



REPUBLIC OF KENYA

IN THE COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 91 OF 2019

IN THE MATTER OF

ARTICLES 2, 3, 20, 21, 22, 23, 25(C), 28, 31(C), 35, 47, 48, 50 OF

THE CONSTITUTION 2010

IN THE MATTER OF

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER

ARTICLES 25(C), 31(C), 28, 35, 47, 48, 50 OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF

FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

IN THE MATTER OF

HIGHER EDUCATION LOANS BOARD ACT, NO. 3 OF 1995

IN THE MATTER OF

THE BANKING ACT, (CHAPTER 488 LAWS OF KENYA)

IN THE MATTER OF

CREDIT REFERENCE BUREAU REGULATIONS, 2013

BETWEEN

EUNICE NGANGA.....PETITIONER

VERSUS

HIGHER EDUCATION LOANS BOARD.....1ST RESPONDENT

TRANS UNION KENYA2ND RESPONDENT

METROPOL CREDIT REFERENCE BUREAU LIMITED.....3RD RESPONDENT

RULING

APPLICATION

1. The 1st Respondent/Applicant through an application dated 28th October 2020 seek the following orders:-

a) Prayer No. 1 spent.

b) Prayer No. 2 spent.

c) That the Honourable Court be pleased to order a stay of execution of the judgment delivered herein on 15/10.2020 and all other orders consequential therefrom pending the hearing and determination of the Appeal emanating herefrom.

d) That the costs of this application be provided for.

2. The Application is premised on the grounds on the face of the application being as follows:-

a) Judgment was entered in favour of the Petitioner herein on 15/10/2020 for a sum of Kshs.10,000,000/= among other orders.

b) The 1st Respondent is dissatisfied with the said judgment and has already commenced an Appeal therefrom.

c) Meanwhile, execution may very well be underway and the 1st Respondent is apprehensive that it will suffer substantial loss and its appeal defeated if stay is not issued pending outcome of the said Appeal.

d) The 1st Respondent is ready and willing to offer security for the due performance of any decrees that may ultimately be binding upon it.

e) The 1st Respondent's has an arguable appeal with high chances of success.

f) No prejudice will be suffered by the Petitioner should the application be allowed.

3. The application is further based on supporting Affidavit and Supplementary Affidavit of Bernadatte Masinde sworn on 29th October 2020 and 11th December 2020 respectively.

RESPONSE

4. The Petitioner/Respondent is opposed to the application and in doing so has filed a Replying Affidavit sworn by Eunice Ng'ang'a dated 14th February 2021.

5. The Petitioner/Respondent contend that the application is an attempt to delaying the determination of this matter and denying her the enjoyment of the fruits of her judgment. The Petitioner/Respondent further urge the 1st Respondent/Applicant has not met the threshold for granting of the orders sought in its application.

ANALYSIS AND DETERMINATION

6. I have considered the pleadings herein, parties submissions and from the same the following issue arise for consideration:-

a) Whether the Respondent has met the threshold for granting of order of stay of execution of the Judgment delivered on 15th October 2020 and all other orders consequently therefrom pending hearing and determination of the Appeal emanating therefrom.

b) Whether Court should order security.

A. WHETHER THE RESPONDENT HAS MET THE THRESHOLD FOR GRANTING OF ORDER OF STAY OF EXECUTION OF THE JUDGMENT DELIVERED ON 15TH OCTOBER 2020 AND ALL OTHER ORDERS CONSEQUENTLY THEREFROM PENDING HEARING AND DETERMINATION OF THE APPEAL EMANATING THEREFROM.

7. The 1st Respondent application is filed through *Rule 19 and 32(3) of the Constitution of Kenya (Protection of rights d Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise referred to as Mutunga Rules). Rule 32(3) of the Mutunga Rules* provides:-

“32. (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the Court may direct.”

8. The formal application herein was filed on 28th October 2020, thus within 13 days from the date of the Judgment hence within the timelines under *Rule 32(3) of the Mutunga Rules*.

9. *Order 42(6) of the Civil Procedure Rules* deals with cases of stay in case of an appeal and provide as follows under *42 Rule 6 (2)(a)-(b):-*

“(2) No order of stay 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.”

