



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 2 OF 2013

PIUS LELEI APPELLANT

VERSUS

PAUL KOSGEI.....RESPONDENT

**(Being an appeal against the judgment and decree of Hon. B. Mosiria (Principal Magistrate)
in Kapsabet Principal Magistrate's Civil Case No. 155 of 2012 delivered on 27th December,
2012)**

RULING

The application for determination is the Notice of Motion dated 22nd January, 2013. It is brought under Order 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules 2010 and Section 1 (a), (b) of the Civil Procedure Act and all other enabling provisions of the law.

The main prayer in the application is that a stay of execution against the Order by Principal Magistrate Kapsabet issued on 27th December, 2012 do issue pending the hearing and determination of the appeal.

The application is premised on the following three grounds:-

- (a) The the Appellant is dissatisfied with the ruling of the subordinate court in Kapsabet Principal Magistrate's Civil Case No. 155 of 2012 delivered on 27th December, 2012.
- (b) That substantial loss will result to the Applicant unless the order for stay is made and that the application has been made without unreasonable delay.
- (c) That the Principal Magistrate's court declined to issue a temporary order of stay and directed that the same be sought from this court.

It is further supported by the affidavit of the Applicant, Pius Lelei sworn on 22nd January, 2013.

The Applicant depones that he instructed the law firm of M/s. Gicheru & Co. to defend him in Kapsabet Principal Magistrate's Civil Case No. 155 of 2012. That the said advocates only filed a Memorandum of Appearance and not the defence. Consequently, an ex-parte judgment for the sum of Ksh. 230,000/= was entered against him. That execution proceedings began and he was put in civil jail for non-payment of the decretal sum.

The Applicant further states that, while in civil jail, his family paid Ksh. 50,000/= as part of the decretal sum. Thereafter, counsel for the Respondent took to him a consent on proposal of payment of the balance of the decretal sum which consent he signed on ground of fear of remaining in civil jail.

After his release from civil jail, the Applicant applied to set aside the ex-parte judgment on the ground that the Respondent could not charge interest on the sum owed to him as he was not a bank institution. He also raised a Preliminary Objection to the entire suit based on the same ground.

The Magistrate's court dismissed both the application and the Preliminary Objection, which dismissal gave rise to this appeal.

The application is opposed by the Respondent vide a Replying Affidavit he swore on 30th January, 2013. He depones that the Applicant cannot apply to set aside a decree for which he has partly satisfied. He states that the appeal stands no chances of success.

He depones that the Applicant borrowed money from him and refused to refund. He states that the lending was based on a personal contract and not under Section 3 of the Banking Act.

He states the appeal herein is aimed at delaying the expeditious satisfaction of the decree herein, consequent wherefore, the Applicant should pay the balance of Ksh. 103,850/=. The Respondent further states that in the unlikely event that the application is allowed, the balance of the decretal sum should be deposited in a joint interest-earning account pending the determination of the appeal.

In submissions, counsel for the Applicant Mr. Nyamweya submitted that, in the interest of justice, the application should be allowed as the Applicant was not given an opportunity to defend himself before the Magistrate's court. He submitted that the Respondent's suit was illegal as he did not have a licence to render financial services. He argued that the Respondent should not be allowed to benefit from an illegality. That therefore, if the application is not allowed, the Applicant stands to lose money to a shylock.

On the issue of security in due performance of the decree, the Applicant argues that the amount of Ksh. 50,000/= paid in partial satisfaction of the decree should be used as the security. It is further argued that the part-payment was made so as to secure the release of the Applicant from civil jail. But that this payment, of itself, cannot legalize that transaction.

On the part of the Respondent, he submits that the Applicant had twice tried to set aside the Ex-parte judgment without success, which is an indication that the appeal is likely to fail.

He submits that he lent the Applicant the subject money pursuant to a personal contract and not under Section 3 of the Banking Act. He states that this application is intended to delay the expeditious satisfaction of the decree and urges the court to dismiss the same.

I have accordingly considered the respective submissions and I take the following view of the same.

The Applicant who is also the Appellant herein was the Defendant in Eldoret Chief Magistrate's Civil Case No. 155 of 2012. He was sued by the Respondent for recovery of the principal sum of Ksh. 100,000/= advanced to him by the Respondent in an agreement dated 1st January, 2011. He failed to enter appearance and file defence consequent wherefore an ex-parte judgment in default of appearance was entered against him.

Execution proceedings began. He was put in civil jail for failure to pay the decretal sum. Whilst serving in the civil jail, his relatives partially satisfied the decree by paying Ksh. 50,000/=.

Upon his release, he engaged his current advocate who moved the court in an application seeking to set aside the Ex-part judgment. At the same time, his counsel, M/s. C. D. Nyamweya & Co. Advocates also filed a Preliminary Objection, seeking that the suit be struck out on account that the entire suit did not satisfy Section 3 of the Banking Act.

