



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**CIVIL APPEAL NO E35 OF 2021**

ZION TOURS LIMITED.....1<sup>ST</sup> APPELLANT

MULUMBI MUTISO BENJAMIN.....2<sup>ND</sup> APPELLANT

STEPHEN MUNGUTI WAMBUA.....3<sup>RD</sup> APPELLANT

**-VERSUS-**

CAROLYNE NDINDA MUNYAO.....RESPONDENT

CHARLES MWENDWA MUINDI

(Suing as the Administrators of the

Estate of the Estate of BRIAN MUMO

alias BRIAN MUMO MUNYAO-Deceased)

**RULING**

1. By a Motion dated 28<sup>th</sup> April, 2021, the Applicant herein seeks the following orders:

1) **THAT** this Application be certified urgent, service be dispensed with thereof and the same be heard *ex parte* in the first instance. .

2) **THAT** this Honourable Court be pleased to order a stay of execution of the Judgment delivered by the Trial Court in Machakos Civil Suit No. 435 of 2018 on 25/02/2021 pending the hearing and determination of this Application.

3) **THAT** this Honourable Court be pleased to Order a stay of execution of the Judgment delivered by the Trial Court in Machakos Civil Suit No. 435 of 2018 on 25/02/2021 pending the hearing and determination of the Machakos Civil Appeal No. E35 of 2021.

4) **THAT** this Honourable Court be pleased to order stay of execution of the Warrants of Attachment and sale issued on 23<sup>RD</sup> April 2021, Proclamation dated 26<sup>TH</sup> April, 2021 or any form of ad

vertisement of the Defendant's proclaimed properties pending the hearing and determination of this application *inter-partes*.

5) **THAT** this Honourable Court be pleased to order stay of execution of the Warrants of Attachment and sale issued on 23<sup>RD</sup> April 2021, Proclamation dated 26<sup>TH</sup> April, 2021 or any form of advertisement of the Defendant's proclaimed properties pending the hearing and determination of the Appeal filed at the High Court of Kenya at Machakos as Civil Appeal No. E35 of 2021.

6) **THAT** the Auctioneers, Crater View Auctioneers be ordered to tax their costs on the scale.

7) **THAT** the Appellant/Applicant be allowed to furnish the court with bank guarantee as security pending the hearing and determination of the intended appeal and the instant application.

8) **THAT** the costs of this Application abide the outcome of the Appeal.

9) **THAT** the Application be heard *inter parties* on such date and time as this Honourable Court may direct.

2. The application was supported by an affidavit sworn by **Kevin Ngure**, the Legal Officer at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KCE 102L at whose instance the above cited suit was defended. According to the deponent, he swore the supporting affidavit by virtue of their rights of subrogation under the relevant policy of insurance and the common law rights to defend, settle and prosecute any claims in the insured's name.

3. According to the applicant, judgement was delivered in the said case on 25<sup>th</sup> February, 2021, judgment was delivered as against the Applicant herein in the following terms, Liability 90%, General Damages under **Law Reform Act** Kshs. 200,000.00, Under **Fatal Accident Act** Kshs. 1,200,000 and special damages Kshs. 130,500 = plus interest and costs of the suit.

4. According to the deponent, being aggrieved and dissatisfied with the said whole judgment on quantum they have instructed M/S Kimondo Gachoka to appeal against the said judgement and based on legal counsel they believe that the intended appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chance of success since the trial court did not consider the Applicant's evidence on quantum.

5. In the meantime, the Appellant/Applicant is reasonably apprehensive that the Respondent may levy execution against the Appellant/Applicant and the same will render the Appellant/Applicant appeal nugatory and will cause the Appellant/Applicant to suffer irreparable loss and damage. To the deponent, the Appellants/Applicants are reasonably apprehensive that if the decretal amount is paid over to the Respondent, the said Respondent would be in no position to refund the same if the Appeal is successful.

6. The deponent averred that they were ready and willing to furnish the court with bank guarantee as security, pending the hearing and determination of the intended appeal and instant application herein.

7. There was another supporting affidavit sworn by **Stephen Munguti Wambua**, who averred that he was the insured of motor vehicle registration number **KCE 102L** at whose instance this claim is being prosecuted. Apart from the obviously misleading description of the deponent in the said affidavit that he was the insured while the applicant is indicated as a limited liability company, nothing new was disclosed in the said affidavit.

8. In the submissions filed on behalf of the Applicant, it was contended that the right of appeal is a constitutional right which is the cornerstone of the rule of law and that to deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution.

