



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY COURT

CIVIL CASE NO. 500 OF 2008

MICHAEL KAREKO GATERE.....PLAINTIFF/1ST RESPONDENT

VERSUS

COOPERATIVE MERCHANT BANK LTD.....1ST DEFENDANT/APPLICANT

MODO UNIPACKERS LIMITED.....2ND DEFENDANT/2ND RESPONDENT

GEORGE GACHARA GATERE.....3RD DEFENDANT/3RD RESPONDENT

GEORGE KAMAU NDIRANGU.....INTERESTED PARTY/4TH RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 5th October, 2016, brought under Section 1A, 1B, 3, 3A, 63, and 66 of the Civil Procedure Act, Order 42 Rule 6 and 7 and Order 51 of the Civil Procedure Rules, 2010. It is based on the grounds on the face of it, and an Affidavit sworn by Debra Ajuang Ogada.
2. The Applicant is seeking for Orders that there be a stay of execution of the Orders and all other further proceedings arising from the judgment delivered herein on 18th August 2016, pending the hearing and determination of the intended Appeal against the said Judgement. That the cost of this application be provided for.
3. The Applicants' case is that the Plaintiff (hereinafter "the Respondent") filed this suit seeking for orders to restrain it from exercising its statutory power of sale over his property known as; **Title No. Mavoko Town Block 2/251**. The Property was offered as a security for a credit facility of Kshs.7,200,000.00 advanced to the 2nd Defendant (herein "the Respondent"). The 2nd Respondent defaulted on the repayment of the facility and on 28th August 2008, the property was auctioned and bought by the 4th Respondent who was the highest bidder.
4. Upon filing of this suit, the Respondent was granted an Order of injunction and the matter proceeded to a full hearing culminating in the aforesaid judgment. Being aggrieved by the decision of the court, the Applicant has filed a notice of Appeal and applied for typed proceedings for the purpose of the intended Appeal. The Applicant argues that, the intended Appeal will be rendered nugatory if the stay sought hearing is not granted or if the suit property is discharged as per the orders of the court. That guarantee debt will remain unsecured rendering it difficult for the Applicant to secure sums that are still due to it by

the 2nd Respondent. The Applicant told the Court that it is willing to provide security for the decretal amount by providing appropriate bank guarantees from any reputable commercial bank in Kenya. That it is therefore only fair and just that the Application be heard and orders sought be granted.

5. The Application was opposed by the Plaintiff/Respondent on the grounds that:

- *The Appeal completely lacks merit and it is founded on clearly wrong principles and presumptions not supported by law and precedent.*
- *There is no proved or shown substantial loss which the 1st Defendant/Applicant will suffer if stay is not granted.*
- *There is no evidence or proof that the Appeal will be rendered nugatory.*
- *All the ingredients necessary for stay of execution have not been met since,*

(i) There is no proof of irreparable damage/loss.

(ii) The Plaintiff is entitled to the fruits of his judgement or part thereof pending the appeal.

6. In response to the above grounds, the Applicant filed a further affidavit sworn by the same Deponent who swore the supporting affidavit. She reiterated that the Applicant has an arguable Appeal and has proved and shown that it will suffer substantial loss and the Appeal will be rendered nugatory if the stay of execution is not granted. That, the Applicant has certified all the necessary conditions for granting of the prayers sought for herein.

7. The Parties agreed to dispose of the application by filing written submissions which I have considered alongside the application. I find that the issue for determination is whether the Applicant has met the threshold for grant of stay of execution pending Appeal.

8. This application is brought under Order 42 Rule 6 (2) of the Civil Procedure Rule 2010. It is now settled law that for the Court to grant the Orders sought herein, the Applicant must meet the following conditions: -

- *That they will suffer substantial loss if the stay is not granted.*
- *The Application has been made undue delay.*
- *The Applicant is able to provide such security for the due performance of such degree or order as the Court may direct.*

9. In the case of *Carter & Sons Ltd Vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997*, the Court held:

“...the mere fact that there are strong grounds of Appeal would not in itself justify an order for stay. The Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensure from a refusal to grant a stay and thirdly the Applicant must furnish security and the Application must of course be made without unreasonable delay...”

10. I further find that the grant of a stay pending Appeal is discretionary power of the Court. However the Court has to balance the interest of the Applicant and the Respondent. As was held in the case of *Global Tours & Travel Limited Nairobi HC winding up Cause No. 43 of 2000*:

“....as I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously...”

11. And in the case of **Butt Vs Rent Restriction Tribunal (1982) eKLR**, the Court held that;

“...the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed.”

12. I shall first address the issue of substantial loss. In the case of **Kenya Shell Limited Vs Kibiru & Another (1986) eKLR** the Court observed as follows;

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

13. And the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR** the Court held as follows;

“...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. This is so because execution is a lawful process.

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.”

14. The Plaintiff/Respondent submitted that the Applicant had not adduced evidence in support of substantial loss and relied on the case of **Machira t/a Machira & Company Advocates Vs East African Standard (No2) 63** where the Court held;

“The application is failing because the Applicant merely repeats the words of rule that substantial loss will be suffered, but does not set out factual particulars of the kind of loss that might be suffered..... In all fairness and justice the Plaintiff should be allowed to move on. If the Appeal is successful, what is done here will be undone without serious or any prejudice to any party. We do not know what the assessment of damages may bring. So there is no basis which one can speak of loss of a substantial nature. For these reasons, the application is dismissed with costs.”

