



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 46 OF 2020**

**FROM THE ORIGINAL CIVIL SUIT MERU 161 OF 2017**

**SILVANUS KIZITO.....APPLICANT**

**VERSUS**

**EDITH NKIROTE MWITI.....RESPONDENT**

**RULING**

1. On 5/6/2020 the lower court delivered a judgment by which it awarded to the respondent, as plaintiff then, an aggregate sum of kshs. 3,386,997.00 as general and special damages plus costs and interests.
2. That decision attracted and provoked the current appeal whose mainstay is that the award for general damages was too high while the special damages were never specifically proved as only invoices were produced.
3. After filing the appeal, the appellant approached the trial court with an application for stay dated 2.7.2020 seeking stay pending the hearing and determination of this appeal but the same was heard and dismissed by a ruling dated 8.9.2020 on the basis that the court had become *functus officio* and could not consider the application which ought to be canvassed before the appellate court.
4. In the instant application the appellant puts forth the dismissal of the application before the trial court as having aggrieved him in that he has an arguable appeal which will be rendered nugatory in the event of success for reasons that the respondent is a woman of the straw who would be unable to effect a refund.
5. It is further asserted that stay was necessary to forestall execution which was threatened by the respondent which would visit upon him irreparable damages and substantial loss. In the affidavit in support of the application the applicant reiterates the grounds in the application and adds that he is prepared to abide by any conditions the court shall impose as a term for grant of stay because he is insured and the insurer has the necessary capacity to meet the decree and such conditions to secure the due performance of the decree after the appeal is concluded.
6. By a replying affidavit sworn on 1.10.2020, the respondent opposed the application by terming it a collection of falsehood intended to hoodwink the court. The respondent contended that there was nothing demonstrated to verify the fact that she is of the straw and unable to effect a refund in the event that the appeal succeeds after she would have been paid. She asserted being an employee of the civil service and could readily effect a refund and that there had been no demonstration that any irreparable or substantial loss would be occasioned to the appellant.
7. The fact that grant of stay is a discretionary matter was then underscored it been stressed that it is only available in deserved cases and to a party who has endeared himself to the court. However, the respondent concluded, in appreciation of the unfettered discretion of the court to grant stay, that in the event the court was to grant stay, same should be upon terms that half of the sum is paid to the respondent while the other gets deposited with an escrow account.
8. The court directed that the matter be canvassed by way of written submissions to which discretions, the applicant filed submissions dated 11.11.2020 on the 21.12.2020 while the respondent filed theirs on the 5.5.2020.
9. Order 42 Rule 6(1) provides:-;

**“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.”

10. I read that provision to dictate and mandate that the application for stay be made in the first instance to the court from whose decision the appeal is preferred and only after that court considers and determines such an application can the aggrieved party approach to appellate court to set aside the order made by the court appealed from.

11. It was thus incorrect for the trial court to have held as she did that the court had become *functus officio*. The court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. In **Leisure Lodge Ltd Vs Japhet Asige and another (2018) EKL**R the court said and held:

**“On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In **Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR**, this court said of the doctrine of *functus officio*:-**

*“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.*

*It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.*

*As was held by the court of Appeal in **Telkom Kenya Ltd vs John Ochanda**, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.*

*Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.*

*I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment-debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become *functus officio*. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.*

*The following are just but examples:*

- *Application for stay*
- *Application to correct the decree*
- *Application for accounts*
- *Application for execution including garnishee applications*
- *Applications for review*
- *Application under section 34 of the Act*

*If one was to accede to the position taken by the judgment debtor that the court is *functus officio* then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed”.*

*This court has not changed its views on the point and reiterates that here it has become *functus officio* as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is *functus officio* because there is a final judgment”.*

12. In this matter I find that the plea of *res judicata* is improperly invoked and cannot be sustained. However, I would agree with the trial court that once it has delivered itself on the merits and foundations of the case, it becomes difficult to interrogate the strength of the appeal challenging that finding. I say it is difficult but not outlawed. It is permissible for a judicial officer to strongly believe in her/his decision but it is expected that once an appeal is preferred, a reversal by the appellate court is one of the probable outcomes. Such appreciation is always a consideration in an application for stay pending appeal.