9. According to the applicant, the Memorandum of Appeal filed on 23<sup>rd</sup> March, 2021 within the lower court stay period sets out precisely the grounds upon which the Appellants intends to appeal the decision of the lower court. The Appellants are appealing mainly on quantum as an excessive award was made by the lower court which is not proportionate to the injuries suffered and the evidence that was tabled before court which injuries ought to have attracted a lower award based on the similar recent decided cases. It was therefore submitted that the Memorandum of Appeal herein is arguable and raises serious points of law and fact that warrant the Court's intervention on appeal.

10. According to the applicant, in applications for stay pending Appeal, in the subordinate courts it is not a requirement to show that the Appeal has high chances of success and that the Applicant only needs to show he has an arguable appeal. This submission was based on the decision of the Court of Appeal in **Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR**. On that basis it was submitted that the Applicants Appeal herein is merited and is based on very strong grounds with high chances of success and it is therefore paramount and important that the Appellants are given an opportunity to ventilate their Appeal on merits.

11. It was further submitted that from the supporting affidavit, it has been demonstrated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants/Appellants Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing. The Respondent, it was noted, in his Replying Affidavit, did not dispute this and/or show that she had means of paying the decretal amount in the event judgment was delivered in favour of the Applicant. However, it is only the Respondent who can specifically show that she has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds and reliance was placed on **Edward Kamau & Anor vs. Hannah Mukui Gichuki & Anor (2015) eKLR**.

12. Based on the said decision, it was contended that in the absence of an Affidavit of means the Respondent's financial status is still unknown and has not been proven. There is therefore likelihood that the Respondent has no means to refund the decretal amount. Since there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, pursuant to Section 112 of the **Evidence Act**, the evidentiary burden is shifted to the Respondent to show that she has financial resources to satisfy the decretal amount. Since the Respondent has chosen not to show that she has financial resources to pay the decretal amount in the event the Appeal already filed succeeds, the court was urged to allow the Application for stay of execution.

13. According to the applicant, the Applicants filed the Appeal herein within time as judgment in the lower court was delivered on the 25/2/2021 and the memo appeal filed on the 23/3/2021 thus no unreasonable delay has been caused by the appellant.

14. As regards security, it was submitted that the Appellants are ready and willing to provide security in the form of a bank Guarantee pending the hearing and determination of the appeal. In this respect, the applicant cited **Selestica Limited vs. Global Rock Development (2015)** and submitted that the Applicants having satisfied all the conditions set out in Order 42 Rule 6, they should be granted an order of stay of execution pending hearing and determination of the Appeal.

15. In response to the Application, a replying affidavit was sworn by **Morris M. Mulei** the Respondent's advocate in which he deposed that the applicant has not presented a case worthy of the orders sought herein. According to him, while the applicant is required to prove specific details of substantial loss for purposes of praying for an order of stay of execution, the applicant has not presented evidence implicating the respondent as a person of straw who will not be able to repay her debts.

16. It was his view that a bank guarantee is not sufficient for purposes of security for costs and that the respondent is already being delayed from enjoying the fruit of her judgment as she has been litigating since 2018.

17. It was his view that the court should order the applicant to release half of the judgment sum for the benefit and use by the respondent since a quick perusal of the appeal reveals that it has minimal chances of being disturbed by this court.

18. It was his contention that the applicant has not met the threshold for grant of stay under Order 42 Rule 6 of the **Civil Procedure Rules 2010** hence the application should be dismissed with costs.

### **Determination**

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

20. 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.*

21. 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.

22. 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 intendment 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.”

23. 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.”**

24. 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.”**

25. 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.”**

26. 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.”**

27. 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.**

28. 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.**

29. 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.

30. In this case, the applicants have not disclosed their grounds for believing that the Respondents would not be able to refund the decretal sum herein as the supporting affidavit is deposed to by an agent of the applicants' insurers as opposed to the applicants themselves. They

have not disclosed the source of information that the Respondents will be unable to refund the decretal sum if paid over to him. In my view it is not sufficient to simply make a bare averment that the Respondents will not be able to refund. As far as the Court is concerned the Respondents are the successful parties and has a right to enjoy the fruits of his judgement and brakes ought not to be applied to that right unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement that ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief.

31. In this case however, the decree holders are personal representatives of a deceased person. The Respondent have not sworn any affidavit but rely on an affidavit sworn by their advocates which has not attempted even by way of bare averment that the Estate will be in a position to refund the decretal sum if paid over to the Estate. I have however perused the intended grounds of appeal and it would seem that the applicants are more aggrieved by the extent of liability and quantum of damages as opposed to the entire liability.

32. 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.

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

34. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Kamene for Mr Mulei for the Respondent**

**CA Susan**