



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT OF KENYA

#### AT NAKURU

#### ELC NO. 39 OF 2016

**POWER PLANT ENGINEERING LIMITED.....PLAINTIFF**

**VERSUS**

**BUSINESS PARTINERS INTERNATIONAL KENYA LIMITED .....DEFENDANT**

#### RULING

1. The plaintiff filed the present suit seeking to have the defendant restrained from selling the suit land pursuant to a charge held over the land by the defendant as security for a loan advanced to the plaintiff by the defendant. The plaintiff claimed to have fully repaid the loan and made an overpayment thereof. The plaintiff further prayed for damages and costs of the suit. At the time of hearing the defendant had not filed any defence and the hearing proceeded on the basis of the pleadings filed by the plaintiff. The plaintiff presented two witnesses in support of the plaintiff's case and the defendant neither cross examined nor offered any evidence.

2. The Court on 1<sup>st</sup> October, 2019 delivered a judgment in favour of the plaintiff holding that the plaintiff had over paid the loan in the sum of Kshs771,333.90. The Court ordered a refund of this sum to the plaintiff by the defendant and further ordered the defendant to issue a discharge in regard to the charge held by the defendant over suit property within 21 days of the date of judgment. Costs of the suit were awarded to the plaintiff.

3. The defendant being aggrieved by the judgment filed a Notice of Appeal dated 9<sup>th</sup> October 2019 signifying its intention to appeal against the judgment to the Court of Appeal. Consequent to filing the Notice of Appeal the defendant filed a notice of motion dated 18<sup>th</sup> October 2019 seeking stay of execution of the judgment. The defendant was on 27<sup>th</sup> November 2019 granted leave to amend the Notice of motion and the Notice of motion dated 26<sup>th</sup> November 2019 was admitted to replace the Notice of Motion dated 18<sup>th</sup> October 2019. By the Notice of motion the defendant under prayer (3) sought the following order:-

*3. That a stay of execution of the judgment of this court delivered on 1<sup>st</sup> October 2019 and all consequential orders arising therefrom do issue pending the hearing and determination of the intended Appeal.*

4. The application was supported on the grounds set out on the body of the application and on the supporting affidavit by Sally Gitonga dated 26<sup>th</sup> November 2019. The defendant/applicant averred that the hearing of the suit on 7<sup>th</sup> March 2019 proceeded in the absence of a defence on record on the part of the defendant. The applicant contended it had a meritorious appeal with a high chance of succeeding and that unless a stay of execution of judgment pending the hearing and determination of the intended appeal is granted, the appeal if successful will be rendered nugatory. The Applicant argues that as a chargee of the property **Naivasha /Mwichiringiri/block5/937**, which secured facilities to it, if the judgment is executed and the defendant is obligated to discharge the charge as ordered in the judgment, and the defendant be permanently restrained from exercising its power of sale to recover the monies due to it, the defendant will suffer irreparable loss as the Applicant's rights as chargee over the property will dissipate. The intended appeals if successful will thus be rendered nugatory and merely of academic value.

5. The plaintiff through Jannita Ndila Daudi filed a replying affidavit dated 19<sup>th</sup> November 2019 in opposition to the application. The respondent deposed that the defendant/applicant was duly served with the pleadings in the suit but failed to file a defence and/or any other relevant documents in support of the defence case. The Plaintiff/Respondent averred that the defendant/respondent had participated in the interlocutory proceedings and cannot therefore contend that the suit had abated for want of extraction and service of summons to enter appearance. The Respondent further argued that the defendant's intended appeal cannot be rendered nugatory as the plaintiff company is a body corporate with both fixed and immovable assets and that besides, the Respondent's directors are people of means who can indemnify the company in the event the applicant's appeal succeeds. The Respondent further averred the applicant's application is calculated to prevent the Respondent from enjoying the fruits of what is otherwise a valid judgment.

6. The parties canvassed the application by way of written submissions. I have read and considered the submissions filed by the parties and

the following is my take on the matter.

7. The power of the court to grant a stay of execution of judgment, decree or order is discretionary. However the Court considering an application for stay has to act judiciously. The power of the Court appealed from to grant stay of execution is conferred under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides as follows:-

42.6(1)

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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.

8. Under sub rule (1) the court appealed from may for sufficient cause order stay or execution of the decree or order. Sub rule (2) makes provision for the conditions that an applicant for stay needs to satisfy in order for the Court to grant stay under sub rule (1) of Rule 6 of order 42. Such an applicant must demonstrate substantial loss may result unless stay is granted and the application for stay ought to have made without unreasonable delay. The court may as a condition for stay order security to be furnished for the due performance of the decree in the event that the decree becomes binding on the applicant should the appeal be unsuccessful.

