



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 13 OF 2012

EQUITORIAL COMMERCIAL BANK LTD.....PLAINTIFF

-V E R S U S-

JODAM ENGINEERING WORKS LIMITED.....1ST DEFENDANT

SHADRACK KIEMA MUTUA.....2ND DEFENDANT

ESTHER NDUKU KIMULI.....3RD DEFENDANT

RULING

1. Plaintiff's claim against Defendants is for judgment for Kshs. 5,396,017.85 plus costs and interest.
2. By this Court's Ruling on 20th March 2014 the Defendants' Defence was struck out and judgment was entered for Plaintiff as prayed.
3. By further Ruling of 26th June 2014 this Court granted Plaintiff leave to execute that judgment before Taxation as provided under Section 94 of the Civil Procedure Act.
4. Defendants filed Notice of Motion dated 10th July 2014 which is under consideration. By that application Defendants seek stay of execution pending appeal. Defendants filed a Notice of Appeal on 1st April 2014 seeking to appeal against this Court's Ruling of 20th March 2014. There are only 5 paragraphs where the Defendants set out the grounds upon which they seek the stay of execution. I reproduce those paragraphs as follows-
 - **THAT in the circumstances, execution is imminent, which execution would, in light of the foregoing, render the intended appeal subject hereof nugatory and purely academic.**
 - **THAT a cursory perusal of the draft Memorandum of Appeal reveals an arguable Appeal with high chances of success, as juxtaposed against the substantial loss, we, the Defendants, stand to suffer in absence of Stay of Execution.**
 - **THAT unless this Honourable Court stays Execution pending this Application and, ultimately, the Appeal, execution shall issue against us thereby causing us to suffer grave loss and damage.**

- **THAT it is only in the interests of justice, fairness and equity that this Application be allowed as prayed;**
 - **THAT no prejudice shall be suffered should this Application be allowed as prayed.**
5. Under Order 42 Rule 6(2) an Applicant seeking stay of execution pending appeal should meet the following parameters-
- **Satisfy the Court that if stay is not granted substantial loss will result;**
 - **Make the application for stay of execution without unreasonable delay;**
 - **Provide such security as the Court may order for the due performance of the Decree.**
6. The paragraphs of Defendant's affidavit in support of the application reproduced above are the ones for consideration by this Court in determining whether the above threshold has been met by the Defendants. Defendants did not elaborate what **"grave loss and damage"** they will suffer if stay is not granted. It is not enough for a party to make such statement without backing it up with evidence. Such statement therefore did not assist the Defendants in so far as showing that substantial loss would result if stay is not granted. The Defendants therefore failed to satisfy the burden of proof as set out in Section 107(1) of the Evidence Act Cap 80 viz-

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

7. The Court in deciding on an application for stay pending appeal must balance the rights of the party with the Decree with those of the party wishing to appeal. In this regard I am guided by the case **PORTREITZ MATERNITY –Vs- JAMES KARANGA KABIA CIVIL APPEAL No. 63 OF 1997** where the Court stated-

"The right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

8. The Plaintiff by its replying affidavit sworn by Brian Asin dated 22nd July 2014 stated that the Defendants had admitted the debt; had failed to show what substantial loss they will suffer; and that it is the Plaintiff, which being a financial institution, will suffer prejudice because it requires to be in a liquid position and to have funds to lend its client and to have those funds available for depositors.
9. I have considered the evidence before Court and the submissions of the Learned Counsel. I find that Defendant's application has no merit having failed the test of Order 42 Rule 6(2). Accordingly the Notice of Motion dated 10th July 2014 is dismissed with costs to Plaintiff.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE