REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 45 OF 2012

KENYA COMMERCIAL BANK LIMITED…………………………PLAINTIFF

VERSUS

STAGECOACH MANAGEMENT LIMITED………...……………DEFENDANT

RULING

1. For the determination of the Court is the application by the Plaintiff dated 10th December 2015. The application was brought under the ambit of Order 40 Rule 4, Order 22 Rule 22 and Order 51 Rule of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant sought the following prayers *inter alia*;

1. *Spent*
2. *THAT the Notice of Certificate of Costs and the Certificate of Costs dated 27th and 29th October 2015 respectively against the Plaintiff/Applicant in the sum of Kshs 312,244.70/- be set aside and discharged.*
3. *THAT a temporary injunction do issue against the Defendant/Respondent his servants and/or agents retraining it from proclaiming and/or attaching the Plaintiff/Applicant's assets whatsoever pending the hearing and determination of this application.*
4. *THAT this honourable Court be pleased to set aside/stay the execution including the proclamation and attachment of the Plaintiff/Applicant's property by the Defendant/Respondent whether by itself, representatives, employees, agents, servants or other person acting on its behalf or claiming through it, an any other proceedings and execution arising from the Certificate of Costs with regards to HCCC No 45 of 2012 delivered by Hon Tanui on 27th October 2015, pending the outcome of the Judgment in HCCC No 60 of 2015 involving the same parties and subject matter.*
5. *THAT the execution against the Applicant herein be lifted pending the hearing and determination of this application.*
6. *THAT the costs of this application be in the cause.*

2. In the grounds supporting the application, the Applicant admitted that there had been the dismissal of the instant suit following the ruling of Havelock, J (as he then was) on 7th August 2014. Further, it was admitted that following that ruling, the Applicant had filed Civil Case No 60 of 2015 against the Respondent, and which matter was still pending hearing and determination.
3. It was averred that in the suit, judgment in default had been entered against the Respondent for Kshs 29,184,499.60/-, and that therefore, and in the interests of justice, that the execution of the Certificate of Costs dated 27th October 2015 should be stayed pending the hearing and determination of Civil Suit Case No 60 of 2015.

4. Further, it was contended that the Applicant stood to suffer irreparable harm and immense injustice if the execution of the Certificate of Costs was not stopped. The application was further predicated and supported by the affidavit of Tom Ogola, sworn on 10th December 2015, and in which the deponent reiterated the grounds raised in support of the application.
5. In response to and in objection of the application, the Respondent filed its grounds of opposition on 4th January 2015. Therein, it was averred that the instant application was frivolous and mischievous having been filed over a year after the ruling dismissing the suit, that there is no substantive suit pending and, that, that the application has not satisfied the grounds required for the grant of stay of execution.
6. Further, it was averred that the application offended the provisions of Sections 6 & 27 of the Civil Procedure Act, and that, the reasons cited for not paying the costs, having admitted them, were not grounds in law.
7. I have considered the dispositions made by the respective parties, including, the application, the affidavit in support thereof and the grounds of opposition by the Applicant and Respondent respectively. I have also considered the oral arguments made by the parties in Court on 24th February 2016, both in support of and in objection to, the application dated 10th December 2015, and the authorities cited thereto.
8. The application by the Applicant seeks two distinct orders; (1) an order for injunction under Order 40 Rule 4 and (2) an order for stay of execution, although they have not cited the law provisions that they rely upon. Effectively, they seek the Court's intervention to estop the execution of the Certificate of Costs issued by the Deputy Registrar on 29th October 2015, following the dismissal of the substantive suit by Havelock, J on 7th August 2014.
9. The dismissal was not challenged, even though the Plaintiff was granted leave to appeal on 7th August 2014. They, however, instituted Civil Suit No 60 of 2015 in which they admittedly claimed against the Defendant on the same subject matter as was in the dismissed suit. As to whether the issues raised therein are *sub-judice* or *res judicata*, are issued that will be dealt with by the trail Judge in that matter. As for now, the Court will limit itself to the issue of stay of execution and/or injunction as raised by the Applicant.
10. The instant application was made over one (1) year after the substantive suit was dismissed on 7th August 2014. Under Order 22 Rule 22(1) of the Civil Procedure Rules, with regards to an application for stay, it is provided that;

    The court to which a decree has been sent for execution shall, *<u>upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance</u>*, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.[Emphasis added].