9. In my considered view therefore it does appear to me that for an applicant to succeed in an application for stay of execution pending appeal he must, firstly prove he or she stands to suffer substantial loss, and secondly, that the appeal would eventually be rendered nugatory if the stay is not granted. See the case of *Hassan Guyo Wakalo –vs- Straman EA Ltd ( 2013) eKLR* and *Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR*.

10. The Respondent in the present matter has argued that the Applicant would not suffer any substantial loss if the stay was not granted. The Respondent has contended that what would be in issue would be the amount of money that the Respondent would be owing which the respondent contends was capable of being ascertained and the Respondent would be capable of paying the same. The Respondent placed reliance on the Court of Appeal case of *Jitendra Dhokia –vs- Bank of Baroda (2015) eKLR* where the court declined to grant stay to bar the sale of the charged property on the basis that the applicant would not suffer any loss that could not be compensated in damages. The Court held that in case damages were to be awarded as compensation; the respondent had the financial capability to repay the applicant.

11. In the instant matter the defendant /applicant is the chargee and it is its contention that the judgment herein was reached without their participation in the trial and the effect of its execution would be to discharge the security they hold over the Respondent's property without the loan facility advanced to the defendant / respondent being fully paid. Additionally the judgment ordered the payment of a sum of Kshs.771, 333.90 being a refund of an overpayment made on the loan by the defendant which the applicant states was erroneous as the loan amount had not been fully settled by the respondent.

12. Both parties have in their submissions made arguments on the chances of the intended appeal and/or lack of merit in the intended appeal. This Court as the Court appealed from cannot properly concern itself in considering the merits and/ the demerits of the intended appeal. The Court of Appeal would be the appropriate court under Rule 5 (2) (b) of its Rules to consider whether or not an applicant had an arguable appeal or not.

13. Under Order 42 Rule 6 pursuant to which the instant application is brought there is no requirement for the court appealed from to consider the chances of success of the intended appeal. To do that the court would be usurping the role of the appellate Court within whose province that jurisdiction vests.

14. As observed above the main considerations are whether there is a likelihood of the applicant suffering substantial loss and whether the appeal would be rendered nugatory. In the draft memorandum of Appeal, the applicant under prayer (II) proposes to seek that the whole judgment delivered on 1<sup>st</sup> October 2019 be set aside and substituted by an order enlarging time to file the Appellant's defence and granting leave to Appellant to file its defence out of time. It is thus apparent that were the applicant's Appeal to succeed, the Appellate Court could order a retrial after allowing the applicant to file its defence out of time. The execution of the judgment would entail a discharge of the charge registered in favour of the applicant and if that happens and the applicant is successful on appeal the applicant would be without its security. In my view this would render the appeal nugatory. The applicant would also have been deprived of its security and would therefore be unable to enforce the security by way of exercising its power of sale conferred under the charge in the event the applicant is successful in the appeal and a retrial is ordered. I am in the circumstances persuaded the applicant would be exposed to substantial loss if the order of stay is not granted.

15. I am conscious that the decree arising from the judgment has a monetary element in that the applicant was ordered to make a refund of Kshs771,333.90 being an overpayment on the loan by the plaintiff/respondent. In the draft defence, the defendant had annexed to the

application to be granted leave to file a defence, which application the court disallowed, the defendant contended the plaintiff was still indebted to it in the sum of Kshs.4,167,030= and hence there was no basis to restrain the defendant from exercising its power of sale over the charged property. Notably the plaintiff had not specifically pleaded the overpayment in the plaint and there was no amendment of the plaint to specifically plead the sum of Kshs771,333.90 ordered to be refunded. The order of refund is intrinsically tied to the issue of discharge of the charge and in my view cannot stand alone. In the instant matter the scales of justice lean on granting stay of execution of the decree in order to afford the applicant an opportunity to ventilate its appeal. The applicant as pleaded by the Respondent, is a financial institution and that is how it came to advance to the plaintiff the loan facility that has precipitated these proceedings. There can therefore be no doubt that if it was unsuccessful in the appeal it would be in a position to satisfy the decree. The court does not consider that any order for security would be necessary in the circumstances.

16. In the result I grant an order of stay of the judgment delivered on 1<sup>st</sup> October 2019 and all consequential orders therefrom pending the hearing and determination of the intended appeal. The applicant is directed to file and serve the record of appeal within the next 120 days from the date of this ruling. In default of filing and serving the Record of Appeal as directed herein above the stay granted herein will automatically lapse and the respondent will be at liberty to execute the decree unless further stay will have been sought and granted by the Court of Appeal by the Applicant. The costs of this application will abide the outcome of the intended appeal.

17. Orders accordingly.

**Ruling dated signed and delivered electronically at Nakuru this 7<sup>th</sup> day of May 2020.**

**J M MUTUNGI**

**JUDGE**