Both the application and the Preliminary Objection were dismissed, giving rise to this appeal.

Under Order 42 Rule 6 (2), an Applicant who seeks a stay of execution must satisfy the following conditions;

- (a) That he is likely to suffer substantial loss if the order sought is not granted.
- (b) That the application has been filed without undue delay.
- (c) That he should offer a security for the due performance of the decree.

As regards the issue about whether the Applicant stands to suffer substantial loss, I note as follows:

The Applicant does not deny he borrowed the sum of Ksh. 100,000/= (being the principal sum) from the Respondent. This lending was reduced into an agreement which is marked as annexure PK. 4 to the Replying Affidavit.

Under Clause 2 of the said agreement ***“the said amount of Ksh. 100,000/= shall attract interest of 10% every month”***.

But the Applicant is now contesting the charging of the said interest on account that the Respondent, not being a financial institution, cannot charge an interest on the advanced money. At this point, it must be noted that, the amount advanced to the Applicant was squarely based on a personal contract. It was not borrowed from a financial institution or a person registered to carry on financial business. Therefore, if the Applicant was not comfortable with the terms of the personal contract, he ought not to have signed the said borrowing contract (agreement).

The above notwithstanding though, whereas under the personal agreement the interest may be chargeable, it is my view that the same should not be so exorbitant as to surpass the market interest rates. Therefore, in the appeal, probably, the Applicant may wish to argue that that interest of 10% was so high as to be realistic and/or in consonance with the financial forces in the market. Hence, in terms of the charged interest, the Applicant may persuade the court that he is likely to suffer loss.

As to whether the application was brought without undue delay, I note that, in the Memorandum of Appeal and Supporting Affidavit, it is indicated that the ruling was delivered on 27th December, 2012. In contrast, the order annexed to the Supporting Affidavit (Annexure 'P.L.2') was given on 14th January, 2013, which ought to be the date of the ruling. The Applicant may then have to explain whether the appeal which was filed on 8th January, 2013, was so filed before the ruling was given. Pursuant to these discrepancies, it is not clear why the Applicant did not attach the ruling from which the appeal arises.

Be that as it may, going by the date of the order (14th January, 2013), and taking into account that the application was filed on 22nd January, 2013, it follows that the delay was of eight (8) days only. This delay cannot be said to be inordinate. In fact, the appeal would be deemed as filed promptly and without any delay.

Finally, on offer of security in due performance of the decree, the Applicant states that the Ksh. 50,000/= which he paid in partial satisfaction of the decree should be deemed as sufficient security. It must be borne in mind that the dispute arose out of non-payment of a personal loan advanced to the Applicant by the Respondent. This fact, of itself, is not denied by the Applicant. His major contention is the interest the Respondent charged on the loan which he argues can only be charged by a licensed financial institution.

May I stress that, from the onset, there is no indication that the Respondent lent the money to the Applicant whilst he purported to be a financial institution. The aforementioned loan agreement is in clear terms; that it is between two individuals. These two individuals sat and agreed on the lending terms which bound them. To this extent, the Respondent cannot be heard to say that the part-paid principal sum should be applied as the security. Any security deposited must be for the satisfaction of the balance of the unpaid decretal sum and probably any accruing costs in the event the appeal does not succeed.

I wish to point out that I have avoided to analyze the application of Section 3 of the Banking Act to the instant case for the reason that it may pre-empt the arguments which will be advanced in the appeal. It is the basis on which this appeal is founded. Suffice it say though, the provision outlines the restrictions on carrying on banking business. I would not also predict whether the Applicant will move the Court of Appeal for orders premised on the orders I give.

Having said that, I wish to re-state the major blunder the Applicant has made that will cost him this application. He has referred to orders issued on 27th December, 2012 against which he has appeal. Neither the order nor the application against which the orders were issued is annexed to the application.

In the instance, I am at loss as to whether, what the Applicant states was contained in that ruling is factual.

As I have noted above, only an order given on 14th January, 2013 is attached as annexure 'PL2'. This order was given pursuant to the hearing of a Preliminary Objection dated 27th November, 2012 on the part of the Applicant and a Preliminary Objection dated 3rd November, 2012 on the part of the Respondent. And in the Order No. 2, the Court refers to the dismissal of a Preliminary Objection dated 27th November, 2012 and an application dated 31st October, 2012.

From the above outline, it is clear that the Applicant is not certain of what he is seeking from the court. The court cannot also at this time call for lower court record with a view to scrutinizing it so as to ascertain the existence of the purported order dated 27th December, 2012. It is the duty of the Applicant to disclose to the court all the relevant information required for the just and fair determination of a matter before it. But in this respect, the Applicant has totally failed. I am therefore not possessed of the order and the Application I am referred to, and I cannot therefore adequately, and with certainty, determine this application.

In the result, this application is dismissed with costs.

DATED and DELIVERED at ELDORET this 10th day of June, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent