



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

CIVIL CASE NO. 49 OF 2011

ANNE NJERI MWANGI PLAINTIFF

VERSUS

MUZAFFER MUSAFEE ESSAJEE 1ST DEFENDANT

HUSEINA MUZAFFER ESSAJEE 2ND DEFENDANT

RULING

1. The Plaintiff's Application before this Court's dated 4th April 2014 and it seeks a Stay of Execution pending the intended appeal of this Court's Judgement delivered on 25th March 2014. The Notice of Motion is brought under the provisions of **section 3A** of the *Civil Procedure Act* as well as **Order 42 rule 6** of the *Civil Procedure Rules, 2010*. The Application is brought on substantial grounds as follows:

"1. THAT on 25th March 2014 the plaintiff and her lawyer attended court before Honourable Justice J. B. Havelock when Judgment to this case was delivered by court dismissing the plaintiffs suit and entering judgment in favour of the defendants as per the counterclaim.

2. THAT the plaintiff has since gone through the lengthy judgment is dissatisfied with it and have asked her advocate to prefer an appeal to the Court of Appeal against the whole judgment.

3. THAT the advocate has simultaneously requested for copies of the entire proceedings to enable him prepare a Record of Appeal and served it on the defendants advocate.

4. THAT the plaintiff stands to suffer substantial loss and injury were the judgment in question to be executed as it has granted a mandatory injunction compelling her and or her tenant to vacate the suit property L.R. No. 209/7755/19 to hand over vacant possession to the defendants, it has further ordered cancellation of the entries on the title in the plaintiffs favour as well as in favour of the charge Co-operative Bank Limited and ordered surrender of the title within 7 days to the defendants at paragraph 30 of that judgement.

5. THAT the plaintiff stands to suffer substantial loss by the intended appeal being rendered nugatory were the judgment to be executed as the factual position on the ground will be permanently altered to the plaintiffs detriment.

6. **THAT** whereas the court had given 7 days to vacate the house and surrender title no such time limit has been given for refund of the monies payable to the plaintiff thus need for reversal of the decision on appeal to bring fairness and equality.
 7. **THAT** the judgment has made adverse findings against Co-operative Bank and cancelled its security without affording it an opportunity to be heard contrary to the rules of natural justice.
 8. **THAT** the judgment fails to appreciate the plaintiffs role as willing buyer willing seller and the fact that on 14th December 2010 she was misled by the defendants lawyer to think permission had been granted and moved out as soon as she learnt otherwise and that She moved into the suit premises in January 2011 on receipt of the bank lawyers letter dated 11th January 2011 confirming that the balance of the purchase price had been paid.
 9. **THAT** we pray that this court be pleased to grant an unconditional stay of execution of the judgment dated 25th March 2014 pending hearing and determination of the intended appeal as the plaintiffs Kshs. 4,750,000 are held by the defendants and the Ksh 13 million is held by Co-operative Bank Limited.
 10. **THAT** the Plaintiff is nevertheless prepared to comply with any other conditions the court may grant and believes that she has an arguable appeal with high chances of success as demonstrated in the draft memorandum of appeal.
 11. **THAT** it is in the interest of justice that the sought orders are granted to prevent the intended appeal being rendered nugatory”.
2. The said Application came before Court on 8th April 2014 and **Ogola J.** granted a limited stay of execution pending the hearing of the Application *inter-partes*. The Court has extended those temporary Orders until the delivery of this Ruling. The Application is supported by the Plaintiff's Affidavit sworn on even date and basically repeated the sentiments expressed in the Grounds in support of the Application as above. The deponent emphasised that the Judgement of this Court delivered on 25th March 2014 failed to appreciate her role as a willing buyer and that of the Defendants as willing sellers. She maintained that she was misled by the Defendants' lawyer to think that she had permission to move into the suit premises upon receipt of the Chargee Bank's lawyers' letter dated 11th January 2011 confirming that the balance of the purchase price for the purchase of the suit property had been paid. The Plaintiff noted that the deposit that she had paid of Shs. 4,750,000/- towards the purchase price of the suit property was still being held by the Defendants' advocates. She was however prepared and willing to comply with any other conditions that the Court may determine as regards the provision of security for stay of execution.
 3. The first Defendant swore a Replying Affidavit to the said Application dated 22nd April 2014. He commenced his Affidavit by stating that he was the Executive Director of Revital Healthcare (EPZ) Ltd a company carry on the business of manufacture and sale of Healthcare products in Kenya and abroad. He maintained that the Defendants had the financial means to satisfy an award of costs and damages should the Court of Appeal determine the intended appeal of the Plaintiff in her favour. The deponent went on to say that in his Judgement dated 25th of March 2014, that this Court had found that the sum of Shs. 4,500,000/- was held by the Defendants' advocates on record in trust detailing that it should be returned to the Plaintiff. The Plaintiff had obtained a loan facility in the amount of Shs. 13,000,000/- for the balance of the purchase price of the suit property from the Cooperative Bank of Kenya Ltd. That sum was held by the said Bank and constituted the subject matter of **HCCC No. 507 of 2012** as between the Plaintiff herein and the said Bank which was pending hearing and determination by this Court. That suit had been brought by the Plaintiff as a result of her defaulting in payments of monthly instalments to go towards the offsetting of her loan facility with the said Bank which had prompted the latter to invoke measures of realising its security over the suit property. The first Defendant went on to say that he and his wife, the second Defendant, were aware that having been awarded the possession of the suit property in execution of the Judgement, they were bound by law not to exercise their rights in connection with the same

