REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 6 OF 2016

(CORAM: F. GIKONYO J)

MARTIN KIRIMA BAITHAMBU……..…….....……APPELLANT

VERSUS

JEREMIAH MIRITI…….…….1ST RESPONDENT

RULING

Stay of execution pending appeal

[1] The significant order sought in the application dated 27th July 2016 is stay of execution pending appeal. The application is supported by the affidavit of the Applicant, the grounds set out in the application and as expounded in the written submissions. The main complaint is that the Applicant has not been heard on his defence which is plausible yet the Respondent and the principal debtor one Mr. Douglas Gitonga James are colluding to unfairly reap from the Guarantee herein. As such, he avers that he will suffer prejudice and prayed for stay of execution. He also undertook to abide by any conditions set by the court for stay of execution.

[2] The Applicant reinforced his arguments and submitted that the Respondent may not be able to refund the decretal sum if he pays over to him. This would occasion substantial loss to him should his appeal succeed. He also urged that he is a salaried employee and that he would be crippled if he is to be made to pay the decretal sum herein at this stage. He insisted that he has explained at length the efforts he engaged to have the principal debtor pay his debts but in vain yet the principal debtor still uses for gain the lorry registration number KBS 404T for which the principal debt herein was advanced. On this basis, he believes that the respondent and the principal debtor are in cahoots to fleece him. The Applicant stated that he ready to deposit a reasonable security in court once stay is granted; one which should not stifle access to justice.

[3] On 15th December 2016, Counsel for the Respondent indicated that he will not file any written submissions as he considered this application to be simple and straight-forward. He, however, filed his client's Replying Affidavit which I shall consider. The Respondent deposed that the Applicant is a Guarantor but is merely out to frustrate the Respondent from enjoying the fruits of his judgment. He stated that he applied to have the ex parte judgment set aside vide application dated 13th August 2015 which was dismissed for lack of merit. Again, the court found that he had not offered reasonable explanations for not filing appearance and defence despite service with summons. The Applicant went to sleep until he was awoken by NTSC dated 31st July 2015. The Applicant filed for stay of execution pending appeal before the lower court but it was dismissed. He went to slumber once again he was awakened by NTSC scheduled for hearing on 8th August 2016.Therefore, the Respondent concluded that

this application is yet another attempt to abuse the process of the court and should be resisted by the court.

DETERMINATION

[4] This case presents a woolly scenario yet a substantial matter of law has arisen. Thus, I will have to take a wider sense of justice in applying the prescriptions of law in Order 42 rule 6 of the Civil Procedure Rules as commanded by the Constitution of Kenya, 2010 and the Overriding Objective of the law. In the circumstances of this case, I should ask whetherthere is sufficient cause for which a stay of execution pending appeal could be ordered.

Case of Guarantee

[5] The Applicant who is a Guarantor has not yet paid the guaranteed debt. However, he has alleged that the Principal debtor is able to pay the principal debt except that the creditor has colluded with the principal debtor not to call for payment from the principal debtor but the guarantee in order to fleece the guarantor. That is a substantial matter in the law of guarantee about which I find myself having to examine the rights of a Guarantor before he satisfies the guaranteed debt.

Rights of guarantor before satisfying debt

[6] As a general rule, a guarantor is not entitled to relief until the guaranteed debt has become payable by him. He may not, therefore, call upon the principal debtor to make provision for payment of the debt before the debt is due. However, this does not mean that the guarantor does not have rights to call upon the principal debtor to pay the guaranteed debt until and unless he has paid the guaranteed debt. Needless to state that guarantor's rights accrue from the relationship created by the guarantee, and not merely when he discharges the principal debtor's obligations. Therefore, it is not the law that the guarantor has no rights- equitable or otherwise- until he has paid the guaranteed debt. See Halsbury's Lawsof England, Fourth Edition Reissue) Vol 20(1) para 239 that:-

> **When a creditor has acquired a right to immediate payment of the debt from the guarantor, the guarantor is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the guarantor from his obligation, even though the guarantor, has paid nothing under the guarantee, even though the creditor has not demanded payment from him or the principal debtor''.**

