Mukundi v Francis & another (Civil Appeal 98 of 2020)
[2023] KEHC 24443 (KLR) (30 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 98 OF 2020

SM MOHOCHI, J

OCTOBER 30, 2023

BETWEEN

GEORGE KARANJA MUKUNDI ..... APPELLANT

AND

MARIERA FRANCIS ..... 1ST RESPONDENT

VICTOR NYACHIEKA MARIERA ..... 2ND RESPONDENT

RULING

1. The Applicant by Notice of Motion pursuant to Sections 1A, 1B, 3, 3A, & 63 of the *Civil Procedure Act*, Orders 22 Rule 22, 42 Rules 6(2), and Order 51 of the Civil Procedure Rules moves this Court for the following Orders;

    a. Spent.

    b. Spent.

    c. That this Court be pleased to order a Stay of Execution of the Judgment and/or Decree in Nakuru HCA No. 89 of 2020 delivered by the Trial Court on 17th March, 2023 and all consequential orders therefrom, pending the Hearing and determination of the Appeal herein.

    d. That the costs of this Application be in the cause.

2. The Application is supported by a sworn Affidavit of Erick Onderi dated 13th April 2023, and is based on the following fourteen (14) grounds:

    i. That, the Applicant herein lodged an appeal as against the Respondents/Applicants vide a memorandum of appeal dated 25th May 2020.

ii. That, a judgment in relation to this appeal was delivered by Hon. Lady Justice Mumbua T Matheka on or around 17th March, 2022 in favour of the Appellant and the Respondents were further condemned to pay costs of the appeal together with costs in the lower Court.

iii. That, the Applicant is aggrieved by the whole of the said decision on both liability and the quantum of the general damages awarded and have preferred an Appeal in the Court of Appeal. To this end, he had duly filed a notice of appeal dated 29th March, 2022 together with a letter seeking for copy of typed proceedings.

iv. That, the Applicant's appeal will be rendered nugatory if the orders contained in the said judgment and all other consequential orders therefrom are executed by the Respondent who seeks to get a decretal sum of Kshs. 916.572.85 plus Costs of the lower Court suit and the appeal.

v. That, the Applicant is apprehensive that the Respondents by themselves and/or persons claiming entitlement under them may seek to attach property owned by the Applicant and which will be detrimental to Applicant.

vi. That, the Respondents advocates have since sent a letter to the Applicant seeking payment of the decretal sum together costs of the suit of the lower file and has also fixed for taxation. the bill of costs with respect to the appeal and as. such the threat of execution is imminent.

vii. That, the execution of the, judgment and/or decree and consequential orders arising therefrom involves a colossal sum and will be detrimental to the Applicant.

viii. That, the Applicant will suffer substantial loss if the said judgment and/or decree and consequential orders are executed pending the hearing and determination of the intended appeal.

ix. That, the Respondent are not a persons of means and that in case they are allowed to execute the judgment and/or decree and the Applicants succeed in the appeal, they will have a hard time recovering the decretal sum from the Respondents and therefore their appeal will be rendered nugatory and a mere academic exercise.

x. That, the Applicant is willing to abide with any conditions set by this Honourable Court.

xi. That, the Applicants has acted with spęed in approaching this Honourable Court seeking for stay of execution pending the intended appeal.

xii. That, it is in the interest of justice, that the Applicant be granted an opportunity to prosecute his appeal without the threat of execution hanging over his head like a noose.

xiii. That, the application herein as endorsed under the rules is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of the appeal.

xiv. That, the Applicant's appeal has high chances of success and raises weighty issues which shall be determined by the Appellate Court.

3. On the 17th March 2023, this Court directed that the Application was to be heard and determined on the basis of written submissions, and parties were to file and exchange their written submissions by the 26th of May 2023.

4. The Applicant had complied by filing their written submissions on the 18th December 2022 while the Respondent filed their written submissions dated 19th May 2023 in opposition to the Application.

Applicant's Case

5. The Applicants Submit by framing two issues for the Court's consideration

6. Rules 1 and 3 of the Civil Procedure Rules state the instances under which the trial Court may order a stay of execution of a decree or order pending appeal.