15. However, the Applicant argues that by virtual of the Court order directing it to immediately discharge the security property and releases the title document to the Plaintiff/Respondent, it will suffer substantial loss as the 2nd Defendant/Respondent has not honoured its obligation under the charge document which entitled the Plaintiff/Respondent to be given back the title document. Similarly, if the Applicant does not comply with the Court order it stands to be cited for contempt of court.

16. As regards the issue of substantial loss; I find that the Applicant was ordered *inter alia* to immediately discharge the suit property and release the title documents to the Plaintiff/ Respondent. If the Applicant obeys that Court Order, and the 1st Plaintiff/Respondent subsequently disposes of the suit property, then the Applicant will be exposed to substantial loss, if the intended Appeal were to succeed, and the Applicant is unable to trace and utilise the suit property as a security, especially if the Court of Appeal were to find the loan secured has not been fully repaid. It is also unlikely that the Plaintiff will be willing to re-charge the property. I note that among the orders given by the Court, is an order restraining the Applicant from transferring or signing a transfer of the suit property in favour of other persons or third party. This order secures the suit property and as long as the Applicant obeys it, and I hereby direct that it

be obeyed. The Plaintiff/Respondent rights will be protected. He may only suffer inconvenience in terms of delay to use his title documents which can be compensated in monetary terms. I have no doubt that, the 1st Defendant/Applicant being a Bank of reputable and of sound financial standing unless otherwise proved, will be able to pay any damages that may be ordered. I therefore find that, the Applicant has adequately and sufficiently demonstrated the real likelihood of suffering substantial loss.

17. In relation to the second issue, the Applicant submitted that it filed this application without delay on 5th October 2016, the judgment having been delivered on 18th August 2016. They relied on the case of **Jaber Mohsen Ali & Another vs Priscillah Boit & Another (2012) eKLR**. Where it was held that:

“.....unreasonable delay depends on the circumstances of the case. The Court stated, “the question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case.....”

Be it as it were the issue of delay was not contested by the Respondent.

18. I now move to the issue of security, the Applicant relied on the case of **Nduhiu Gitahi vs Warugongo (1988) eKLR** which dealt with the issue of adequacy of security. The Applicant reiterated that they are willing to give security as stated in form of a bank guarantee to ensure the rights of the Plaintiff/Respondent are protected pending the hearing and determination of the Appeal. That the damages as assessed by the Court currently stand at Ksh10,400,000.00 which sum continues to appreciate upwards in the form of KSh100,000.00 per month until payment in full. That they are willing to abide by any condition and terms as to security as the Court may deem fit to impose.

19. To the contrary, the Respondent submitted that the *“Applicants have not provided any security. It is just a mere assertion that they are willing to deposit the decretal sum”*. Reliance was placed on the case of **Socfinac Company Ltd Vs Nesphat Kimotho Muturi 2013 eKLR**. However, the Plaintiff/ Respondent argued that, if *“the security were to be considered, the full decretal amount must be deposited in a joint account”*.

20. In my considered opinion, the Applicant has offered a security for due performance. I however find that, the offer of a Bank Guarantee may not allow the decretal sum an opportunity to attract any interest. I am inclined to go by the submissions that, any decretal sum owing to Plaintiff/Respondents as of the date of this ruling, (be calculated by the Court), shall be deposited in an interest earning Bank Account in the joint names of the Counsels of the Plaintiff/Respondent and 1st Defendant/Applicant, in a reputable Bank, (not the 1st Defendant’s Bank) within fifteen (15) days of this order. Further, there shall be no sale of the suit property or transfer thereof to any third party during the pendency of the Appeal.

21. Finally, the 1st Respondent submitted on the issue as to whether there is an assurance that, the Intended Appeal will succeed. That issue is not available for consideration by this Court, neither is it a ground upon which the Court will rely on in considering whether to grant the orders sought for herein or not. As held in the case of **Carter & Sons Limited Vs Deposit Protection Fund Board, Civil appeal No. 291 of 1997**, that:

“It was also contended that the Intended Appeal has strong probability of success. In our view, the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. A Party is expected to prefer an appeal only when there are strong reasons for doing so.”

22. In conclusion, I order that there be:

i. Stay of execution of the Orders issued under Paragraph No. 43(iv) and (v) of the Judgement delivered on 18th August 2016 pending the hearing of the Intended Appeal on the terms stated above.

ii. All the other orders issued by the Court under Paragraph 43 (i), (ii), (iii), (vi) and (vii) to

remain in force and await the hearing of the Intended Appeal.

iii. In default of compliance with the Injunction Order to deposit the sum ordered herein and within the time frame set, the Order will stand vacated without reference to the Court.

iv. The costs of this Application shall abide the outcome of the Appeal.

Dated, signed and delivered on this 14th day of June 2017 at Nairobi.

GRACE L. NZIOKA

JUDGE

In Open Court in the presence of:

Mr. Mulaku for Mr. Namada for the Plaintiff/1st Respondent

Mr. Akhulia for the 1st Defendant/Applicant

No Appearance for the 2nd Defendant/2nd Respondent

No Appearance for the 3rd Defendant/3rd Respondent

No Appearance for the Interested Party/4th Respondent

Teresia – Court Assistant