



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 376 OF 2007**

**JAMES MUNGAI MAGARI.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT**

**RULING**

1. By an application dated 22.10.2004, the Defendant/Applicant seeks Orders of Stay of execution pending intended appeal under Order 42 Rules 6(1) and 2 of CPR inter alia.
2. The application is predicated on the grounds that there is a judgment against Defendant/Applicant amounting to Kshs.1,827,140.29 together with costs. The applicant being aggrieved by the said judgement did lodge a Notice of Appeal timeously and applied for typed copy of the proceedings.
3. However the Court file was misplaced and thus it could not procure requisite documents to lodge though still desirous to lodge the appeal. The Applicant contends that it will suffer prejudice and loss if execution levied and the intended appeal will be rendered nugatory though it has high chances of success.
4. The Applicant also contends that if the amount is paid the Plaintiff may not be able to refund the same in event the appeal is successful and thus irreparable loss. This also will amount to hardship on its side being inflicted to the institution.
5. The Applicant is ready to offer reasonable security. The application is supported by the affidavit sworn by Martin Machira sworn on 22.10.2016 which reiterates the same grounds.
6. To oppose the application, the Respondent has filed grounds of opposition dated 23.4.2015 which are to the effect that, the intended appeal is unlikely to succeed; the complaint by Applicant is purely mathematical. The Respondent should not be deprived the fruit of this judgment and in any case if the appeal succeeds the Respondent can refund the decretal amount.
7. The parties agreed to canvass the application via written submissions which they filed and exchanged. The Applicant submits that it has met the thresh hold of granting of stay of execution under Order 42 Rule CPR and thus ought to be granted Orders sought. On the limb of substantial loss, the Applicant submits that same is to be prevented by preserving status quo because the loss would render the appeal nugatory. It relies on MUKUMA VS. ABUOGA (1988) KLR 645. The Applicant thus submits that substantial loss will befall by Applicant if execution is levied against it.

8. On the limb on security, the Applicant submits that it is ready, able and willing to commit in giving security. The Applicant is a financial institution with financial sound state of affairs and can pay the amount if it fails in the appeal. It submits that the Respondent has not demonstrated ability to refund the decretal amount should the appeal succeed.

9. Finally on the third limb of delay in filing the application, the Applicant submits that upon delivery of judgment, a stay of 30 days was granted, it did file Notice of Appeal and applied for typed proceedings but the loss of court file delayed in filing the appeal and instant application. The Applicant ought not to be blamed for the said loss of file and delay thereof in filing application and the appeal.

10. The Respondent submits that it issued notice to show cause why the Defendant should not pay Ksh.3,655,953.90/=. The Applicant has sought to forestall execution herein. The Respondent submits that the substance of the matter is interest calculation which is alleged to be erroneous. The Applicant has not indicated the extent of that miscalculation otherwise if it had done proper calculations it would pay what it accepts to be the correct amount. Thus the Applicant has not met the thresh hold of an arguable appeal.

11. The Applicant has also not demonstrated the nugatory aspect of the intended appeal should execution be levied. Relying of the case of **KCB VS. BENJOL AMAL GAMATED LTD CA 50/2001 NRD**, where the Court of Appeal held that; *'for stay of proceedings (and execution) pending appeal to be granted, the appellant must prove that it has arguable appeal and that appeal would be rendered nugatory if execution proceeded'*. The Respondent thus prays for the dismissal of the application.

12. After going through the material before the Court, the Court finds the singular issue for determination is; Whether Applicant has satisfied the conditions for grant of stay of execution set out under Order 42 rule 6(1) and (2) of the CPR 2010.

13. Order 42 Rule 6 above stipulates that;

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appeal from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) 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”.*

14. The Applicant urges that the execution will occasion Applicant hardship and render intended appeal nugatory. This is because the Respondent may not be able to refund the amount if the amount is paid.

15. The Respondent has not filed a replying affidavit to demonstrate ability to refund the amount in event the appeal succeeds but just states in the Grounds of Opposition that he can refund the same amount if appeal succeeds.

16. In MUKUMA case Supra; the Court held that *“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving status quo because such a loss would render the appeal nugatory”*. If the Respondent is paid Kshs.3,655,953.90/= plus further interest

accrued, there is no evidence same may be recovered if the appeal succeeds.

17. The Applicant has intimated that it is ready to pay a reasonable security. The Respondent has not contested the ability of bank to pay the amount in event it loses in appeal. Nor has the Respondent raised issues on delay in filing instant application herein.

18. The Court has to balance the interest of the Applicant and Respondent as we await the outcome of the appeal.

19. Doing the best I can, I make the following Orders;-

**1. The Stay of Execution is granted on conditions that Kshs.600,000/= shall be paid to the Respondent within a period of 30 days.**

**2. If the said amount is not paid, the Stay application will stand dismissed and execution shall proceed.**

**3. Costs of the application in the main cause.**

**Dated, signed and delivered in court at Nairobi this 8<sup>th</sup> day of April, 2016.**

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**C. KARIUKI**

**JUDGE**