Bad faith, connivance at and collusion by creditor

[7] Pertinently, although the guarantor may not force the creditor to sue the principal debtor before the guarantor could be called upon to satisfy the guarantee, equity has intervened to protect the guarantor in certain circumstances by providing him with certain rights and creating certain duties upon the creditor. As a matter of the law, Guarantor's liability will not arise before the default by the principal debtor to pay the debt. And even if demand by the creditor to the principal debtor may not be a strict requirement in guarantee, however, civil procedural law which governs civil suits may makedemand for payment of debt statutorily imperative or desirable. In addition, other forms of guarantees, say, those given in form of a charge or mortgage, are governed by land laws which strictly regulate default and sale of the charged or mortgaged property. Those laws require demand for default and remedial notices to be given to the person who has pledged his property as security before default is declared and the debt becomes due. Here I have in mind sections 90, 96 and 97 of the Land Act, 2012. Again, by the very nature of guarantee and the legal requirement that Guarantor's liability arises only where there is default to pay on the part of the principal debtor envisages utmost good faith on the part of the creditor. Thus, but without overriding the guarantee, modern guarantee and equity anticipates that the creditor should signify good faith towards the guarantor.

[8] The said intervention by equity supplements but does not replace the contractual rights and processes under the guarantee; see it within equitable protection of the guarantor especially where the creditor acts

in bad faith towards the guarantor, or connives at the default by the principal debtor on a matter in respect of which the guarantee was given. In this case bad faith, connivance at and collusion to fleece the guarantor have been alleged against the creditor and the principal debtor. Applying the above principle, the material available- which was not controverted- shows that the principal debtor still plies and carries out transport business with the vehicle in respect of which the guarantee was given. The Guarantor has alleged that the creditor is fully aware of these facts including that the principal debtor is able to pay-up the debt. Except, however, the two have colluded to fleece the guarantor by calling up for the guarantee without demanding for payment of the debt by the principal debtor. He stated that he should be allowed to stake his defence in the suit between the creditor and the Guarantor. The assertion leads me to state the following.

[9] There that there is no absolute restriction in law on joinder of the principal debtor in a suit based on guarantee especially where bad faith, connivance at default by and collusion with the principal debtor has been alleged against the creditor. This is a substantial matter of law which could justify granting of stay of execution pending appeal. But before I close, as the guarantor intend to introduce the principal debtor in the suit by the creditor to enforce the guarantee;the discussion below is pertinent.

Guarantor and principal debtor could be in one suit

[10] Conceptually, the guarantor who has settled the guaranteed debt will proceed against the principal debtor under subrogation and will invoke the name of the creditor for indemnification by the principal debtor. However, in practical terms that procedure presents challenges. The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invokethe procedure provided under Order 1 Rule 15 of the Civil Procedure Rules. I say these things for the sake of jurisprudence.

[11] Accordingly, looking at the appeal and the dictates of the Constitution on substantive justice, there is sufficient cause to order stay of execution under Order 42 rule 6 of the Civil Procedure Rules. I grant stay of execution except on the conditions I will attach herein below.

Security

[12] Now that I am satisfied that a stay is deserved, what type of security is reasonable in this case? Ideally, the security under Order 42 Rule 6 of the Civil Procedure Rule should be for the due performance of the decree that might ultimately be binding on the Applicant. I am aware that:-

> **…insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".[See SEWANKAMBO DICKSON vs. ZIWA ABBY HCT-00-CC MA 0178 OF 2005, by the High Court of Uganda at Kampala]**

I am also acutely aware that it is also true that the court ought not to place the Plaintiff in a position in which it would be difficult to realize the fruits of his litigation due to the inadequacy of the security ordered. On this see the case of **Visram RavjiHalai & another vs. Thorntorn & Tupin [1963] Ltd Civil App. No NAI 15 of 199** by the Court of Appeal of Kenya**.** Therefore the court should consider all the facts of the case in making the decision on the security it should order for the due performance of the decree or order that might ultimately be binding on the applicant. This is a case of guarantee and it would only be prudent if the amount of the guarantee is secured while the appeal is being considered. The way of doing that is to require, and I do hereby orderthat the Appellant shall deposit Kshs. 400,000 in an interest earning account in the names of both counsels within 90 days from today. The Appellant has not shown vigilance in these proceedings and I will, therefore, direct him to file the record of appeal within 21 days from today so that this appeal could be heard. In light of my orders, I order that each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 9th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Munene Advocate for Appellant

Mr. Ondieki advocate for respondent - absent

F. GIKONYO

JUDGE