



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1271 OF 2015**

**ROSE SANG TARUS.....CLAIMANT/RESPONDENT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant filed a Notice of Motion dated 10.7.2020 seeking orders THAT:
  - a. Pending the hearing and determination of this Application, there be a stay of execution of the decree and judgment of this court delivered on 26.6.2020.
  - b. Pending the lodging of the Intended Appeal against the Judgment of this Court to the Court of Appeal there be a stay of execution of the decree and Judgment of this Court delivered on 26.6.2020.
  - c. Costs be provided for in the cause.
2. The application is premised on grounds that judgment was entered on 26.6.2020 against the Applicant for Kshs. 2,400,000 as compensation for unfair termination that the Applicant lodged a Notice of Appeal on 2.7.2020; that the Applicant will suffer substantial loss in the event of execution of the Judgment; that the application has been made without undue delay; that it is willing to deposit such security for the underperformance of the Judgment; and that no prejudice will be occasioned if the application is allowed.
3. The application is supported by the affidavit of Milkah Gachanja the applicant's Legal Counsel sworn on 10.7.2020 in which she reiterated the foregoing grounds.
4. The Respondent opposed the application vide a Replying Affidavit sworn on 18.9.2020 in which she contended that the while the Applicant has not met the conditions required for granting stay pending appeal; that she stands to suffer irreparably if denied access to the fruits of the Judgment; that it is not open for the applicant to trample upon her rights on the simple basis that they are able to pay or offer security; that she owns an apartment at Tamarind Court in Lavington whose value in 2008 was Kshs. 8,500,000 and whose current value is way enough to settle the decretal sum should the appeal succeed; that having not met the conditions for grant of execution, the court should dismiss the application for lack of merit.
5. In rejoinder, the Applicant filed a Further Affidavit sworn on 10.11.2020 by Michael Massawa, its Legal Counsel in which he contended that the applicant is not aware of the realizable assets to guarantee settlement of the decretal sum should it be successful in the appeal; that the Applicant cannot place reliance on the alleged prime asset as it does not have a registrable interest and the Respondent may dispose it on a whim without further reference to it; that the Respondent has not exhibited title documents to enable the Applicant undertake a search to determine the legal ownership of the said property; that the Applicant has unequivocally met the conditions for stay; and that it is in the interest of justice that the application be allowed.
6. The application was canvassed by way of written submissions.

**Applicant's submissions**

7. The Applicant submitted that Order 42 Rule 6 of the Civil Procedure Rules provides for two major principles that ought to be satisfied for the Court to exercise its discretion in granting stay of execution, namely, substantial loss and expeditious filing of the application, and the willingness to offer security for the performance of the decree. For emphasis it relied on **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the Court of Appeal held that the two principles to be satisfied for stay of

execution is that there is an arguable appeal which is not filed and that the appeal would be rendered nugatory if stay of execution is not granted.

8. It further argued that it has an arguable appeal as per the annexed Memorandum of Appeal being *Nairobi Civil Appeal no. 244 of 2020-Barclays Bank of Kenya v Rose Sang Tarus*.

9. It reiterated its willingness to deposit as security the decretal amount in a joint bank account to be held by both parties pending the hearing and determination of the Appeal.

10. Finally, it urged the court to consider the weighty matters raised in the appeal and exercise its inherent powers under section 3A of the Civil Procedure Act to issue the stay order in furtherance of Article 50 of the Constitution.

### **Respondent's submissions**

11. The Respondent submitted that the prayers sought have been spent because the applicant sought stay of execution pending the lodging of the intended appeal but it in its Further Affidavit, he annexed the record of appeal duly filed on 4.8.2020.

12. She further submitted that the applicant has not met the three conditions required to satisfy before grant of stay pending appeal under Order 42 Rule 6 of the Civil Procedure Rules namely, the application is brought without inordinate delay; that the applicant will suffer substantial loss unless stay is ordered; and that the applicant is willing to give security as the court may order.

13. She argued that the use of the word "and" in law implies that a party desirous of having a stay of execution must demonstrate the twin conditions and not either of them. She further argued that a party cannot come to court waving the security and seek the court to grant stay simply because a party would be willing to give security.

14. She submitted that the issue of whether or not there exists an arguable appeal has not been a ground for consideration of stay before this Court and therefore the Applicant's submissions are misplaced. According to her the Applicant has failed to demonstrate by evidence the substantial loss it will suffer unless the stay is ordered and urged that there was no legal basis for granting the stay order.

15. She argued that it has been held that in order to deny a successful party the fruits of his/her success, it is upon the Applicant to prove that he unlikely to make good whatever sum he may have received in the meantime. To buttress this position, she relied on **Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR** where it was held that poverty is not a ground for denial of a person's right to enjoy the fruits of his success, that financial ability of a decree holder is not a reason for allowing stay, and that an applicant must prove that the Respondent is unlikely to make good the sum he has received.