13. In short, I consider that the trial court ran into error when it narrowed down and confined its decision on the application for stay on the arguability of the appeal only. The court should have been guided by the many authorities on the consideration on an application for stay pending appeal. of those many decisions one may only cite **Kenya shell Ltd Vs Kibiru (1986) KLR 400** to the effect that the court needs to consider whether substantial loss would be occasioned to the applicant if stay is not granted. In that decision the court said-;

**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”.**

18. 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.”**

14. It is clear to me that in arriving at its decision dated 2.7.2020 the trial court fell into an error in exercising its discretion on stay pending appeal. The error in failing to consider matters that were relevant and in making a decision that was patently incongruent with the law. Where such is revealed this court as an appellate court is entitled to interfere even in the realm discretionary powers. It is for that reason that I do set the decision dismissing the application for stay.

15. The other reason I set aside that decision is on the basis that the ruling show that the trial court took the view that the application was improperly before the court for asking the court to sit on an appeal against own decision. There is no evidence that the foundation of the dispute at that time was ever delved into. In such circumstances, when the court considers the matter as not suitable for determination on the merits, the court ought not dismiss the matter but to strike it out. For that reason, I find that dismissal without merit consideration was the improper order to be made.

16. In coming to this determination the court reiterates it view that the real jurisdiction given to the appellate court under Order 42 Rule 6(1) is to consider an application for stay pending appeal only after the trial court has dealt with the matter and determined it either way. I take the view that an appellants first part of call, for an order for stay pending appeal, is the trial court. I also take the position that the appellate court's power is to grant stay only upon setting aside the refusal to grant stay by the trial court. This position leads me to the finding that it is not proper but premature, if not pre-emptory, to run to appellate court for stay before the trial court is afforded the opportunity to consider the matter.

17. Having set aside, the refusal to grant stay by the trial court, what orders should this court make on the requested stay of execution pending appeal?

18. This being a monetary decree, once the court decides to grant stay, the only other consideration is what terms should abide the order for stay in terms of order 42 Rule 6(2) b. The seven (7) grounds of appeal in the Memorandum of Appeal filed herein on the 22.6.2020 do not challenge the finding on liability. The appeal is wholly on the question of damages it being contended that the sum awarded was excessive and that the special damages award was grounded on invoices and without specific proof. I do not hear the appellant to assert that the respondent is not entitled to any damages at all rather the contention is that the sum awarded is too large.

19. In balancing the natural and undoubted right of the appellant to pursue his appeal unhindered and with prospects that if he succeeds and get the award reduced, we will not be exposed to the hardship of having to pursue the respondent, he considers a person of the straw, with the right of the respondent, even if a person of the straw, which I am unable to rule on conclusively because the assertion of being a civil servant is made but without any evidence, I do impose a condition that the appellant shall pay to the respondent the sum of KShs.1,500,000/= and deposit the balance of the decretal sum into an escrow account, in the joint names of the advocates of the parties, within 30 days, from today. Time shall be of essence and on default to so comply, the orders given herein shall stand discharged.

20. By way of case management order, I direct that the appellant files and serves the Record of Appeal within 60 days from today together with any written submissions to be offered by the appellant.

21. Upon being served with the said Record of Appeal and submissions, the respondent shall have 30 days to file and serve any Supplementary Record of Appeal, if it shall consider the record filed by appellant as deficient, together with any written submissions. Once again time shall be of essence in order that the matter be moved towards conclusion.

22. The appeal will me mentioned on 09.06.2021 to confirm compliance with these case management directions and for further direction on way forward.

**Dated, signed and delivered in open court this 15th day of February 2021**

**Patrick J O Otieno**

**Judge**