11. Similarly, under Order 42 Rule 6(2)(a) & (b), provides the grounds which the Court may consider in such an application for stay; these included substantial loss, that the application is made without undue delay and that there is provided security for costs.
12. In so far as Order 42 Rule 6(1) as read with sub-rule (2) may be applicable for applications for stay pending an appeal, the grounds in consideration for any order for stay, including those falling under the ambit of Section 22 Rule 22(1), are applicable. Turning to the instant application, therefore, has the applicant shown that it would suffer substantial loss, and that the application was made without undue delay?
13. As was stated in the case of **<u>Nyamogo & Nyamogo Advocates v Mwangi (2008) 1 EA 283 CAK</u>**, the grant of stay orders is discretionary, and as such, the same will not be issued if the applicant has not shown sufficient cause.
14. In the premise, the application dated 10th December 2015 was made after the lapse of over one (1) year since the substantive suit was dismissed, and after the Defendant had obtained a Certificate of Costs, which the Applicant admitted as having been served. The Certificate of Costs was issued on

27th October 2015, the Warrants for sale of property in execution of decree for money was issued on 28th January 2016, whilst the Proclamation for attachment was dated 29th January 2016.

15. It would seem that the Applicant was rustled into action after the said Certificate of Costs had been issued and that there was eminent danger that its property may be attached in satisfaction of the decretal costs. The Applicant has not given any reason, cogent or otherwise, as to why they had delayed in filing the instant application for stay of execution since 7th August 2014. Their claim that the instant application was made without undue delay does not hold, and therefore, the Court would deem the delay as ordinate.
16. An order for stay is an equitable remedy, which in the present circumstances, would not be used to assist the Applicant extricate themselves from circumstances of their own making. This Court must uphold both the principles of justice and equity. In so doing, the Court shall not aid a party at fault, when the aid has become necessary through his or her own fault.
17. The applicant was aware of the dismissal of the suit on 7th August 2014. It was also aware that costs do follow an event. Therefore, they should have been aware, or reasonably been keen to follow events, and institute the instant application at the appropriate time. A lapse of over one (1) does not, to the mind of the Court, connote a timely action by the Applicant.
18. It only goes to show that the Applicant was indolent, and only jostled into action by the filing of the Certificate of Costs. It should also be noted that they had been granted leave to file an appeal against the ruling on 7th August 2014, but took no action whatsoever in executing the appeal. Further, the Applicant does not challenge the Certificate of Costs issued on 27th October 2015.
19. Further, the Applicant had not been able to set out the substantial loss that it stands to suffer. In **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No 368 of 2001**, Musinga, J (as he then was) on the issue of substantial loss, had rendered himself as follows;

> ***"'substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."***

In **Equity Bank Limited v Capital Construction Ltd & 3 Others (2014) eKLR,** Havelock, J (as he then was) rendered himself as follows;

> ***"In the application and in the supporting affidavit therein, the applicant does not show, or indeed establish what substantial loss that it stands to suffer should the application be dismissed. Instead, what is contended is that the applicant has an arguable appeal against the determination of Musinga,J dated 29th June 2012. The provisions of the law, are however, very clear and couched in mandatory terms; the Court will not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6 are satisfied."***

20. With regards to the issue that the Applicant's claim in Civil Case No 60 of 2015 was bigger than that in the instant suit, and that there is judgment in default, it is to the mind of the Court, inconsequential to the instant application.
21. As to the application of the cited case of Warsame, J in **Kenya Commercial Bank v The Commissioner for Police & 2 Others [2012] eKLR**, it is distinguished by the fact that; there must be two (2) definite decrees that can be satisfied at the same time.
22. In the instance, there is no decree that has been extracted by the Applicant in Civil Case No 60 of 2015, and as such, the authority cited is not of much use in support of their claim under the application.
23. In consideration of the foregoing, therefore, the application is found to be unmeritorious and the same is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Court at Nairobi this 8thday of April, 2016.

………………

C. KARIUKI

JUDGE