7. That the criteria for granting Stay of execution are well founded in precedence as was held In Elena D. Korir Vs Kenyatta University [2012] eKLR, Justice Nzioki Wa Makau, who place reliance on the case of Halai & Another v Thorton & Turpin (1963) Ltd[1990] KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that: -

> " The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted"

8. With regards to the Sufficient Cause Test, it is the Applicant submission that, they have met the conditions required for stay to be granted, that failure to grant the Applicant stay of execution would render the Appeal nugatory and an exercise in futility as the Respondent would have already executed the decree and attached the Applicant property motor vehicle which is their source of income and livelihood.

9. Reference is made to the case of Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo Vs Straman FA Ltd [2013] eKLR in which it was held thus:

> " In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other"

10. With regards to the Substantial Loss Test, it is the Applicant's submission that, they will suffer prejudice if the Application is not allowed, as their properties will be attached and sold and further the appeal has high chances of success will be rendered nugatory.

11. That further, the appeal is on liability and the Applicant are apprehensive that if the Respondent is paid, they may deal with the same in a manner prejudicial to the Applicant and if the appeal is successful, the Applicant might not be able to recover the same from the respondent.

12. The Applicant have undertaken to abide by any conditions set by this Court, which goes to show that they are willing to abode to any condition of stay including depositing security.

13. Reliance is placed on the case of Jackline Tabitha Kinyua v Jacob Mugo Nyaga & another [2019] eKLR where the Court stated:

> " Regarding the proposal by the respondent that the applicant deposits the whole of the decretal amount with half of it being released to the Respondent it is my considered view that the interests of justice will not be served if such an order is granted, that refund cannot be guaranteed in the event of a successful appeal."

14. That the Applicant have established that they will suffer substantial loss if the intended execution is not stayed and urge the Court to consider the cited authorities in allowing the application.

15. That the Applicant are ready and willing to furnish the Court with a bank guarantee which is reasonable security pending hearing and determination of the Appeal filed herein. The Court in Bernard Ontita Zebedeo Vs Julius Nyamwega Ontere [2022] eKLR allowed an application for stay on condition that they deposit a Bank guarantee as security. It held: -

> " Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse."

16. That in the event the appeal succeeds the Applicant is apprehensive that the Respondents will not be in a position to refund the money to the Applicant which will be prejudicial to them. The Applicant pray to be allowed to furnish the Court with a bank guarantee pending hearing and determination of the appeal.

17. In Compliant International Security Ltd & another Vs Nicodemus Mulwa Muli [2019] eKLR the Court expressed itself as follows in an application seeking extension of time way after the set timelines.

> " ...if the applicants are not given an opportunity to deposit the decretal Sums as ordered by the trial cour then the appeal will be rendered nugatory and will only be there for academic purposes. There win be no prejudice suffered by the respondent if time is extended in order for the deposit to be made as had been directed by the trial Court."

18. That the Notice of Appeal and the Application have been filed without any unreasonable delay and that it is in the interest of justice that the Application be allowed.

Respondents Case

19. The Respondent opposed the Application by filing a Replying Affidavit Dated 24th July 2023 urging that, she is advised by her advocates on record which advice she verily believe to be true that the Application herein offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

20. That the judgment made by the trial Court is very sound and the appeal has no chances of succeeding.

21. That, the Notice of Motion application is pursuant to Order 42 Rule 6 instead of Order 5 Rule 2(b). That the Applicant has filed a Notice of Appeal before the Court of appeal hence ought to have made the instant application before the Court of Appeal instead of the High Court.

22. Pursuant to Order 42 Rule 6(4) of the Civil Procedure rules, an appeal is deemed to have been filed before the Court of Appeal upon lodgment of the Notice of Appeal. Under Rule 5(2) (b) of the Court of Appeal Rules, 2010. Rule 5(2) (b) of the said Rules provides that:

> " Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-
>
> (a) ...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

23. That, Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of *the Constitution*. It illuminates the Court of Appeal inherent discretionary jurisdiction to preserve the substratum of an appeal or an intended appeal.

