



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO E39 OF 2020**

**JULIUS CHOMBA CHOMBA NYAGA.....1<sup>ST</sup> APPELLANT**

**JOYMAX HOLDINGS LIMITED.....2<sup>ND</sup> APPELLANT**

**DAVID NGUMI MWANGI.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**MARY NYAMBURA MATHARRA, CATHERINE WANJIKU MUIRURI &**

**EMMAH MWAHAKI GITUTU MATHARA (Suing as the Administrators of the**

**Estate of the Estate of BRIAN MUMO alias BRIAN MUMO MUNYAO-Deceased.....RESPONDENTS**

**RULING**

1. By a Motion dated 11<sup>th</sup> January, 2021, the Applicants herein seek an order staying execution of the judgement delivered by the trial court on 3<sup>rd</sup> December, 2020 pending the hearing and determination of the appeal.
2. The application was supported by an affidavit sworn by **David Ngumi Mwangi**, the 3<sup>rd</sup> applicant herein. According to him, judgement was on 3<sup>rd</sup> December, 2020 delivered in which liability was determined at 90:10 in favour of the Respondents and the Respondent was awarded Kshs 50,000/- for pain and suffering, Kshs 100,000/- loss of expectation of life, Kshs 4,160,000/- for loss of dependency and Kshs 28,380/- special damages plus costs and interests.
3. According to the deponent, the said award is excessive and they have high chances of success and this application has been presented without inordinate delay and they are ready, willing and able to furnish such reasonable security with such time as the court may direct.
4. According to the deponent, the Respondent is a person of unknown means hence their apprehension that should the decretal sum be paid out, the appeal will be rendered an academic exercise.
5. The Respondents undertook to furnish the court with bank guarantee as security for stay pending appeal.
6. In response to the application, the Respondents filed a replying affidavit sworn by **Catherine Wanjiku Muiruri**, the deceased's wife. According to her the award was not excessive based on the age of the deceased, the authorities and the rate of inflation. It was averred that the application was based on speculations with no proper grounds hence lacked merit.
7. The deponent lamented that the matter was old as the cause of action arose 3 years ago hence the estate of the deceased is likely to be prejudiced if the orders sought are granted as the application is only meant to delay and/or deny the Respondents the fruits of justice.
8. The Applicants in their submissions relied on **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR** for the position that in such application, the Applicant is not required to prove that he has an arguable appeal. They also relied on **Esther Wamaita Njulia & 2 Others vs. Safaricom Limited [2014] eKLR** as regards the principles applicable in applications requiring the exercise of discretion. As for principles guiding stay of execution pending appeal, they relied on **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**.
9. On the issue of substantial loss, it was reiterated that the Applicants were ready and willing to issue a banker's guarantee and that the

Respondent's means were unknown hence is unlikely to refund the decretal sum in the event that the appeal is successful. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was submitted that the Respondent is the only one who can specifically show that she has the means to repay the decretal sum if the appeal succeeds. According to the Applicant the amount awarded is substantial and in the event that the Respondent is unable to refund the same and the appeal succeeds the said success would be rendered nugatory and the Applicants would be exposed to irreparable damage.

10. It was submitted that there was no inordinate delay in making the application and that the Applicants were willing to furnish security. It was therefore submitted that the Applicants had fulfilled all the necessary conditions for the grant of the orders sought hence the same ought to be granted.

11. No submissions were filed on behalf of the Respondents who through the learned counsel **Ms Naswa** informed the court that their only concern was the form of security.

### **Determination**

12. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

*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.*

14. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. 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" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

15. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intent of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

**“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in**

an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

16. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

**“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.”**

17. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

**“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”**

18. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

**“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”**

19. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was 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.”**

20. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

21. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

22. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

23. In this case, only grounds that the applicants have for believing that the Respondents would not be able to refund the decretal sum herein are because the Respondent is a person of unknown means. The Respondents are three in number. The affidavit does not state who amongst the three is the person referred to as a person of unknown means. It is clear that the affidavit in support of the application was very casual

drawn. It is not the kind of affidavit one expects to warrant stay of execution where such a large amount is in issue.

24. In this case however, the decree holders are personal representatives of a deceased person. The Respondents seem more concerned about the nature of security. From the grounds of appeal, it is however, clear that the appeal is only challenging the quantum of damages.

25. In the premises, there will be a stay of execution pending the said appeal on condition that the Applicants remit to the Respondents half of the decretal sum and issues a bank guarantee from a reputable bank to secure the balance of the decretal sum during the period of the appeal within 30 days from the date hereof and in default the application for stay shall stand dismissed.

26. The costs of this application are awarded to the Respondent in any event.

27. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF FEBRUARY, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Wanjiku for the Appellants/Applicants**

**CA Susan**