**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO. E327 OF 2021**

**JESSIKAY ENTERPRISES LTD.........APPLICANT/APPELLANT**

**-VERSUS-**

**GEORGE KAHOTO MUIRURI.............................RESPONDENT**

**RULING**

1. The motion dated 8th June 2021 by **Jessikay Enterprises Ltd** (hereafter the Applicant) essentially seeks an order to stay execution of the judgment and decree in **Milimani CMCC No. 3205 of 2019** issued in favour of **George Kahoto Muiruri** (hereafter the Respondent), pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Section 3A of the Civil Procedure Act, Order 42 Rule 1 & 6 and Order 51 Rule 1 and 3 of the Civil Procedure Rules. On grounds, among others that, being dissatisfied with the judgment and decree of the subordinate court delivered on 4th June, 2021, the Applicant has preferred an appeal.

2. The affidavit in support of the motion is sworn by **Kevin Ngure** who describes himself as the Senior Claims Manager at **Directline Assurance Co. Ltd,** at whose instance the claim in the subordinate court was being defended and is therefore authorized and competent to swear the affidavit pursuant to his company's right of subrogation to defend, settle or prosecute claims filed against or in the name of **Jessikay Enterprises Ltd,** their insured under the policy of insurance. The gist of his affidavit is that being dissatisfied with the judgment of the subordinate court the Applicants have preferred an appeal; that the appeal is meritorious and arguable with a high chance of success; that unless an order of stay pending appeal is granted by this court, the Respondent is likely to execute thereby rendering the appeal *"hopeless"*. The deponent further avers that the Respondent will not suffer any prejudice that cannot be compensated through costs and expresses willingness to provide security by way of a bank guarantee.

3. The motion was opposed through grounds of opposition dated 28th June, 2021. To the effect that the motion is an abuse of the court process; it is an afterthought and lacking in substance; it is totally defective and unattainable and; it is only meant to deny the Respondent the fruits of his judgment.

4. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant's counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Counsel asserted that the motion was filed barely a week after the judgment of the lower court was delivered. About substantial loss, it was submitted that the Respondent did not furnish the court with any documentary evidence to prove his financial standing and or capability to refund the decretal sum in the event the Applicant succeeds on its appeal. Further, while relying on the decisions in **Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR** and **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR**, counsel submitted that appeal is arguable as it raises serious questions of law and fact which ought to be considered on appeal. In conclusion counsel expressed the Applicants' willingness to provide security by way of a bank guarantee and urged the court to allow the motion.

5. On the part of the Respondent, counsel submitted the Applicant has not met the threshold for the grant of an order to stay of execution. Relying on the timeless decision in **Mukuma v Abuoga (1988) KLR 645** counsel submitted that the conditions for the grant of stay of execution pending appeal are inseparable and must be satisfied by the successful applicant. Further, citing the decisions in **Jeny Luesby v Standard Group Ltd [2014] eKLR** and **Equity Bank Ltd (Supra)** counsel argued that the commencement of the execution process is a lawful process and cannot be equated to substantial loss. That the Applicant has failed to demonstrate substantial loss. The court was urged to dismiss the motion but if inclined to allow the same, require that half the decretal sum be released to the Respondent.

6. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to grant stay of execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt v Rent Restriction Tribunal [1982] KLR 417.**

7. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

**“(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 subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.**

8. The cornerstone consideration in the exercise of the discretion is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the **Shell** case are especially pertinent. These are that:

**“1. …..**

**2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**

**3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**

**4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”**

9. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The **Platt Ag JA** (as he then was) stated inter alia that:

**“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts… (</u>**<u>emphasis added)</u>**”**

10. The learned Judge continued to observe 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. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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</u>.”** (Emphasis added)

11. Earlier on, **Hancox JA** in his ruling observed that

**“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”**

**As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”**

12. The Applicant’s chief claim is that unless an order to stay execution pending appeal is granted, the Respondent is likely to execute the judgment of the subordinate court thereby rendering the appeal *“hopeless”*. Concerning this claim, the Respondent has submitted correctly that the Applicant has not demonstrated with particularity how the impending execution will lead to substantial loss. Execution is a lawful

process and the mere fact that it is carried out is not *ipso facto* evidence of substantial loss. Equally, the right of execution where it has accrued cannot be stayed, save for a just cause, and with conditions. The Applicant was duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants.

13. These are matters to be established through affidavit evidence and it is not available to the Applicant to allude to such loss through submissions, as done here. The Applicant having failed to establish the likelihood of substantial loss cannot be heard to submit that the Respondent has not proven his means. In the **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Anor. (2006) eKLR** the Court of Appeal stated that:

> **"This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."**

14. As held in the **Shell** case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to justify keeping the Respondent out of the fruits of his judgment. It is trite that without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money. In this case the Applicant swore that if stay is denied, its appeal would be rendered "hopeless", whatever that means.

15. The upshot of the foregoing is that the motion dated 8th June 2021 is devoid of merit and is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2022.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Mr Kabita**

**For the Respondent: Mr Waiganjo**

**C/A: Carol**