REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 33 OF 2021

ROSE A. OCHANDA.....1ST APPELLANT

AGRICULTURAL FINANCE CORPORATION.....2ND APPELLANT

VERSUS

RICHARD WAFULA MAKOKHA T/A

R.M. WAFULA & CO. ADVOCATES.....RESPONDENT

(Being an appeal against Judgment of Hon. L. Kassan

Chief Magistrate in Eldoret CMCC No.533 of 2016)

JUDGMENT

Introduction & Background

1. There are two applications filed by the appellants. The first is dated the 13th of August 2021 and primarily seeks to set aside and or vary the order of stay of execution issued on the 23rd of July 2021 by Chief Magistrate Hon. L. Kassan in Eldoret CMCC No.533 of 2016. In the said decision, the Hon. Kassan ruled in favour of the respondent and awarded him Kshs 5,000,000 as general and punitive damages and Kshs 1,000,000 as damages in lieu of apology bringing the total decretal sum to Kshs 6,000,000.

2. The second application is dated the 16th of September 2021 and seeks stay of execution of judgement delivered on 29th March 2021 in Eldoret CMCC No. 533 of 2016, restraining orders against the respondent from proclaiming, attaching or auctioning or holding or converting or in any manner dealing with the movable assets and or any other assets belonging to the appellants; and for the respondents to show cause why stay cannot be held in contempt of court order dated 18/8/2021.

3. The two applications were supported by the affidavits of John Kithinji, the legal officer of the 2nd appellant, dated the 13th of August 2021 and 16th August 2021 respectively wherein the grounds are similar. In particular, the appellants contend that their appeal would be rendered nugatory if the court fails to grant them the orders sought. They point out the fact that the respondent attempted to execute judgement by instructing Seventy-Seven auctioneers to proclaim and attach the movable assets of the 2nd appellant despite a court order staying execution. Accordingly, the appellants contend that this act constitutes impunity and a threat to their movable assets which requires this court's intervention. Furthermore, the appellants contend that their appeal has high chances of success and that if the court does not grant the orders sought, there is real likelihood that the respondent will execute the decree and orders issued pursuant to the impugned decision of the lower court, thus rendering their appeal nugatory.

4. The two applications are opposed in their entirety by the respondent through his replying affidavits dated the 2nd and 29th of September 2021. In particular, the respondent contends that the two applications do not meet the pre-requisite of Order 42 Rule 6 of the Civil Procedure Rules and ought to be dismissed. He argues that no substantial loss will be occasioned on the appellants assets, since his law firm serves as enough security to settle the decretal sum in one bullet. Furthermore, the respondent argues that he is a man of means and can pay the decretal sum if the appeal succeeds.

5. Secondly, the respondent contends that the applications are incompetent since first, the firm of Eurry Mabonga is not properly on record as no leave was obtained by the said firm to come on record in place of M/s Nyachiro Nyagaka and Company Advocates, and secondly, the application has been overtaken by events as the reliefs sought were already granted by the lower court and this court has not been properly moved.

6. In addition, the respondent avers that the court never made any orders of stay of execution pursuant to the application dated the 13th

August 2021 and that upon vacating the orders of stay granted in the subordinate court, no orders were subsisting stopping the execution of the decree and or restraining the respondent from levying execution. The respondent thus submits that the execution levied by M/s Seventy-Seven Auctioneers was lawful and in compliance with the law.

7. The applications were canvassed by way of written submissions. All the parties have filed their respective submissions.

Appellants Submissions

8. The appellants through their submissions dated the 18th of November 2021 observed that an applicant for stay of execution of a decree or order pending appeal must satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules and made reference to the case of ***Antoine Ndiaye vs. African Virtual University [2015] eKLR***. In this regard, the appellants submitted that they are ready and willing to provide security in form of a bank guarantee or as the court may order. This, they termed as a clear demonstration of good will, and relied on the case of ***Focin Motorcycle Co. Limited vs Ann Wambui & another [2018] eKLR***.