10. It is clearly provided under **Order 42 Rule (2) of the Civil Procedure Rules** that in order to issue stay orders in case of an appeal, the Applicant has to satisfy the conditions set out under **Order 42 Rule (2) of the Civil Procedure Rules**. It is therefore clear that the Court’s discretion to order stay of execution of its orders or decree is fettered by the conditions enumerated under **Order 42 Rule 2 of the Civil Procedure Rules**, which are briefly as follows: sufficient cause, substantial loss that would ensue from refusal to grant stay, furnishing of a security and the application must be made without unreasonable delay.

11. On whether 1st Respondent has sufficient cause/arguable case in the appeal, reliance is placed in the case of Court of Appeal in **Shah Munge & Partners Ltd v. National Social Security Fund Board of Trustees & 3 Others [2018] eKLR** where the Court concurred with the decision in **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**, in which it was held that a single bonafide arguable ground suffices for an arguable appeal.

12. The Petitioner / Respondent contend that the 1st Respondent has no cause in the appeal as it admitted to facts of breach of Petitioner’s Constitutional rights, looking at the memorandum of Appeal, the 1st Respondent has raised several grounds on the interpretation of the law and analysis of the facts. The issue of the awarded damages is equally raised. I therefore do not agree with the Petitioner that the 1st Respondent has no cause in the appeal. I find that it would be incorrect to state that the 1st Respondent has not demonstrated cause. I find that whether the appeal will succeed or not is not a basis to say the 1st Respondent has no sufficient cause or not.

13. On whether 1st Respondent/Applicant would suffer substantial loss should the stay be denied, the 1st Respondent/Applicant is required to prove declining of stay would cause it to suffer substantial loss.

14. The Petitioner/Respondent placed reliance in the case of **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410**.

15. In **Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR** and in distinguishing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Ltd – Civil Application No. Nai.358 of 1999 (unreported)**, the Court of appeal stated that an applicant alleging substantial loss must demonstrate how its financial position would be adversely affected by payment of a money decree. It stated, **“whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind [and this (weighing of parties positions) applies only where the decretal amount is acceptably large in the circumstances of the case] ...the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to “put on the table” its financial position and how the same would be affected.”** (Emphasis added)

16. Upon perusal of the instant application it is evident that the 1st Respondent has not demonstrated how paying Kshs.10,000,000/= would be an unbearable hardship to an institution believed to have assets worth hundreds of millions of shillings. On the other hand justice call for declining of granting stay as the money decree is indeterminately denying the Petitioner the enjoyment of the fruits of her judgment, taking into account the period the Court of Appeal would take to determine the appeal is indeterminable.

17. On the issue as to whether the appeal would be rendered nugatory if stay is not granted, I find guidance in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR**, where the Court of Appeal held that to prove nugatory limb, the applicant must demonstrate that the state of facts in the suit will change if stay is not granted. The Court was dealing with a judgment against a trespasser and held, **“In this case, there is evidence that the applicant is indeed a trespasser on the suit premises. That was the position before the suit before the High Court was filed. It still remains the position and it will not be changed by any orders of stay we may make in this application. This therefore, means that there is nothing to be rendered nugatory even if the stay orders are not granted at this stage.”**

18. In the instant matter the 1st Respondent had listed the Petitioner as a defaulter with CRBs for over a decade **without her knowledge**, even though she never obtained or benefited from any loan from the 1st Respondent. The 1st Respondent admitted it did not notify the Petitioner of their intention to list her and admitted it did not notify her after listing her as is required of it by the law. The Petitioner has suffered immeasurable losses in business and in profits and psychological torture as a result of denied access to financial facilities for her business. These facts will remain the same whether a stay pending appeal is granted or not.

19. The Petitioner/Respondent places reliance on the above proposition in the decision of Court of Appeal in **Fred Matiang’i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna & 4 others [2018] eKLR** where it was held that in determining whether a matter would be rendered nugatory on appeal, there ought to be an element of irreversibility which had to be presented before Court. The Court would not rely on speculation, conjecture and apprehensions. The Court went on and stated, **“there is nothing irreversible that could occur as a result of those order subsisting while the appeals intended are processed, prosecuted and decided by the Court... All the applicants voiced were apprehensions ... and this Court cannot move to stay the orders made by a Court of competent jurisdiction on the basis of such far-fetched fears.”**

20. Further the Petitioner’s ownership of property worth more than the decretal sum awarded to the Petitioner has not been impeached through evidence by 1st Respondent but the 1st Respondent has raised unfounded conjecture, unwarranted speculation and apprehension that the Petitioner would not be able to repay the decretal sum.

