



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
CIVIL SUIT NO. 284 OF 2003

KOMASSAI PLANTATIONS LIMITED..... PLAINTIFF

VERSUS

BANK OF BARODA (K) LTD.....DEFENDANT

RULING

1. The Application now before the Court is for a stay of execution pending hearing and disposal of an appeal against the final Judgment of Hon Kimaru J in the main suit, delivered on 1st October 2016.
2. The Applicant herein was the Defendant in the main suit, namely, Bank of Baroda. The Defendant was the holder of a charge over the Plaintiff's property which the Defendant subsequently sold at auction as mortgagee in possession.
3. The Plaintiff brought a claim for damages for a sale at an undervalue. The Plaintiff was filed on 5th January 2006 and amended on 23rd October 2006. The Plaintiff alleged that there was a sale at an undervalue. This was as a consequence of breach of the Bank's duty to the Plaintiff mortgagor/chargor. The learned Judge (Hon. L. Kimaru J) heard evidence from all the witnesses and gave his Judgment on 1st October 2015. It he found for the Plaintiff.
4. He quantified damages at Kshs.24,500,000/-. He also awarded interest pursuant to **Section 26** of the **Civil Procedure Act Cap 21 of the Laws of Kenya** from the date of the amended Plaintiff to date of payment. The rate of interest applicable was the commercial rate at the time being applied.
5. The Defendant in the suit, who is the Applicant herein states it wishes to appeal against that decision. Exhibited to the Supporting Affidavit at **Exhibit JDN 2** is a Notice of Appeal dated 13th October 2015. The dates are unclear, the Exhibit states that the Affidavit was sworn on 10th October 2015 but the Affidavit itself is dated as sworn on 15th October 2015. The Notice of Appeal is stamped as received at the High Court, Commercial and Admiralty Division on 13th October 2015. The Memorandum of Appeal appearing at **Exhibit JDN 3** is neither dated nor signed.
6. The Application is brought by Notice of Motion under **Order 42 Rule 6 and Order 9 Rule 9 of the Civil Procedure Rules 2010** and **Section 3A of the Civil Procedure Act**. It seeks orders Orders "that:
 1. *The application herein be certified urgent and be heard expeditiously and ex parte in the first instance,*

2. *That the Court do grant leave to Gathaiya & Associates to act for the Applicant in place of Kittony Maina Karanja Advocates.*
3. *There be stay of execution of the Judgment and Orders of Hon. Justice L. Kimani delivered on 1st October 2015 in Nairobi HCCC NO. 284 of 2003 Komassai Plantation Limited vs. Bank of Baroda (k) Limited pending the inter-parties hearing of this application.*
4. *There be a stay of be execution of the judgment and Orders of Hon. Justice L. Kimaru delivered on 1st October 2015 in Nairobi HCCC NO. 284 of 200 Komassai Plantations Limited vs. Bank of Baroda (k) Limited pending the hearing and determination of this application.*
5. *There stay of execution of the Judgment and Orders of Hon. Justice L. Kimaru delivered on 1st October 2015 in Nairobi HCCC NO. 284 of 2003 Komassai Plantations Limited vs. Bank of Baroda (K) Limited Pending the hearing and determination of the intended appeal.*
6. *This Honourable Court do issue such other directions and/or Orders as the Court may deem just and expedient to grant.*
7. *Costs of this application be in the cause.*

Prayers 1-4 have been superseded by events.