9. Secondly, it was their submission that they will suffer substantial loss. In particular it was their submission that since the 2nd appellant is a public institution with a revolving fund to serve farmers, it would be prudent that the decretal sum goes to aid farmers as the appeal progresses rather than it being deposited in court. This, they see as constituting special conditions that tilt the ruling in favour of the appellant.

10. Lastly, it was their submission that a party should have the right to choose whether to remain with the same advocate or engage another on appeal, without being required to obtain leave from the concerned court, since the appeal constitutes new proceedings and not a continuation of proceedings in the lower court. In submitting so, the appellant relied on the case of ***Tobias M. Wafubwa vs ben Butali [2017] eKLR***, where the court was of the view that once judgment is entered, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court.

11. The appellants urged the court to allow the application as prayed.

Respondent's Submissions

12. In his submissions dated the 18th of October 2021, the respondent reiterated that he is a man of means that thus capable of refunding the decretal sum of Kshs 6,000,000. It was his submission that the assets (Motor Vehicle KCS 803Q Toyota Harrier valued at Kshs 3,000,000) and his law firm constitute enough security to settle the decretal sum in one bullet. In any event, the respondent submitted that the appellants have failed to demonstrate that he cannot be able to repay the decretal dues in the event the appeal succeeds.

13. Furthermore, the respondent observed that the applications do not meet the pre-requisites of Order 42 of the Civil Procedure Rules and the same ought to be dismissed, as no substantial loss is to be suffered by the appellants. It was his submission that he ought to enjoy the fruits of his judgement.

14. In addition, the respondent noted that the appellants have not furnished security for the due performance of the decree considering that security is one of the mandatory requirement for the grant of such application as this.

15. Finally, the respondent submitted that the appellants are acting in bad faith since they have not deposited half of the decretal sum as ordered by the lower court and further, that no leave was obtained by the current advocates. The respondent thus urged court to dismiss the application with costs.

Determination

16. I have considered the application and submissions by counsel, including the authorities cited by the parties, and I am satisfied that the single issue for determination is whether the applicants have met the threshold for grant of stay and injunctive orders sought. In considering an application of this nature, a judge exercises wide and unfettered discretions, but which must however be exercised judiciously and never arbitrarily or capriciously. The Court has to take into account, among other factors, if substantial loss will be suffered; whether the application has been filed without unreasonable delay and lastly security. The court must also look at the extent and the degree of prejudice to the respondent if the application is granted. See ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1977] eKLR.***

17. However, before applying the above principles to the application before court, I have to first determine whether the firm of Eurry Mabonga are rightly before this Court, based on the respondent's submissions that they did not seek the Court's leave to come on record in place of M/s Nyachiro Nyagaka and Company Advocates who were acting for the applicant in the trial court, as per the provisions of order 9 rule 9 of the Civil Procedure Rules.

18. ***Order 9 rules 9*** **and** ***10*** **of the Civil Procedure Rules** provide as follows;

> ***"9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."

19. As well noted in ***Tobias M. Wafubwa vs Ben Butali Civil Appeal 3 of 2016 [2017] eKLR***, the application of *rule 9* is an issue that has incessantly recurred and vexed the courts, and in determining the issue, of whether or not compliance is mandatory, courts have reached varied conclusions dependent on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their application, and the mischief that sought to be addressed requires to be taken into account.

20. In the instant case, the case involves an appeal from the Chief Magistrate's court to the High Court, and it is with this in mind that I take cognizance of the apt observations of Sitati, J. in the case of ***Stanley Mugambi vs. Anthony Mugambi [2005] eKLR*** where it was stated thus;

"The issue for determination is whether commencing an appeal by an advocate other than the one who conducted the case in the lower court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming applications by advocates wishing to file appeals on behalf of litigants who were represented by different advocates in the lower court. I would agree with Mr. C. Kariuki for the appellant/respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an advocate after judgment with the aim of denying the advocate the fruits of their costs. I therefore find that this application is misplaced and misconceived. It would, in my view, be draconian to strike out the appellant's appeal on the ground raised in the application."