24. That the Applicant having lodged an appeal at the Court of Appeal, the Court of Appeal is therefore seized with the matter and therefore the Court of Appeal is the only Court that has the jurisdiction to determine an application for stay of execution pending the appeal in its Court.

25. Thus, it must be understood, that whereas Article 159 (2) (d) of *the Constitution* of Kenya, 2010 comes to the aid of litigants to cure procedural technicalities, it cannot cure substantive issues. This was a conclusion that was arrived in the case of Raila Odinga vs IEBC & Others (2013) eKLR where the Supreme Court held that Article 159 (2) (d) of *the Constitution* of Kenya, 2010 simply meant that a Court shall not pay undue regard to procedural technicalities at the expense of substantive justice but that the same was not intended to oust the obligations by litigants to comply with procedural imperatives.

26. That it is trite law that, the High Court can only grant a stay in respect of a pending appeal in the High Court and not in respect of a pending appeal in the Court of Appeal. Moreover, the Applicant has not annexed the draft Memorandum of Appeal and instead annexed a Notice of Appeal that has been Lodged in the Court of Appeal.

27. The Respondent invites the Court, to have the same struck-out and remain fortified by the case of University of Eldoret & Another versus Hosea Sitienei &3 Others (2020) eKLR Kiage JA in his judgment quoted a passage from the judgment of the Court of Appeal in Gurbux Singh Suiri & Another vs Roval Credit Ltd Civil Application NAI 281 of 1995 expounding the Court's reflection in its dictum in the Githunguri case as follows:-

> " In ordinary circumstances the Court has only appellate jurisdiction and in the absence of Rule 5 (2)(b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction....But because of the existence of Rule 5 (2)(b) one does not have to apply to the Court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds de novo or it is not an appeal from the learned Judge's discretion to ours."

28. That practically, with this appeal on record, the Court of Appeal is seized of the matter and the High Court has technically relinquished its authority or jurisdiction over the matter. In other words, there cannot be parallel proceedings both before the High Court and the Court of Appeal over the same subject. That this Court has been rendered functus officio and cannot purport to continue with any other proceedings.

29. As to whether stay of execution should be granted? That, if the Court has jurisdiction to grant such orders then the Respondent submit on whether the stay of execution should be granted or not;

30. That it is clear that the granting of stay of execution pending the hearing and final determination of an appeal is governed under the provisions of Order 42; Rule 6 of the civil procedure rules.

31. That to this end the Applicant is yet to lodge an appeal and that they have only filed a Notice of Appeal to this end. That the conditions thereto have to be compiled to the certainty of this Court. First, the Applicants have not sufficiently established that the Respondent is a man of straw.

32. The Applicant sought to have stated that they personally know the means of the Respondents and the same should have sufficient evidence to back up the same.

33. Second, the Applicant has not sufficiently explained, what substantial loss he is likely to suffer and mere narration of the same in an affidavit is insufficient. It is therefore prudent that the Applicant offers substantial evidence to the fact the 1st Respondent is not a man of means and that will lead to them not to recover any amount disbursed. With these assertions not backed by any sufficient or cogent evidence we believe that the Applicants only wish to deny the Respondent from enjoying the fruits of his judgment. The Respondent relies on the decision of the Learned Lenaola J (as he then was) in the Case of Mutua Kilonzo Versus Kioko David In the High Court of Kenya at Machakos Civil Appeal 62 of 2008 [2008] eKLR.

34. Further in such an application what it means is that the Applicants want to deny the Respondent the fruits of his judgment and to this end. The Applicants do not in any way oppose the Respondent from realizing his judgment. Also, the Applicants are left and are granted the locus standi to lay a basis on the belief that the Respondent will not refund the decretal amount; a basis which should be supported by cogent evidence. Reliance is placed on decision of the learned Odunga J holding in the case of Joseph Gachie T/A Joska Metal Works Versus Simon Ndeti Muema In the High Court at Nairobi (Nairobi law Courts) Civil Appeal 372 of 2012

35. That, the failure of the Applicants to succinctly state and argue that the Respondent is a man of straw and will be unable to refund the decretal amount to the applicants if this appeal succeeds is fatal to this application. That also, the Respondent is able to meet all monetary compensation in terms of costs and any other loss attributed to the application in the event stay herein is denied.