- in a manner prejudicial to the Plaintiff pending the hearing and determination of the intended appeal.
4. In response as to whether the Plaintiff would suffer substantial loss and injury by the Defendants being allowed back into possession of the suit property, the first Defendant made the following observations:

- “a. the applicant will neither suffer substantial loss and injury by putting the respondents in possession of the Judgment property, and delivering the Title thereof to them in 7 days in execution of the judgment, nor will her intended appeal be rendered nugatory in light of the depositions made in paras 3 – 6, above;**
- b. the applicant has not demonstrated any hardship or injury she may incur on execution of the Judgment, that cannot be compensated in damages and costs, if the intended appeal is heard and determined in her favour; and**
- c. the Hon. Judge in his careful and reasoned Judgment, did not over-look the rights of the applicant’s lessee of the judgment property. The Court ordered that the lessee be served with a notice, before being required to give vacant possession”.**

The first Defendant went on to say that the Plaintiff had turned a blind eye to the award of interest on the sum of Shs. 13 million in security, costs and interest at Court rates to the Defendants which sums were to be set off as against the said amount of Shs. 4,500,000/- held in trust by the Defendants’ advocates. The first Defendant concluded his Replying Affidavit by stating that it was just before the Defendants to enjoying the fruits of the Judgement dated 25th March 2013 as it Plaintiff had not demonstrated any just cause for the grant of an Order for stay of execution.

5. The Plaintiff’s written submissions were filed herein on 7th May 2014. Having set out the background to the Application before Court, the Plaintiff submitted as to the substantial loss that she would suffer if the Orders prayed for in her Application were not granted. The Plaintiff had complied with the prerequisites of instituting an appeal to the Court of Appeal, within the shortest time possible. She maintained that her appeal was arguable and had high chances of success as per the draft Memorandum of Appeal annexed to the Affidavit in support of the Application. The Plaintiff maintained that the factual position prevailing prior to the Judgement herein was that the Plaintiff was in occupation of the suit premises whereas the Defendants had been holding on to Shs. 4,500,000/- already paid to them pursuant to the sale Agreement relating to the suit property. The Plaintiff noted that the balance of the purchase price being Shs. 13,000,000/- million was held by the said Bank as chargee and which, despite the execution of a consent between the parties dated 13th May 2011, had not been released to go into a joint interest-bearing account in the name of the respective advocates for the parties hereto. The Plaintiff maintained that as the three participants as regards the transaction giving rise to this suit were holding something in relation thereto, a status quo order would be the most appropriate to back up an unconditional Order of stay of execution pending appeal. The Plaintiff/Purchaser was still in possession of the suit premises, the Defendants/Vendors were holding onto the said Shs. 4,500,000/-and the Bank was holding onto the said Shs. 13,000,000/-.
6. As regards the law in relation to a grant of stay of execution pending appeal, the Plaintiff emphasised that it was discretionary but should be exercised judiciously in such a way as not to prevent the appeal from being nugatory. The Plaintiff referred the Court to the findings in **Butt v Rent Restriction Tribunal (1982) KLR 410** as well as **Equity Bank Ltd v West Link Mbo Ltd Civil Appl. No. 78 of 2011** in this connection. As regards the giving of security, the Plaintiff maintained that she was prepared to give any security that the Court may order but pointed to her submission as above that each party to this suit was already holding on to some form of security or another. The Plaintiff relied upon the finding of **Porter J.** in the case of **New Stanley Hotel Ltd v Arcade Tobacconist Ltd (1986) KLR 757** had held:

“As there was very little likelihood of the applicant being able to pay the rent claimed by the respondent, to require any real security to be taken for the intended appeal would be to

deprive the Defendant of his right of appeal.”