21. Considering the orders issued by the Court in its judgment, it turns out that all orders issued by the Honourable Court are reversible in the unlikely event of the success of appeal. The Petitioner has demonstrated her ability to repay the decretal sum through title to property worth more than the decretal sum. On the other limb the apology in the Newspaper can be retracted and declaratory orders issued can be reversed by the Appellate Court.

22. In the decision of the Court of Appeal in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike and Another [2006] eKLR* it was held that once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum the evidential burden must then shift to the Respondent (Petitioner in this case) to show what resources she has since that is a matter which is peculiarly within her knowledge...”

23. Further the Court of Appeal in *Kenya Hotel properties Limited v Willesden Investments Limited (supra)* reiterated that the success of the appeal would not be rendered nugatory if the decree is a money decree *so long as the Court ascertains that the Respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant and that there would be no undue hardship on the Applicant...*

24. In the instant application, and from the affidavit evidence before the Court I find that the Petitioner/Applicant has discharged the burden of showing what resources she has and by offering a property whose value as per attached valuation Report is much more than the decretal sum, as its value is shown as Kshs.13,000,000/= and which property the Petitioner is willing to deposit, the title to the property with Honourable Court to secure the decretal sum pending hearing and determination of the Appeal.

25. On the issue of offering a security the Petitioner places reliance in the case of *Joel Mutuma Kirimi & another vs. The Standard Digital & another [2020] eKLR*, where the decree-holder urged the Court to order the Judgment-debtor to pay them at least 70% of the of the decretal sum. The Court held that the order would have been obtained had the decree-holder produced evidence of ownership of property or income capable of repaying the amount so prayed if paid...

26. In the instant application, the Petitioner urges the Court to consider as just and reasonable that the 1st Respondent pays at least five (5) million shillings thus 50% of the foresaid value of the Petitioners property as the amount would be recoverable from the property mentioned hereinabove even in a worst case scenario and therefore, the appeal would not be rendered nugatory.

27. It is further Petitioner’s case that, the Petitioner presented bank statements evidencing her liquidity of a cash only business amounting to four hundred and fifty thousand dollars (USD 450,000) in annual gross turnover even under the very constraining circumstances of denied access to credit facilities. In addition it is averred that the Petitioner’s travel business has turned over of one hundred and forty thousand dollars (USD 140,000) in six months of trading during the pandemic year in which airlines and hotels are operating under severe restrictions. This it is urged clearly contrary to allegations by the 1st Respondent that the Petitioner’s business is at the risk of collapse.

28. The Petitioner has therefore demonstrated that she is not a person of straw because in addition to owning property worth much more than the decretal sum, she is engaged in meaningful income generating activities as an Advocate of the High Court and as an IATA Travel Agent.

B. WHETHER COURT SHOULD ORDER SECURITY.

29. The Court has discretion as regards granting stay orders pending appeal. The proposal to order security for the decretal sum is unequivocally rejected by the Petitioner because the Petitioner continues to suffer immense losses of business and income due to the damage done by the 1st Respondent to her credit worthiness.

30. The Petitioner in place for any proposed security deposit, prays for the Court to order the 1st Respondent to pay at least 50% of the decretal sum, pending appeal, an amount the Petitioner has clearly demonstrated she can comfortably repay back should the appeal succeed. The 1st Respondent in prayer for an order of stay of execution of the judgment, avers that it is ready and willing to offer security for due performance of the decrees.

31. **The upshot is that the 1st Respondent’s application partially succeeds and orders are granted in the following terms:-**

a) The stay of execution of the judgment delivered on 15th October 2020 is granted under the following conditions:-

i) The 1st Respondent do deposit with the Court 50% (Kshs.5,000,000/=) of the sum awarded by Court within 21 days from the date of this ruling.

b) The Petitioner within 7 days from the date of deposit of Kshs.5,000,000/= by the 1st Respondent to deposit the title No. Nyandarua/South Kinangop/2542 (CRC.1403) with the Court as security and upon compliance the Court do forthwith release (Kshs.5,000,000/=) to the Petitioner pending the outcome of the 1st Respondent’s intended Appeal.

c) The balance of sum awarded be deposited in joint interest earning account in the name of the Petitioner and 1st Respondent within 21 days from the date of this Ruling.

d) In default of compliance with (a), (b) or (c) above execution to issue.

e) The 1st Respondent to pay auctioneers charges within 30 days from today or from the date of taxation or on agreement on the same.

f) Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF OCTOBER, 2021.

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J. A. MAKAU

JUDGE