



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 2728 OF 1986**

**THUGGE .....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**RULING**

This is an application by the defendant for a stay of execution of the judgment by Shields J in favour of the plaintiff for the sum of 1.4 million shillings plus interest and costs. This application is supported by the affidavit of the defendant's lending officer to the effect that the defendant has filed a notice of appeal against the judgment of Shields J and that if stay is not granted and the defendant were to be successful in its appeal, this success would be rendered nugatory since the plaintiff was a bad customer of the defendant and would not be able to disgorge what the defendant would have paid him in satisfaction of the judgment. On the other hand, were the defendant to lose the appeal, it was in a position to pay the judgment debt and was ready to provide sufficient security for this purpose. It is not deponed that the defendant's chances of success on appeal are overwhelming.

The plaintiff charged his property namely, LR 209/2030 which I shall call the suit property, to the defendant to secure an overdraft limited to Shs 280,000/-. The defendant alleges that in exercise of its right of redemption, prior to the redemption date, it had the suit property sold. It was sold at a public auction for Shs 1,100,000/-; the reserve price being Shs 1,000,000/-. Upon the evidence, Shields J came to the conclusion that the value of the suit property was about Shs 2,500,000/- and upon the basis of this finding, he concluded that the sale was at a gross undervalue which, "is in the words of the Court of Appeal evidence of fraud". Having also earlier concluded that the defendant had failed to establish that the power of sale under which the suit property had been sold, had in the particular circumstances, properly arisen before the redemption date, he delivered himself in strong language about the conduct and motive of certain officers of the defendant in engineering the wrongful and fraud tainted sale of the suit property. He has been criticised for this. But I confess I can find no fault with his reasoning and findings which led him to the use of ardent language and to award damages. To my mind, this matter turns on the issue whether, if the defendant's appeal is successful, it would be nugatory. In this regard I have been referred to the leading Court of Appeal judgment in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga*, Civil Application No NAI 97 of 1986 unreported, which incidentally was an appeal from the ruling of Shields J where he had refused to grant stay of execution. In that case the Court of Appeal had to deal with two contending issues namely, that when a party is exercising his undoubted right of appeal, the Court of Appeal should see that the appeal, if successful, was not nugatory and that a litigant if successful, should not be denied the fruits of his judgment and thereby locking up funds to which he is entitled. With respect to the first principle, Platt Ag JA as he then was, had this 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 corner stone of both jurisdiction for granting 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”. Gachuhi Ag JA as he then was, put it this way:

“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 damages it would suffer if the order for stay is not granted..... The applicant has not given to court sufficient material to enable it to exercise its discretion in granting the order of stay”.

In setting out the grounds on which stay was sought in the *Kenya Shell* case, Hancox JA as he then was, found that:

“The main ground on which the stay is sought pending the determination of the appeal is that if the respondents proceed to execute their decree the proposed appeal would be rendered nugatory, because, as I understood Mr Kwach’s submissions, if the decretal sum is paid over, Kenya Shell will have the utmost difficulty in recovering it back from the respondents at a later date if the appeal is successful”.

The essence of this main ground is also the same as the main ground for the present application. And so I have to consider the evidence produced to support this ground. To repeat the words of Gachuhi Ag JA reproduced above:

“What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted ..... The applicant has not given the court sufficient material to enable it to exercise its discretion in granting the order of stay”.

When it is considered that the main ground for the application in the *Kenya Shell* case is the same as in the present application, namely, that the appeal would be nugatory because of the alleged inability of the decree holder to repay the decretal sum in the event of the appeal succeeding, it would seem from this passage from the judgment of Gachuhi Ag JA that merely asserting that ground is not sufficient. There must be some evidence to show that there would be substantial loss to the defendant if stay is refused. Platt JA in the *Kenya Shell* case also said this:

“The application for the stay before the High Court failed because the first of the conditions set out 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 would be unable to repay the decretal sum plus costs in two courts”.

Whilst there is no evidence to support the proposition that the defendant will suffer substantial loss “in the matter of paying the damages awarded which would cause difficulty to the” defendant, itself, there appears to be some which is intended to support the proposition that the defendant will suffer substantial loss if the decretal sum was paid as the plaintiff will be unable to make repayment to the defendant in the event of the appeal succeeding. In the affidavit of 29.3.90 in support of the defendant’s application, it has been deposed that because the plaintiff had been irregular in his repayment to the defendant of loan installments in respect of which the plaintiff had charged to the defendant his property LR/Muguga/Muguga/T 378/13 which I shall call the second property, he would not have funds to repay the decretal sum if the defendant’s appeal succeeds. The plaintiff in his affidavit of 12.4.90 refuted this by saying that he had already paid off his loan with which the second property was charged, and went on to depone that he was the owner of another property, LR No 11781/2, Kiambu District which I shall call the third property, and which had been valued at Shs 5,250,000/-. In the defendant’s replying affidavit filed on 23.4.90, the fact that the plaintiff had paid off his debt in respect of which the second property had been charged, was not denied. It seems that the defendant had been aware of this but had preferred to

remain silent about this making the defendant's affidavits also less than candid.

It was rather further deponed in the defendant's replying affidavit that the plaintiff had defaulted on many occasions in making regular repayments of the loan and documents were annexed to show that properties of the plaintiff other than the third property, had been in danger of being sold in default of the plaintiff repaying various loans. But, it seems to me clear that at the time of the swearing of his affidavit, the plaintiff had paid off this loan and the second property which the plaintiff had deponed had a value of more than Shs 300,000/- is available to the plaintiff. Whilst the Income Tax Department have a first charge on the property for Shs 400,000/-, the value of Shs 5,250,000/- of this property has not been seriously challenged by the defendant. And so the plaintiff would seem to have two properties of Shs 5,550,000/- in value which can after deducting Shs 400,000/- due to the Income Tax Department, fetch a substantial sum. Can it be said from the affidavit evidence that the plaintiff will not be able to pay back to the defendant the decretal sum in the event of the defendant's appeal succeeding? In the *Kenya Shell* case, all that the respondents therein really had after their house had been burnt to the ground, was the husband's job as an executive of Agip and the prospect that he will continue in that job and hopefully earn a pension. The Court of Appeal held that in those particular circumstances, there would be no justification in holding that there was a likelihood that the respondent's appeal were to be successful.

In the present case, we are not dealing with the plaintiff's prospects but with his proven wealth which amount to more than three times the decretal sum. On the basis of this, I would also say that there is no justification in holding that there is a likelihood that the plaintiff would not be able to repay the decretal sum in the event of the defendant's appeal, an appeal which it has not even been deponed by the defendant to have overwhelming chances of success, succeeding. But the plaintiff has offered the second and third properties as security that he will be able to make restitution in the event that the defendant's appeal succeeds.

And so bearing in mind the parallel propositions that when a person is exercising his undoubted right of appeal, the appeal should not be rendered nugatory in the event of success and that a successful litigant should not be deprived of the fruits of his victory, the orders that commend themselves to me are.

The application for stay is hereby dismissed only on condition that the plaintiff should within three weeks of today, create an equitable charge on the second and third properties with the defendant for the decretal sum.

This charge shall stand discharged forthwith upon the dismissal of the defendant's intended appeal. In the event that the defendant's appeal is allowed and the plaintiff does not within three weeks thereof refund to the defendant the decretal amount so paid to him, and costs of the appeal, the defendant shall be at liberty to sell the said properties to recoup the decretal amount and costs of the appeal.

It is so ordered.

Dated and Delivered at Nairobi this 29<sup>th</sup> Day of May, 1990

**A.M. AKIWUMI**

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**JUDGE**