



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1886 OF 2013

AGNES KAVATA MBITI.....CLAIMANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....RESPONDENT

RULING

1. The claimant, by application dated 28th July, 2017 is seeking for orders that there be a stay of execution of the judgement and decree issued herein on 27th July, 2017 pending the hearing and determination of the intended appeal. The application is based on the grounds that judgement herein was delivered on 27th July, 2017 for the respondent in terms of the counterclaim and for the sum of Kshs.12, 207,210.00 on the basis that the counterclaim was undefended. The claimant is aggrieved and has filed a Notice of Appeal.

2. The application is supported by the annexed affidavit of the claimant and on the grounds that upon delivery of judgement herein, the claimant is aggrieved and wishes to file an appeal which has arguable grounds. There was a response filed against the counterclaim on 28th January, 2014 and there was therefore an error on record when the court failed to consider it and made a finding that the counterclaim was undefended. Where stay of execution is not granted there will be execution to the detriment of the claimant. The decretal sum is substantial and if execution is allowed, the claimant shall suffer loss and damage.

3. In reply, the respondent filed a Replying Affidavit sworn by Eunice Kamau the Assistant Legal Manager of the respondent and avers that judgement delivered on 27th July, 2017 was in favour of the claimant for the sum of Kshs.157, 432.00 and in favour of the respondent in terms of the counterclaim for Kshs.12, 207,210.00. Such an award was after hearing of the case and analysis of the matters before court. The claimant testified that she lacked authority to switch off the date base audit which caused the respondent the loss counterclaimed and awarded by the court and as such, the intended appeal has no merit and execution should be allowed to follow the cause.

4. The claimant has not met the threshold for the grant of the orders of stay of execution and application should not be allowed. The application is filed with delay and time has since lapsed.

5. Both parties filed written submissions.

6. I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities relied upon in the written submissions. The basis of the application is Order 22 Rule 22 and order 42 Rule 6.

7. For the purpose of the application before court Order 42 Rule 6 (2) provides as follows;

2. No order of stay 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 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

8. What constitutes substantial loss is enumerated by the court in the case of **James Wangalwa & Another versus Agnes Naliaka Cheseto HC Misc No. 42 of 2012 OR (2012) eKLR** where it was held *inter alia* that;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**, the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”*

9. In the instant case, the claimant has not stated that the respondent is not an entity with means to repay the judgement amount of over Kshs.12 million if the intended appeal once filed is a success. The claimant as the applicant has not demonstrated that she would suffer substantial loss. In **Equity Bank Ltd versus Taiga Adams Company Ltd [2006] eKLR** the court stated as follows:-

In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant.

10. The claimant has offered to deposit security as the court may direct.

11. The main ground and basis of the application by the claimant is that the court has made a finding of fact that there was no defence to the counter-claim but that such defence had been filed on 28th January, 2014. Such are questions of fact addressed in the judgement of the court. Paragraph 67 of the court judgement has set out the findings and reasoning for the award in the counter-claim.

12. That set out, the substantial loss that the claimant may suffer where the orders sought are not granted and execution is allowed is not articulated. Even where security is offered in an application seeking stay of execution, such security must have its basis by the applicant demonstrating the loss to be suffered where stay of execution is not allowed. I find no effort to demonstrate such ground. However, putting into account the application in its totality and in the interests of justice, stay of execution shall be allowed subject to the claimant making a deposit of the due judgement amount in her favour with the court.

Accordingly, application dated 28th July, 2017 is hereby allowed; the claimant shall deposit the sum of Kshs.157,432.00 with the court within 14 days from the date herein in security. Costs in the cause.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:.....

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