



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL CASE NO. 653 OF 2015

SBG SECURITIES LIMITED (*previously known as*

CFC FINANCIAL SERVICES LIMITED).....APPELLANT/APPLICANT

VERSUS

MARIAM AWINJA AKWERA.....RESPONDENT/RESPONDENT

RULING

[1] The Notice of Motion dated **29 October 2015** was filed by the Appellant/Applicant herein pursuant to the provisions of **Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as read with **Order 42 Rule 6** and **Order 51 Rule 1 of the Civil Procedure Rules, 2010** for the following orders that:

[a] (Spent)

[b] (Spent)

[c] That there be a stay of execution of the judgment delivered on **30 July 2015** in **Nairobi CMCC No. 407 of 2015: Mariam Awinja Akwera vs. CFC Financial Services Limited** and any consequent decree thereon pending the hearing and determination of the appeal herein.

[d] That the costs of this application be in the cause.

[2] The Application is premised on the affidavit of **EVANSON MUGWE** annexed thereto, sworn on **29 October 2015**, in which it was deponed that Judgment in **CMCC No. 407 of 2015: Mariam Awinja Akwera vs. CFC Financial Services Limited** was entered for the Respondent against the Appellant on **30 July 2015** for the sum of **Kshs. 787,500/=** together with interest at 30% from **9 September 2008**, general damages for breach of fiduciary trust and confidence of **Kshs. 350,000/=**, aggravated damages of **Kshs. 100,000/=**, interest and costs.

[3] That being dissatisfied by the Judgment, the Appellant lodged the appeal on the **28 August 2015**. On the same date, the Appellant filed an application for stay at the Chief Magistrate's Court, which was granted in the interim pending hearing and determination of that application *inter partes*. This was because by a letter dated **31 July 2015**, the Respondent had demanded payment of the decretal amount in

the sum of **Kshs. 1,891,250/=**. When that application was dismissed on **26 October 2015**, the Appellant moved to the High Court and filed the instant application, contending that unless stay of execution is granted the Respondent will move to attach its property, which would not only render the appeal nugatory, but would cause the Appellant substantial and irrecoverable loss. It was further deponed that the Appellant is ready, able and willing to furnish such security for the due performance of the decree as may ultimately be binding on it as the Court may order.

[4] The application was opposed by the Respondent and in this regard she relied on the Replying Affidavit sworn on **18 November 2015** by her Advocate, **Nelson Harun Mituri** and her own affidavit sworn and filed herein on **18 April 2016**. According to the Respondent, the Appellant manages her shareholding which is in excess of the decretal sum, and therefore the Appellant's apprehensions were unfounded. It was further deponed that the Respondent owns the following properties:

- a) Juja property worth Kshs. 5 Million;**
- b) Mavoko property worth Kshs. 5 Million;**
- c) A block of apartments in Ngumba Estate worth Kshs. 100 Million with monthly rental income of Kshs. 400,000;**
- d) Savings Policy with Old Mutual worth Kshs. 4 Million;**
- e) An Allotment letter from JKUAT being her home worth Kshs. 30 Million.**

She attached the title documents to her affidavit to augment the averments in the Replying Affidavits to demonstrate that she would be in a position to pay back the decretal sum should she be required so to do.

[5] Order 42 Rule 6 of the Civil Procedure Rules provides that:

"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 appealed 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..."

Thus, the only conditions such an applicant needs to satisfy as set out in **Rule 6(2) of Order 42** aforementioned are:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[6] Accordingly, although the court has the discretion to grant stay orders, the interests of justice require that the discretion be exercised judiciously and within the aforesaid parameters. The rationale for the circumspection has been considered in various cases such as **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63**, in which it was held that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the

fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

It is with the foregoing caution in mind that I proceed to consider the merits or otherwise of the instant application.

[7] The first issue to consider, then, is whether the Appellant/Applicant has demonstrated to the requisite standard that it risks to suffer **substantial loss** unless the order of stay is made. It was the case of the Appellant/Applicant that the Respondent's Counsel, in their letter dated **31 July 2015**, quantified the decretal amount in the total sum of **Kshs. 3,061,236.25** being the judgment sum of **Kshs. 2,891,250/=** plus costs of **Kshs. 169,986.25**, and that given this substantial sum and the interest accruing thereon, the Respondent may not be in a position to refund the same should the Appellant succeed on appeal. The Appellant relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** with regard to what substantial loss entails.

[8] In response to the foregoing argument, the Respondent demonstrated, vide the two affidavits sworn on **18 November 2015** **18 April 2016** that she would be in a position to repay the decretal amount should she be ultimately required to do so. There appears to be no dispute as to the Respondent's alleged property portfolio, as, indeed the cause of action arose on account of alleged mismanagement of the Respondent's funds that she had entrusted to the Appellant for investment. Accordingly, I am far from convinced that the Appellant stands to suffer any loss, considering that the Respondent has been kept out of her investment funds for about 8 years now. In this conclusion, I am fortified by the finding of the Court of Appeal in the case of **Kenya Shell Limited vs Kibiru [1986] KLR** as to what amounts to substantial loss thus:

"It is not sufficient by merely stating that the sum of shs.20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment" (per Hancox, JA)

[9] Since the requirements of Order 42 Rule 6 are conjunctive, and the Appellant/Applicant having failed to prove substantial loss, I find it unnecessary to consider the other requirements as to whether or not the application was made without undue delay, or whether adequate security has been provided for the due performance of the decree. In the **Kenya Shell Limited case (supra)**, the Court of Appeal was of the same view, and it expressed itself thus:

"...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions 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." (per Gachuhi, Ag. JA, as he then was)

[10] In the light of the foregoing, it is my considered finding that the Notice of Motion dated **29 October 2015** lacks merit and the same is hereby dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 15th DAY OF JULY 2016

OLGA SEWE

JUDGE