16. She argued that the Courts have been clear that an Applicant must discharge this clear burden and a mere statement does not suffice. She cited **Peter Mutuku Nthuku v Perimeter Protection Limited [2019] eKLR** where this Court held that a general statement that the Claimant was not a man of means could not shift the legal burden of proof.

17. She reiterated that she owns a prime asset whose value is above the decretal sum. She therefore submitted that even though the Applicant has failed to discharge its legal burden, she has discharged the evidentiary burden placed upon her to prove her ability to refund the sum.

18. She argued that failure to demonstrate substantial loss, means that it is fruitless for the court to consider whether the Applicant would be willing to offer security or not as the two conditions have to be considered jointly and not severally. She relied on **Kwekwe Mwakela v Krystalline Salt Ltd [2015] eKLR** where this Court held that the only hurdle that the applicant failed to jump was prove of substantial loss if stay is not granted.

### **Issues for determination**

19. Having considered the application, affidavits and submissions, the main issue for determination is whether the Court should grant stay of execution pending appeal. Order 42 rule 6 (2) of the Civil Procedure Rules of the Civil Procedure Rules provides as follows:

***"No order for stay of execution shall be made under sub-rule (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; and***

***(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

20. This provision plainly sets out the three conditions required for grant of stay of execution. The Applicant brought this application under several provisions including Order 42 Rule 6 of the Civil Procedure Rules. In its submissions, it focused on the ground that it has an arguable appeal as per the Memorandum of Appeal.

21. The said ground is relevant but it is not one of the conditions for grant of stay under Order 42 Rule 6 of the Civil Procedure Rules. Rather, it is a ground mainly considered by the Court of Appeal in a stay application filed under Rule 5 (2) (b) of the Court of Appeal Rules. In my view, it is enough for this court for the applicant to show that a Notice of Appeal has been lodged or a Memorandum of Appeal has been filed.

## Undue delay

22. The Applicant submitted that the application has been made without undue delay. Judgment was delivered on 26.6.2020 and the instant application was filed on 15.7.2020. This condition was not in contention and I also do not find 3 weeks to amount to unreasonable delay.

## Substantial loss

23. The Applicant stated that it would suffer substantial loss in the event of execution but the Respondent submitted that the Applicant has not demonstrated that it will suffer substantial loss if stay is not granted.

24. Substantial loss has not been defined under the Civil Procedure Act or Rules, but judicial precedents agree that substantial loss refers to actual loss that is demonstrable. The High Court of Uganda in **Tropical Commodities Suppliers Ltd & Ors v International Credit Bank Ltd (In Liquidation) (Miscellaneous Application-2003/379) [2003] UGHC 80** described substantial loss as :

**“...Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.”**

25. The legal burden of proving that the decree-holder is a man of straw lies on the applicant while the evidential burden of proving capacity to repay the decreed sum is placed upon the decree-holder. That position was affirmed in **National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR**, where the court held that:

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”**

26. Again In **ABN Amro Bank N v Lemond Foods Limited Civil Application No.15 of 2002** the Court Appeal held that :

**“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”**

27. In this case the Applicant did not adduce any evidence or set out factual circumstances to demonstrate that it would suffer substantial loss if the appeal succeeds nor did it rebut the fact that the respondent is the legal owner of an apartment at the Tamarind Court in Lavington valued over Kshs. 8, 500, 000. It only made generalized statement that it would suffer substantial loss. Such a statement does not persuade this Court that any actual loss would be suffered so as to justify grant of the orders sought.

28. In view of the foregoing, I find that the Respondent has demonstrated that she owns property of substantial value and as such she has capacity to refund the decretal sum should the pending appeal succeed. Consequently, I hold that the Applicant has not demonstrated the degree of loss or detriment it would suffer should stay be denied .

29. The Court of Appeal in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** held:

**“...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 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.”**

## Security

30. The Applicant submitted that it is willing to provide security for the due performance of the decree by depositing the sum in a joint bank account held by both parties. The Respondent argued, and I agree, that it would be fruitless to consider whether the Applicant would be willing to offer security because the other two conditions have to be considered jointly. The Applicant must satisfy all three conditions for the Court to grant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.

31. In **Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR** the Court held:

had discharged its burden. Orders (a) and (b) are already spent while Order (c) seeks stay of execution pending the lodging of the intended appeal. As per paragraph 5 of the Further Affidavit of Michael Massawa, a Notice of Appeal and Record of Appeal have already been filed. Consequently, the order (c) is also spent.

**Dated, and delivered at Nairobi this 27th day of May, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**