The Plaintiff maintained that in **HCCC No. 507 of 2012**, her suit as against the said Bank, the Court was aware that she had been unable to keep up the monthly instalments in relation to the loan of Shs. 13 million. She noted that when giving evidence she had stated that she derived a living from renting out the suit property to raise the money both for the Bank and for her livelihood. As regards the appeal being rendered nugatory if the stay Orders not granted, the Plaintiff referred this Court to various decisions of the Court of Appeal being **Kenya Kazi Security Services Ltd v Kenya National Private Security Workers Union Civil Appl. No. 108 of 2013 (unreported)**, **Reliance Bank Ltd v Norlake Investment (2002) EA 218** and **Kenya Breweries Ltd v Kiambu General Transporters Agencies Ltd Civil Appl. No. 100 of 2000 (unreported)**. The Plaintiff concluded her submissions by stating that the amount of money involved in this suit plus the peculiar relationship between the Plaintiff, the Defendants and the said Bank would be permanently altered to the Plaintiff’s detriment showed an order for stay of execution pending appeal be not granted. She maintained this firstly, because it may render the appeal nugatory and secondly, it would be difficult for her to recover her money given as security to the said Bank or the suit property from the Defendants.

7. The Defendants’ skeletal submissions herein were filed earlier on even date with the Replying Affidavit of the first Defendant. Having set out the facts in relation to the Application before Court, the Defendants concentrated on the principles of law that govern the grant of an order for stay of execution. Jurisdiction of the High Court was given under **order 42 rule 6** of the *Civil Procedure Rules, 2010* while that of the Court of Appeal was under **Rule 5 (2) Court of Appeal Rules, 2010**. The Defendants maintained that the discretion of the High Court in granting a stay of execution was fettered, whereas that of the Court of Appeal was unfettered. The Defendants detailed that as laid out in the case of **Halai & Anor. v Thornton & Turpin (1963) Ltd (1990) KLR 365** this Court’s discretion is fettered by three conditions:

“Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

Moreover, the Defendants as regards the furnishing of security quoted from page 370 of the Halai case to the effect that:

“The court ought not to place a successful litigant in such disadvantageous position that should the appeal not be proceeded with or withdrawn or fail, the respondent would find it difficult to realise the fruits of his litigation due to the inadequacy of the security ordered.”

8. The Defendants conceded that it was common ground that the Application before Court was made without unreasonable delay. However, with respect to their being sufficient reason or justification of the grant of an order for stay of execution, the Defendants did not consider the grounds nos. 1, 2 and 3 of the Application (as above) did not satisfactory explain such reasons. In their view, the Plaintiff had failed to satisfy the Court that there would be a denial of justice if the order for stay of execution was refused. As regards what amounted to fairness and ‘sufficient reason’, as well as ‘substantial loss’, the Defendants referred the Court to the cases of **International Laboratory for Research on Animal Diseases v Kinyua (1990) KLR 402**, **Kenya Shell Ltd v Kabiru & Anor. (1986) KLR 410**, **Mugo & Ors v Wanjiru & Anor. (As is 1970) EA 481** and **Machira & Machira & Co., Advocates v East African Standard (No. 2) (2002) 2 KLR 63**. The Defendants, as regards the question of substantial loss that would ensue from a refusal to grant an order for stay of execution, pointed to grounds Nos. 4 and 5 of the Application before Court and submitted that such did not establish or demonstrate the substantial loss that the Plaintiff would suffer. She had merely repeated the words of the rule that she would suffer substantial loss without setting out the factual particulars of the kind of loss that she might suffer.
9. This Court concurs with the submission of the Defendants that the discretion given to it under the provisions of **Order 42 rule 6** on the *Civil Procedure Rules, 2010* is very much more limited than

the scope given to the Court of Appeal under the *Court of Appeal Rules, 2010* under **rule 5 (2) (b)**. **Order 42 rule 6** provides for the procedural law in making applications for stay of execution pending appeal against any order or judgment that a party may feel aggrieved by. It provides the fundamental procedural framework for an application for stay, such as the instant one. **Rule 6(2) (a)** reads-

“(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;”** (emphasis mine).