36. The Respondents are guided by the decision of M. Muya J in Directline Assurance Company Vs. Salima Salim Hassan Mombasa HC Mise. Civil Appl. No. 23 of 2013 and by the provisions of Order 42 Rule 6 (1) where it was held that:

> " In the present case it has not been established or argued that the Respondent is a woman or man of straw who will not be able to refund the decretal amount to the applicant in the event the appeal if any succeeds."

37. That, taxation of costs is yet to be conducted hence there is no imminent danger of the execution being carried out by the Respondent.

38. That, it is not sufficient to merely state that the decretal sum is a lot of money and the Applicant would suffer loss if the money is paid.

39. The Applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the status quo would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting

the order of stay the same was echoed in Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another (1986)eKLR where the Court held at page 416 that:-

> "It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. 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."

40. In Gianfranco Manenthi & another Vs. Africa Merchant Assurance Company Ltd [2019| eKLR, the Court observed:

> "... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a Court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The Court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is no matter of willingness by the applicant but for the Court to determine."

41. That the principles for the grant of an order for stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which states as follows;

> "(2) No order for stay of execution shall be made under sub rule (i) unless:
>
> (a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and thạt 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."

42. The Applicant therefore needs to prove the following before an order for stay of execution is granted:

a) That they shall suffer substantial loss in the event the orders sought are not granted.

b) The application seeking stay of execution has been made without unreasonable delay.

c) They are willing to offer security for the due performance of the decree.

43. The grant or refusal of an application for stay of execution is discretionary. We are guided by the authority of Butt vs Rent restriction Tribunal 1979, wherein the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal that such power is discretionary and discretion should be exercised in such a way as not to prevent an appeal.

44. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the judge's discretion. Also, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings. Finally, that the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

45. That, Where the allegation is that the Respondent will not be able to refund the decretal sum, then the burden is upon the Applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See Caneland Ltd. & 2 Others Vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

46. That, the Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words, the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of her judgment. As was well established in Attorney General Vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another: Mukuma vs. Buoga [1988] KLR 645.

47. According to Section 1A (2) of the *Civil Procedure Act*:

> " the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective."

48. That, it's the applicants' intention to deny the respondent the fruits of litigation by delaying the justice hence our prayer is that the application dated 13th April 2022 be dismissed with costs.

49. That, Kuloba, J in Machira T/A Machira & Co Advocates Vs. East African Standard (No 2) |2002] KLR 63 held that:

> " to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."

50. That, the 1st Respondent being the successful litigant in the lower Court and the appeal based on the judgement delivered on 17th March 2021 it's the 1st Respondent's submission that he be awarded costs for being dragged into this pending application by the appellant.

51. The Respondent therefore submit that the application dated 13th April 2022 is bad in law and that the Court is functus officio since the Court of Appeal is ceased of the suit and the application not merited since the same has not met the conditions envisaged under Order 42 Rule 6 of the Civil Procedure Rules 2010 and as such should be dismissed with costs to the Respondent.

Analysis & Determination

52. Whether the High Court is functus officio having delivered judgment in this matter or whether it has power or not to make an order, in this case to stay execution, is a matter of jurisdiction not procedure or practice of the Court of Appeal. I think it is well established that the High Court has inherent jurisdiction to stay any of its orders. Questioning the jurisdiction of the High Court to order a stay of execution must fail.

53. I respectfully disagree with the Respondents assertion that by virtue of filing the Notice of Appeal the Application for stay ought to be made pursuant to Rule 5(2), (b) of the Court of Appeal Rules. Having decided that the High Court has jurisdiction to hear the application for a stay of execution pending appeal I now turn to the merits of the application.

