



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 12 OF 2020

CAROL CONSTRUCTION ENGINEERS LIMITED

JEREMIAH MWEBI MAYIEKA..... PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

RULING

1. In a judgment dated 21/02/2021, this Court decided the primary suit herein in favour of the Plaintiffs/Respondents and made the following orders:

- a. A permanent injunction shall issue to restrain the Defendant, its agents and/or servants from advertising for sale, selling or interfering, alienating or otherwise howsoever dealing with the security namely Title No. Nakuru/Municipality/Block 2/58 in any way which is inconsistent with the ownership of the Plaintiffs herein.*
- b. An order shall issue directing the Defendant to, within thirty (30) days of the date hereof, discharge the charge registered in respect of Title No. Nakuru/Municipality/Block 2/58 failing which the discharge of charge to be executed by the Deputy Registrar of this Court.*
- c. The Defendant shall pay liquidated damages in the sum of Kshs. 10,000/- to the Plaintiffs.*
- d. All other claims are declined and are hereby dismissed.*
- e. The Defendant shall pay the costs of this suit.*

2. The suit was one between a chargee and a chargor. The Court relied on the doctrine of estoppel on account of representations made by the Bank/Applicant to prevent it from resiling on its promises and thereby claim certain interests it claimed the Respondent/Borrower owed. The result was that the Court found that the Respondent/Borrower had already repaid the full amount owed and ordered the Bank/Applicant to discharge the charge in respect of *Title No. Nakuru/Municipality/Block 2/58* (the Charged Property).

3. The Bank/Applicant is aggrieved by the decision of the Court. It generously calls the decision “precedent-setting” for its reliance on estoppel by a chargee to reach its decision and states that it wants to test the limits of the doctrine enunciated there at the Court of Appeal. The Bank/Applicant, of course, has a right to appeal the decision at the Court of Appeal. It is also true that the judgment turned on a novel point of law on the extent to which estoppel by representation can override express provisions of a contract in a bank-borrower relationship. The doctrine enunciated by the Court and its application to the facts of this case will benefit from scrutiny and development by the higher Courts. This is to say that the appeal preferred by the Bank/Applicant to the Court of Appeal is eminently arguable.

4. The question is whether this is sufficient to entitle the Bank/Applicant to a stay of execution.

5. The appropriate provisions of the law which govern the grant of stay of execution pending appeal is Order 42, Rule 6 of the Civil Procedure Rules. The Rule provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub-rule (1) unless—

i. 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

ii. 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.

6. Both the Bank/Applicant and the Borrower/Respondent are agreed on how the Courts have interpreted this provision. The Courts have required that an Applicant demonstrates four things in order to be entitled to a grant of an order for stay of judgment pending appeal:

a. The appeal filed must be arguable;

b. The Applicant is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. The Applicant has given or is willing to give such security as the Court may order for the due performance of the decree which may ultimately be binding on it.

7. In the present case, as analyzed above, the appeal is eminently arguable. As the Borrower/Respondent concedes, the Application was timely made. Further, the nature of the case is such that no offer for security for the due performance of the decree is really required since the title document itself performs this role.

8. The gravamen of the case turns on whether it can be said that the appeal will be rendered nugatory if the stay is not granted. The Respondents argue that the Applicant has not satisfied this prong because it has not made out a case for holding onto the security in view of the Court's judgment that the overdraft facility was settled by the Respondents way back in 2017.

9. This is difficult logic to understand. The point is that the Applicant is apprehensive that if it discharges the title and releases it to the Respondents, the 2nd Respondent is likely to encumber it or dispose of the Charged Property such that should the Applicant ultimately prevail on appeal, its only security would have dissipated. This is a credible apprehension given the fact that the Charged Property is commercial property of high value. Evidence on Court record shows that there are apartments constructed on the property.

10. In my view, therefore, the Applicant has easily demonstrated that it is likely to suffer substantial loss if the stay is not granted. It will have no security for the amounts it claims the Respondent owes it since if the title is discharged and released to the 2nd Respondent he will be free to do it as he will. It follows that without the title the Applicant is likely to suffer substantial loss should it succeed on appeal.

11. There is only one concern: armed with a stay of execution order, the Applicant will have no incentive to expedite the appeal. Yet, the stay of execution is a substantial fetter on the ownership rights of the Respondent as things stand (since the Court has declared that he is entitled to the discharged title). This is why it is always preferable that parties going up on appeal should seek stay of execution in the appellate Court to which they are appealing so that that appellate Court can properly calibrate the conditions with the density of its docket and Active Case Management practices in mind.

12. In the circumstances of this case, it is imperative to balance the prospect that the appeal may be rendered nugatory in the absence of a stay (especially since the Applicant has already demonstrated that there is at least an arguable ground of appeal) against the principle that the successful party in the proceeding should not be kept away from the fruits of his judgment indefinitely. The best way to achieve the balance is to grant a time-bound stay of execution. Such a time-bound stay of execution both protects the Applicant but also incentivizes it to expedite the hearing of the appeal. In the event the appeal cannot be heard within the time envisaged in the stay, the Applicant will, then, have to approach the Court of Appeal for an appropriate extension of time. The Court of Appeal would, then, be placed to decide on such an application with the density of its docket in mind.

13. The upshot is the following:

a. Pending the hearing and determination of the appeal whose Notice of Appeal was lodged in Court on 11/02/2021, there will be a stay of execution of the Judgment dated 21/01/2021 and all consequential orders therefrom for a period of one calendar year (365 days) from today.

b. If the Applicant shall require an extension of the stay of execution granted herein beyond the one-year period granted, the Applicant shall move the Court of Appeal for extension of this order or prosecute its appeal at the Court of Appeal within that time. For the avoidance of doubt, the extension of this stay of execution, if needed, shall be sought at the Court of Appeal and not at this Court.

c. The costs of this Application shall abide with the outcome of the Appeal.

14. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 1ST JULY, 2021

.....

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.