8. The Grounds relied upon are “that:

- i. *The Defendant Applicant, Bank of Baroda (K) Limited is an international Bank with a regional presence in the Country.*
- ii. *On 1st October 2015 the Hon. Justice L. Kimaru delivered judgment in Nairobi HCCC No. 284 of 2003 Komassai Plantations Limited vs. Bank of Baroda (k) Limited.*
- iii. *The Learned Judge of the superior Court held that the Defendant Applicant had breached its duty of care to the Respondent by selling the suit property at value that was grossly undervalued and consequently Ordered the Defendant Applicant to pay the sum of Kshs.24,500,000/- plus interest at the rate of 22.75% from 23rd October 2006 until payment in full.*
- iv. *The Defendant Applicant being aggrieved by the aforesaid judgment has filed a Notice of Appeal and also applied for typed proceedings to facilitate the lodging of the main appeal in the Court of Appeal.*
- v. *The Defendant/Applicant will suffer substantial loss if it is required to pay the said sum unless the order is made.*
- vi. *That should the Respondent execute against the Applicant before the hearing and determination of the appeal, the Respondent whose financial position is not known to the Applicant may not be in a position to refund the amounts which are quite substantial and in the circumstances substantial loss will be occasioned upon the Applicant,*
- vii. *There shall be greater hardship and/or injustice occasioned upon the Applicant should this Honourable court not stay the said orders as prayed since the intended appeal if successful will be rendered a nugatory and the Applicant will also suffer substantial loss,*
- viii. *The Defendant Applicant has moved in the presentation of this application before this Honourable Court without inordinate delay and it is in the interest of justice and the greater good that the orders sought be granted.*

ix. *The Defendant herein shall comply with any orders of this Honourable court for security for the due performance of such order or decree as may ultimately be binding upon it, and*

x. *It is just, fair and equitable for this court to allow this application as brought before it.”*

9. The application is supported by the Affidavit of David Nyaboga said to be sworn on 14th October 2015 (in fact it is dated 15th October 2015). The Application was brought under a Certificate of Urgency filed on 19th October 2015. The certificate is premised on the following grounds:

a. *On 1st October 2015 the Hon. Justice L. Kimaru delivered Judgment in this matter and ordered the Applicant to pay to the Respondent the sum of Kshs.24,500,000/- plus interest at the rate of 22.7% from 23rd October 2006 until payment in full.*

b. *The Applicant being aggrieved by the aforesaid judgment has filed a Notice of Appeal and also applied for typed proceedings to facilitate the lodging of the main appeal in the Court of Appeal.*

c. *The Applicant is apprehensive that the Respondent will at any time move to execute for the entire decretal amount before the intended appeal is filed, heard and determined,*

d. *That in the circumstances, the Applicant is also apprehensive that should the Respondent execute the decretal sum which is very substantial and/or if the applicant is compelled to pay the decretal amount on the pain of execution, the Respondent whose financial means are not known to the applicant will not be in a position to refund the said amounts plus costs of the appeal should the appeal succeed and thus the appeal may be rendered nugatory (emphasis added) and*

e. *In the circumstances the 1st Defendant prays that any execution contemplated by the Respondent against the Applicant be stayed pending the hearing and determination of the substantive application herein and the intended appeal herein.*

10. In fact the certificate fails to demonstrate that there is any urgency. It is said there is a fear that the Respondent will execute the Decree but provides no evidence that the Decree has been extracted or served upon the Applicant as Judgment Debtor. It is said in paragraph (a) that the Notice of Appeal has been filed however the copy produced shows it was filed in the High Court and not the Court of Appeal. Therefore there is no evidence that an appeal was lodged with the Court of Appeal. As stated the memorandum of Appeal is unsigned and undated. Equally the supporting Affidavit states at paragraph 6, that;

“6. The applicant herein was aggrieved by the said decision and has already filed a Notice of Appeal to the High Court challenging the entire judgment as well requested for copies of proceedings to facilitate the filling of the record of appeal. Annexed hereto and marked “JDN2” is a copy of the Notice of appeal filed on 13th October 2015 and the letter addressed to court dated the 13th October 2015.”

10. However, the covering letter dated 13th October 2015 states that the Defendant “intends to appeal to the Court of Appeal against the whole of the decision. However paragraph 6 says the Notice of Appeal has been filed (already).

11. The Deponent says he “is well aware the Respondent will move to execute for the decretal sum”. As stated there is no copy of the decree or warrant exhibited. (emphasis added). (paragraph 7). At paragraph 8 the Deponent says “..... the amounts and the judgments are very substantial. The Applicant is further apprehensive that should the Respondent execute the decretal sum The Respondent whose financial means are not known to the Applicant will not be in a position to refund the said amounts.”