54. An appeal is deemed to have been filed before the Court of Appeal upon lodgment of the Notice of Appeal. under Rule 5(2) (b) of the Court of Appeal Rules, 2010. Rule 5(2) (b) of the said Rules provides that:

> " Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-
>
> (a) ...
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

55. In this instance the Memorandum of Appeal ought to have been filed before the Court of Appeal by the 30th June 2022, to crystalize the lodging of Appeal. The Applicant has not disclosed if the Appeal was ever filed.

56. The principles upon which this Court may grant a stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6 of the Civil Procedure Rules, which requires an applicant seeking a stay of execution pending appeal to demonstrate that -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

57. An Order of Stay against execution of judgment/decree can only subsist while an appeal exists and where no such Appeal exists then such Stay orders have no existential basis to continue being.

58. A stay of execution of judgment/decree should only be granted where sufficient cause is shown. In Antoine Ndiaye v African Virtual University (2015) eKLR Gikonyo J opined that -

> " ....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should

be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules..."

59. An Order of stay of execution pending appeal is a discretion of the Court. In Butt v Rent Restriction Tribunal (1982) KLR the Court gave guidance on how such discretion should be exercised and held that: –

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.
>
> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

60. The Primary purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In RWW vs. EKW [2019] eKLR, it was observed that:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

61. The above are the principles that are brought to bear in mind in determining this Application. The first consideration is whether the Application was filed timeously. The judgment of the Court in this matter was delivered on 17th March, 2023 and the Notice of Appeal filed with the Court on the 29th March, 2023. The Application under Certificate of Urgency was filed on the 13th April 2023, a cursory look indicates that the Applicant has moved this Court in a timely manner and without any delay.

62. The Applicant contends that he will suffer substantial loss if the orders sought are not granted as the Respondents will execute the Decree. The Respondents on the other hand contends that there is no loss to be suffered as non-has been demonstrated. I am of the view that, No Evidence of Substantial Loss has been tendered in support of the Application and that the fact that this Court entered judgment against the Applicant cannot be the basis of apprehension of suffering substantial loss.

63. The Affidavit in support of the Application is by a Mr. Erick Ondari a Senior Legal Officer with UAP, the Appellant's insurer at the time of the accident claiming to have authority to swear the affidavit on behalf of the Applicant without evidencing the said authority.

64. The Applicant's affidavit in support alleges in a sweeping statement that the Applicants are apprehensive of an attachment in execution of the judgment. This Court hold and finds that the dependent does not provide any basis for the seeping statement and that the same cannot satisfy the substantial loss test.

65. It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held 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 ... 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."

66. The other consideration is security. In the case of Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR, the Court held that:

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose."

67. The Applicant in this matter has not offered security in the nature of a bank guarantee in the event that the appeal fails but is willing to abide by any conditions as may be set by the Court.

68. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though he brought this Application without undue delay he has not adequately demonstrated the substantial loss that they would suffer and has failed to furnish security as stipulated by sub-rule 2b. However, this Court in dispensing justice is of the considered opinion that, the Applicant stands a disadvantage should stay orders be declined before hearing and determination of the Intended Appeal.

69. In the upshot of the above, this Court in the exercise of its discretion and in the interests of justice, grant the Applicant an Order for stay of execution of judgment/Decree in Nakuru HCA No. 89 of 2020 on the following condition:

a. That the Applicant shall provide security in the nature of a bank guarantee (specific to, and directly relating to this case) from a reputable bank for the entire Decretal Amount of Kshs 916,572.85/- in judgment/Decree in Nakuru HCA No. 89 of 2020, within the next fifteen (15) days from the date hereof.

b. The Applicant shall provide this Court with a copy of the filed Memorandum of Appeal before the Court of Appeal within the next fifteen (15) days from the date hereof.

c. The Order of Stay of execution of Judgment /Decree pending hearing and determination of Appeal shall only apply upon confirmation of an appeal having been filed on time.

d. The Costs of this Application shall be in the cause.

e. A default of Order (a) and/ or (b) above by the Applicant, shall automatically lapse the Order of Stay of Execution of Judgment/Decree granted.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 30TH DAY OF OCTOBER 2023

_____

MOHOCHI S.M

JUDGE