The conditions for this Court to grant a stay of execution pending appeal had been clearly set out as above in relation to the **Halai** case (supra).

10. In terms of what amounts to ‘sufficient reason’, this Court received some guidance from the finding of **Gachuhi Ag JA** (as he then was) in the **Kenya Shell** case (supra) when he observed:

“In an application of this nature, the applicant should show the damages 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 judgement. What assurance can there be of the appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

Perhaps more significant was the finding of **Kuloba J.** in the **Machira & Machira** case (also supra). The Judge first stated:

“The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.”

And then continued:

“so, injustice and fairness, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one’s success can only be rendered in exceptional circumstances after the exercise of great caution and finding of suspension is necessary injustice and fairness”.

Finally, the Judge stated

“Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts point to a conclusion to allow execution or further proceedings to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed. Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So really, stay is normally not to be granted, save in exceptional circumstances.”

11. As regards determination of what amounts to substantial loss, **Musinga, J** (as he then was) in

Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001 held that:

“...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.”

Platt Ag JA again in the **Kenya Shell** case (supra) gave his observations as to the meaning of ‘substantial loss’ when he detailed:

“The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents be unable to repay the decretal sum plus costs in two courts. The learned judge later went on to say: “It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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 for 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.”

12.As regards **Rule 6(2)(b)** in relation to security for costs, the Court in **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013]** eKLR Mabeya, J held as follows;

“As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR *“in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”*

For the Court to issue an order for stay pending an appeal, the applicant has to furnish security for the due performance of the decree. In this case, the Plaintiff has put forward the plea of poverty stating that previous to the Judgement being pronounced herein, she had taken possession of the suit property and had leased it out. She was enjoying the rents proceeds therefrom in order to pay back the said Bank and also for her own livelihood. As a result and bearing in mind that she had paid Shs. 4,500,000/- towards the deposit for the purchase of the suit property, she had no more resources to offer by way of security. The Plaintiff maintained that the Defendants as per the Judgement were to repay to her the said Shs. 4,500,000/-. Against this, the Defendants had responded to the extent that the Judgement allowed to them included the interest on the deposited sum of Shs. 13 million as well as the costs of this suit which they maintained should be set off as against the Shs. 4,500,000/- as above. To support her plea, the Plaintiff referred this Court to the **New Stanley Hotel Ltd** case (supra). Unfortunately for the Plaintiff, the finding of **Porter J.** was based on the fact that the defendant therein was unable to pay the rent claimed by the plaintiff and it was for that reason that the learned Judge refrained from ordering that security be taken.

13.As will be seen from my Judgement delivered on the 25th March 2014, it was my view that the Plaintiff had trespassed onto the suit property prior to completion of the transaction as between her and the Defendants. As of now, the Defendants have not received any monies as regards the sale of the suit property to the Plaintiff. They had not received the said Shs. 13 million put up by the said Bank plus interest thereon. They have not received the deposit monies and the balance of the purchase price outside the Bank’s contribution of Shs. 4,500,000/- as this sum is still being held by their advocates in trust. They have not been put into possession of the property. Presumably,

the Plaintiff's tenant is still in possession and, further, is still paying rent to the Plaintiff. It is not known as to whether the tenant has been given notice again in accordance with the direction in that regard in the Judgement herein. So far from the Defendants enjoying the fruits of their Judgement, they have nothing to show for the same as at the present time. In my view, the terms of the Judgement having not been complied with, the Plaintiff is undeserving of the Orders prayed for in her Application before Court. I am not satisfied from the Grounds in support of the Application, as well as the Plaintiff's said Affidavit sworn on 4th April 2014, that the Plaintiff will suffer any substantial loss unless the order for stay of execution is made.

14. As a result, I refuse the Plaintiff's Notice of Motion dated 4th April 2014 with costs to the Defendants.

DATED and delivered at Nairobi this 15th day of July, 2014.

J. B. HAVELOCK

JUDGE