12. Paragraph 9 also states “**THAT** there shall be greater hardship and/or injustice occasioned upon the Applicant should this Honourable court not stay the said orders as prayed for since the intended appeal if

successful will be rendered nugatory and the Applicant will also suffer substantial loss.”.

13. The Applicant has failed to put forward any evidence of the Respondents supposed or suspected impecuniosity. All that is said is that the facts are not known (Paragraph 8).

14. The unsigned, undated and unstamped Memorandum of Appeal challenges the Judgment on the questions of quantum and interest in detail and liability only in passing – as a general paragraph. The Applicant has offered security without being specific at first.

15. The Respondent is opposed to the making of the Order. The Replying Affidavit is sworn by the Director of the Plaintiff Company. The Replying Affidavit was sworn on 3rd November and filed on 4th November 2015. On advice the Deponent states that the Application is not properly before the Court as it does not comply with Order 42 rule 6. That was written as Order 46 rule 2 but it was quickly corrected and I am satisfied that was a typographical error. It is also averred *“that the Application herein as filed is misconceived, bad in law and should as such be dismissed with costs”.*

16. The Affidavit clarifies the omission in the Application and states clearly that the Application has failed to produce any evidence of any move by the Respondent to effect execution (Paragraph 7 Replying Affidavit).

17. Paragraph 8 deals with the respective financial status of the Parties and correctly notes that there is no evidence before the court of financial standing or of any damage that could be suffered. Again paragraph 9 repeats *“that the application does not disclose any or any sufficient basis for the bare allegation that the decree will be rendered nugatory in the unlikely event of the success of the intended appeal or that any hardship or injustice will result to the Applicant.”.* In fact, it does not.

18. Paragraph 11 reminds the court that in weighing up the interests of Justice require the court considers both sides of the argument. The Affidavit then seems to make an application for the “Judgment amount to be released”. It is not clear where it should be released from. As stated there is no evidence of a Decree or warrant of Execution before the Court. The Respondent asks the court to dismiss the Application with costs.

19. The Applicant filed a Supplemental Affidavit on 25th November 2016. Paragraph 1-6 adds not further evidence and simply take issue with the Respondent through legal argument. It is paragraph 7 and Paragraph 9 that go to the real issues. In paragraph 9 it is said that “the applicant has indicated that it is ready to offer security.

Decision

20. The Application prays for a stay pending an inter partes hearing of the Application. That prayer is superseded by events. There was no evidence of imminent execution so no interlocutory/interim Order was made.

21. As to merits of the Application now for stay pending appeal, there is absolutely no evidence before the court that execution is imminent. The Plaintiff has not become a decree holder as the decree does not appear to have been extracted. That begs the question whether a stay is necessary at all. However, the Plaintiff is entitled to the fruits of its Judgment until such time that it is set aside or varied.

22. The Applicant’s written submissions record that the trial Judge heard oral evidence, including from the Deponent of the Affidavit in Support. The Applicant argues that *“it is in the greater good that the orders sought be granted”* and the *“it is just, fair and equitable for this court to allow this Application as brought before”* (sic) and that the Defendant has not delayed in bringing the application. Security is offered in the form of either, bank guarantee or insurance bond or such other security....” Paragraph 11 asserts that the Respondent would be unable to repay any sums if the Applicant succeeds at trial. There is no evidence of how the phrase *“the Applicant does not know”*, becomes *“the Applicant is sure”* that the Respondent would not be able to pay – in the space of about 5 weeks between the two affidavits..

23. Both Parties have filed written submissions and copies of their authorities which is appreciated by the court. I have read through the documents lodged. The Applicant has attempted to draw the Court into the merits of Appeal, however, the correct procedure is set out clearly in Order 42 Rule 6 (2) of the civil Procedure Rules. It provides:

(2) No order for stay of execution shall be made under subrule (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.

24. I have also read the Judgment on the court file.

25. Therefore what the court needs to be satisfied of is that:-

(1) execution is imminent;

(2) if execution is permitted the Defendant will suffer substantial or exceptional harm

(3) In the event that the appeal is successful, the Respondent will be unable to repay the monies together with interest and costs;

26. As to the Merits of the Application, applying **Civil Procedure Rules Order 42 Rule 6** is mandatory as Rule 6(2) states No order for stay of execution shall be made unless the conditions are complied with.

27 Firstly, the Court to be satisfied that substantial loss may result. As there is no evidence before the court as to the respective financial standing of the Parties, the court cannot be and is not so satisfied.

28. Secondly, Rule 6 (2) (b) requires the Applicant to provide such security that the court orders. The Applicant has offered to do so in the supporting Affidavit but then sought to suggest limits on the type of security it is willing to provide.

29. Under sub rule 4 on Appeal if filed when notice is given under the Rules of the Court of Appeal. In this case there is no evidence that notice had been given either by filing in the Court of Appeal or serving the Respondent on or before 20th October 2015. The Respondent denies being served and the Applicant does not counter that in the Supplemental Affidavit.

30. Further, there is no record of an oral application for stay following the delivery of the Judgment.

31. In its written Submissions the Respondent argues that the Notice of Appeal is irregular because as it has not been filed as envisaged by Rule 75 (2) and Rule 77 (1) of the Court of Appeal Rules and that the Judgment to be stayed has not been annexed. Rule 75 (2) of the Court of Appeal Rules provides:

75. (2) Every such notice shall, subject to rules 84 and 97 be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

and 77 provides:

77.(1) an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:

31. Dealing first with the question of whether there is an Appeal on foot, for the reasons set out above, the inadequacy of the documents filed means that there is no evidence before the court of such an Appeal. The evidence put forward now of industry practice does not seem to have been put before the trial Judge.

32. The Respondent also argues that the memorandum of Appeal raises weak allegations. It is said the interests of Justice require the court to consider the question from the point of view of the Respondent as well as the Applicant. It is argued that withholding the fruit of justice from the Respondent any longer is oppressive. Given that the Respondent had neglected to take any steps towards obtaining a decree and exerting it, between 1st October and 23rd November 2015, it is unclear where it is said the delay becomes oppressive.

33. For the reasons set out above the court would be justified in dismissing the application with costs. However, the arguments put forward by the Applicant in relation to the judgment debt raise concerns. At no time was it said that the Bank could afford to pay the money. It was said that making payment would cause hardship. That raises very real concerns about the Bank's liquidity andThe Respondent touched on the issue by saying the amount should be negligible to the Bank and the real reason is the Respondent's inability to repay. Both are put on equal footing suggesting the Bank's financial standing is the same as the Respondents.

34. The interests of Justice require that both parties have equal access to the courts and both have equal or corresponding protection. The Plaintiff/Respondent has already waited 10 years

35. There is no conclusive evidence before the court but the evidence demonstrates a real risk. I therefore, invoke the inherent jurisdiction of the court and order that the Bank should be the beneficiary of a limited stay provided there is adequate security provided.

36. where a Party demonstrate its own liquidity or ability to a joint account is justified. On these basis the Bank can get its house in Order in relation to the Appeal.

37. I therefore Order that there be a stay of execution pending appeal on condition that the Applicant pays the sum of Kshs.24,500,000/- together with interest at the rate of 22.5% for the ten years period between 23rd October 2006 and 23rd October 2016. Amounting to Kshs.55,125,000/- within 28 days of today.

The monies shall be paid into an interest bearing account in the joint names of the two Advocates.

38. The matter to be listed for mention to verify whether an Appeal has in fact been lodged with the Court of Appeal. List for mention for a date after 90 days to decide whether the stay should continue or the monies released.

It is so ordered.

Dated ...9th day of February 2016.

Signed and Delivered on 10th day of February 2016.

FARAH S. AMIN

JUDGE

In the Presence of

Mr Sehmi for the Plaintiff

Mr for the Defendant/Applicant