugisha holding brief for Mr. Kanchory for the 2nd Respondent

Dennis ……..Court Assistant