21. The above observations were supported by Makhandia, J, (as he then was) in the case of ***Martin Mutisya Kiio and Another vs. Benson Mwendo Kasyali, Machakos High Court Misc. Application No. 107 of 2013*** where in respect of *order 9 rule 9* it was asserted that;

"... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."

22. These words were echoed by Emukule J, in the case of ***Kenya Pipeline Company Limited vs. Lucy Njoki Njuru [2014] eKLR*** who adopted the same approach when he stated;

"More importantly unlike the ordinary trial or review, or other interlocutory applications within the same cause or matter, an appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them."

23. Finally, in ***Kazungu Ngari Yaa v Mistry vs. Narani Mulji & Co. Ltd [2014] eKLR***, the claimant raised a preliminary objection on the grounds that a firm of advocates had come on record post judgment by filing an application for stay of execution without filing a notice of appointment. The court held that as the advocates were coming on record for the first time where no appearance or defence had been filed there was no requirement to file a notice for appointment.

24. I share the same view and would adopt the same approach in matters concerning appeal. Once a judgment is entered, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court. As such, parties should have the right to choose whether to remain with the same counsel/advocate or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

25. This is also the essence of Article 159 2(d) of the Constitution of Kenya 2010 and Sections 1A of the Civil Procedure Act which require greater value to be placed on substantive justice rather than procedural technicalities. I am therefore of the considered view that even if I were to find that leave ought to have been filed, which I have not, proceeding to strike out the applicants applications, would amount to giving due regard to technicalities of procedure contrary to Article 159 (2) (d) of the Constitution of Kenya 2010, and would in my view defeat the overriding objectives as set out under section 1A of the Civil Procedure Act, whose purpose is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes.

26. Having said that, the gist of this case is whether the applicants have met the criteria set out under ***Order 42 Rule 6 of the Civil Procedure Rules*** on stay pending appeal.

27. ***Order 42 Rule 6 (2*****) of the Civil Procedure Rules** sets out the principles that guide court in considering whether to grant stay of execution pending appeal. The provision stipulates:

"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."

28. The provisions of Order 42 Rule 6 indicate two things. First, the high court is empowered to order stay of execution pending appeal either in exercise of its inherent jurisdiction or under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. This position finds support in ***Singh v Runda Estates Ltd (1960) EA 263*** and was reiterated by court in ***Paul Kamura Kirunge v John Peter Nganga [2019] eKLR.***

29. However, this power is discretionary and must be exercised judiciously as was held in ***Canvass Manufacturers Ltd vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853.***

30. This is because in the exercise of this power, the court has to balance between the right of a successful litigant to enjoy the fruits of his/her Judgment with the right of appeal of a dissatisfied litigant whose appeal should not be rendered nugatory in case his or her appeal succeeds and the order of stay was not granted. After all the purpose of stay is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. ***See Odunga's Digest on Civil Case law and Procedure, 2nd Edition, Volume 4, Law Africa 2010 at 3749***.

31. Secondly, the provisions of Order 42 Rule 6 anticipate that for an application for grant of stay to be successful, an applicant must prove the following conditions:

a. That substantial loss may result unless the order is made

b. That the application has been brought without undue delay and lastly

c. ***That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.***

32. These conditions/criteria are central to the decision as to whether the order of stay of execution of decree/judgment may be granted by court. In ***Civil Appeal No.107 of 2015, Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR,*** the Court while affirming these criteria held that:

"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..vs… Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) 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."

33. These conditions are cumulative and mandatory in nature. As such, should an applicant fail in establishing a single criterion, then stay of execution cannot be granted. This position finds support in ***Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR*** it was held that: -

"of all the four, not one or some, must be met before this court can grant an order of stay..."

34. In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted. This position was adopted by the High Court in ***Butt vs Rent Restriction Tribunal [1979]*** *and* ***Hassan Guyo Wakalo.vs.Strsaman EA Ltd (2013)*** as follows:-

"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."

35. After all the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant. It would otherwise frustrate an appellant and ultimately the ends of justice should the order of stay be denied and the appeal be allowed. The Court must therefore balance the interest of an applicant seeking to preserve status quo and opt for the lower rather than the higher risk of injustice as was affirmed by the court in ***Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.***

36. The question therefore is what amounts to substantial loss? In any case, demonstrating that one is likely to suffer substantial loss in case an order of stay is not granted, is core in the grant of a stay order. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** the court observed: -

"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."

37. Similarly, in ***Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*** the court stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that"

38. Substantial loss must therefore, in my opinion, be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal. In ***Silverstein –vs- Chesoni [2002]1 KLR 867*** the Court held: -

"Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory."

39. In the instant case, the appellants argue that if the order of stay is not granted, the appeal would be rendered academic and therefore defeated. The crux of the appeal is two pronged; first, the appellants contend that the letter in dispute was addressed to the firm of RM Wafula and not Richard Wafula as a person and that as a result, the respondent was a wrong party to the suit. Secondly, they argue that as a result of the respondent being a wrong party, the damages awarded were unreasonable and manifestly excessive. Furthermore, in their submissions, the 2nd appellant noted that being a public institution with a revolving fund to serve farmers, the decretal sum would be more utilized in serving farmers than being paid into an account pending the outcome of the appeal.

40. The question that this court must therefore address itself to is whether the appellant has met the threshold for grant of stay. That is, whether substantial loss would occur if the order of stay is not granted.

41. As highlighted above, substantial loss must be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal.

42. In the present case, I note from the application dated 16th September 2021 and in particular the supporting affidavit of John Kithinji, the legal officer of the 2nd appellant that despite the respondent having acknowledged receipt of order of court conditionally staying the judgment of the lower court proceeded to instruct the firm of Seventy-Seven auctioneers to attach the movable assets of the 2nd appellant. Consequently, the auctioneers firm proclaimed the movable assets of the 2nd appellant on the 14th of September 2021. The respondent did not deny but actually admitted the same, noting that the same was lawful.

43. Taking into account the foregoing, I am of the considered view that the 2nd appellant stands to suffer substantial loss if its assets are attached and sold. Moreover, considering that the 2nd appellant is a public institution established under the Agricultural Finance Corporation Act 1969 to assist in the development of agriculture and agricultural industries by making loans to farmers, co-operative societies, incorporated group representatives, private companies, public bodies, local authorities and other persons engaging in agriculture or agricultural industries, it would be against public interest and policy to allow its assets to be proclaimed, attached and sold. This is so because as a public institution, the 2nd appellant is critical to the health of the nation in providing farmers with the necessary support to provide food for the nation. This is the reason why it is frowned upon to execute judgement/decree against the government – including public institutions/bodies- since it may have a direct impact on the delivery of critical/much needed services to the public and may also affect the duties of that institution as it will not be capable of performance and this may lead to chaos, anarchy and the breakdown of the Rule of Law. This rational was aptly discussed by **Ibrahim** and **Visram, JJ** (as they were) in ***Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74***, as hereunder:

"History and rationale of Government's immunity from execution arises from the following…Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered…As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure…The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inudated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the State operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the

objective of the Law that prohibits execution against and attachment of the Government assets and property."

44. A similar finding was affirmed in ***Kenya National Highways Authority v Ahmednassir Maalim Abdullahi [2021] eKLR***.

45. In the circumstances, I am satisfied that the 2nd appellant stands to suffer substantial loss if the stay and injunctive orders are not issued. The injunction in any case serves to preserve the status quo and restrain the respondent and or his agents or any other person, from attaching and or in any way auctioning any assets of the 2nd appellant.

46. In the end, having considered the applications, submissions and the law, it is this court's finding that the law restricts the proclamation and attachment of the applicant's assets and the 2nd applicant being a government institution the order of stay sought for herein is granted without any condition pending the hearing and determination of the intended appeal. The two applications before the court therefore succeed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE