**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 34 OF 2008**

**FRED KIPROP.....APPELLANT**

**VERSUS**

**AMBROSE KIMUTAI.....RESPONDENT**

**RULING**

**[1]** This ruling is in respect of the two applications filed herein by the parties. The 1st application is the Notice of Motion dated **21 September 2020**. It was filed herein by the appellant, **Fred Kiprop**, pursuant to **Section 3** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 22 Rule 29** of the **Civil Procedure Rules** for orders that the funds deposited and currently being held at HFCK Joint Account No. TD-300******1 under the names of **Karira & Company Advocates** and **Limo R.K. & Company Advocates**, together with interest thereon, be released to the appellant herein; He also prayed that the costs of the application be borne by the respondent.

**[2]** The 2nd application, dated **12 October 2020**, was filed by the respondent for stay of both the Judgment delivered on **3 September 2020** and subsequent proceedings herein pending the hearing and determination of the intended appeal to the Court of Appeal. It was filed under **Sections 3A and 63** of the **Civil Procedure Act**, and **Order 42 Rule 6 of the Civil Procedure Rules, 2010.** In the premises, directions were given herein that the two applications be disposed of simultaneously by way of written submissions. Granted the nature of the 2nd application filed by the respondent, it is only logical that it be determined first as the outcome thereof will undoubtedly impact on the 2nd application.

**[3]** The 2nd application was premised on the grounds that substantial loss would be visited on the respondent; that sufficient cause exists for stay of both execution and proceedings; and that the respondent is ready to give security for the due performance of the decree. It was further the contention of the respondent that his application has been made without unreasonable delay. The application was supported by the respondent's own affidavit, sworn on **12 October 2020** in which he averred that he is aggrieved by the decision of the Court dated **3 September 2020** and has preferred an appeal therefrom. He averred that he believes the appeal raises arguable issues that would merit a pronouncement by the Court of Appeal; and yet the appellant has already filed an application seeking for the release of the funds held on account in respect of this case at **HFCK** in the joint names of **Karira & Company Advocates** and **R.K. Limo & Company Advocates**. The respondent accordingly averred that he is willing to comply with such terms as to the giving of security for the due performance of such decree or order as shall be ultimately binding on him; and that no prejudice will be suffered by the appellant if the orders sought are granted.

**[4]** In response to that application, the appellant filed a Replying Affidavit sworn by him on **19 February 2021**. He averred that the application is misconceived and is based on misapprehension of the Judgment of the Court. He pointed out that, since the said Judgment resulted in a negative order, namely the dismissal of the appeal that he filed, it is inconceivable that the respondent should be aggrieved thereby. It was further the contention of the appellant that the applicant has not demonstrated that, unless stay of execution is granted, the appeal will be rendered nugatory; or that he stands to suffer substantial loss. The appellant therefore prayed for the dismissal of the application with costs, contending that it is merely calculated at punishing him and delaying the conclusion of this matter.

**[5]** Whereas no written submissions have been filed herein by the respondent, **Mr. Kibii** filed his written submissions on **22 February 2021,** reiterating the appellant's stance that there are no proceedings before the Court capable of being stayed. He relied on **Mary Goe vs. Kyalo Kinongo & Another** [2021] eKLR and **Save Lamu & 5 Others vs. National Environmental Management Authority (NEMA) & Another** [2019] eKLR. Counsel further submitted that, since in its Judgment dated **3 September 2020,** the Court did not order the appellant to do anything or refrain from doing anything, there is nothing to stay. The case of **Peter Anyang Nyongo & 2 Others vs. The Minister of Finance & Another** was cited, in which the Court of Appeal held that:

> **"Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs, since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgment for the Court of Appeal to stay, enforce or restrain by injunction… Where the superior court merely upheld the preliminary objection and as a consequence struck out the application for**

**judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs."**

**[6]** The record shows that the respondent filed his Notice of Appeal on **15 September 2020.** He annexed to the Supporting Affidavit a Draft Memorandum of Appeal in which three grounds were set forth. It is manifest therefrom that the respondent is aggrieved by the aspect of the impugned Judgment by which the appellant was absolved from liability. In the premises, it cannot be said that the outcome was a dismissal and therefore an order incapable of being stayed. Needless to add, that the instant application was precipitated by the appellant's application dated **21 September 2020**. That is a proceeding capable of being stayed. Clearly therefore, the argument that the appeal resulted in a dismissal order is neither correct nor tenable, granted the success the appellant achieved thereby in so far as he was absolved from liability for the respondent's false imprisonment; which is indeed the basis for his application dated **21 September 2020**.

**[7]** I note too that in his written submissions, **Mr. Kibii** raised a technical point which ought to be dealt with upfront. He was of the view that the application dated **12 October 2020** is incompetent for the reason that it has been made by a stranger to the proceedings. He submitted that the application has been filed without *locus* and in contravention of **Order 9 Rule 9** of the **Civil Procedure Rules**. He further pointed out that the respondent was represented in the lower court by **M/s Karira & Company Advocates**; and yet he moved the Court in the said application through the firm of **M/s Mukabane & Kagunza Advocates** without the leave of the Court. Counsel therefore urged the Court to find that all the pleadings and applications filed by the said firm, including the instant application, the Notice of Appeal and the Grounds of Opposition dated **12 October 2020,** were irregularly filed and ought to be expunged from the record.

**[8] Order 9 Rule 9** of the **Civil Procedure Rules** provides that:

**"Where 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."**

**[9]** A perusal of the record however reveals that a consent order was made and adopted herein on **16 August 2019 by which the firm of Mukabane & Kagunza Advocates** took over the conduct of the respondent's case from the firm of **Karira & Company Advocates.** That being the case, it is manifest that that argument was improperly taken; and that, as long as that order remains in place, the firm of **Mukabane & Kagunza Advocates** is properly on record for the respondent.

**[10]** That said, I now turn attention to the merits of the application for stay dated **12 October 2020**. The basic principle is that a successful litigant is entitled to the fruits of his litigation; and therefore that, barring sufficient cause, no impediments ought to be placed in the way of a decree holder who is simply seeking to reap the fruits of his/her Judgment. This principle was aptly captured in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 thus**:**

**"The ordinary principle is that a successful party is entitled to the fruits of his judgment or 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."**

**[11]** Hence, upon being absolved from liability by the Judgment dated **3 September 2020**, the appellant was entitled to the immediate release of funds paid by him as security pending the hearing and determination of the appeal. It would appear however, that the respondent has declined to sign the requisite release documents; and for this reason, the appellant filed the application dated **21 September 2020** seeking an order of the Court for the release of the said funds.

**[12]** Nevertheless, **Order 42 Rule 6(1)** of the **Civil Procedure Rules,** recognizes that:

**"… 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..."**

**[13]** Thus, the Court has the discretion to grant stay of execution where a justification has been made therefor; and to this end, **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, stipulates that:

**(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."**

**[14]** In the light of that provision, it is incumbent upon any applicant for stay of execution to demonstrate the risk of substantial loss unless stay is granted; and be ready to furnish such security as the court may order for the due performance of the decree or order. It must also be plain that the application was brought without unreasonable delay. And, to ensure the judicious exercise of discretion in such matters, the Court of Appeal furnished the following guiding principles in **Butt vs. Rent Restriction Tribunal** [1982] KLR 417 thus:

> **"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
>
> **2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
>
> **3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings. 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
>
> **5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

**[15]** Given that the 2nd application was triggered by the appellant's application dated **21 September 2020**, it cannot be said that the application for stay was filed after an inordinate delay. Thus, the only key issue that presents itself for determination herein is whether the respondent stands to suffer substantial loss unless an order of stay is granted. The Court will also consider whether, in the circumstances hereof, there is need for security for the due performance of the decree. Needless to mention, at this point, that, from the standpoint of **Order 42 Rule 6** of the **Civil Procedure Rules**, the arguability of the appeal is not a factor.

**[16]** With regard to substantial loss, the Court of Appeal held in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410 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. Substantial loss in its various forms, is the cornerstone 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]** In the same vein**, 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]** In the instant matter, the respondent is himself the decree holder, in whose favour the appeal was determined. He has Judgment against the Attorney General, who neither defended the suit before the trial court nor was he a party to this appeal. It would seem, from the grounds of appeal set out in the Draft Memorandum of Appeal that the respondent is complaining on behalf of the Attorney General. He therefore missed the opportunity to demonstrate that if the security sums are released to the appellant, he will never be able to realize his decree or that he would otherwise suffer such substantial loss as to warrant stay at this point in time. It is therefore my finding that the application for stay is devoid of merit and is hereby dismissed with costs.

**[19]** Turning now to the 1st application dated **21 September 2020**, it seeks orders that the funds deposited at **HFCK** in Joint Account No. TD-300-******11 in the joint names of **Karira & Company Advocates** and **Limo R.K. & Company Advocates** be released to the appellant together with interest earned therefrom. The application is expressed to have been filed under **Section 3A** of the **Civil Procedure Act. Order 22 Rule 29** of the **Civil Procedure Rules,** (which is irrelevant to the subject matter) was also cited by the applicant. The application is supported by the appellant's affidavit sworn on **21 September 2020**. He averred therein that the Court granted him an order of stay of execution, vide its Ruling dated **25 February 2009;** which order required him to deposit the decretal sum in a joint interest earning account in the names of counsel on record.

**[20]** The appellant further averred that he duly complied with the order and deposited the said funds in a joint account as ordered. He annexed copies of the deposit slips and related account opening documents as **Annexure FK2 – FK6** and averred that, now that the appeal has been determined in his favour, he is entitled to his deposit. He further averred, at paragraph 8 of his affidavit that counsel for the respondent has, without justifiable cause, withheld his consent by failing or neglecting to sign the release letter; thereby necessitating the orders prayed for in the 1st application.

**[21]** The respondent opposed the application vide his Grounds of Opposition dated **12 October 2020**, contending that the application is premature, given that costs are yet to be taxed. He further contended, *inter alia*, that he is aggrieved by the Judgment dated **3 September 2020** and is desirous of appealing the said decision; and therefore that the appellant is not entitled to the orders sought.

**[22]** I have given careful consideration to the application and the averments set out in the Supporting Affidavit, including the documents annexed thereto. I have also taken into consideration the respondent's Grounds of Opposition and the written submissions filed by counsel

for the appellant. I need to mention once again that, although no written submissions were filed by counsel for the respondent in respect of the 1st application, I have paid heed to the Grounds of Opposition relied on by the respondent.

**[23]** There is no doubt that, upon filing this appeal, the appellant applied for an order of stay pending its hearing and determination. The record confirms that the said application was heard and determined on **25 February 2009** whereupon an order was made thus:

> **"Balancing all the aforesaid, I do hereby order that there be a stay of execution of the decree as against the 1st Defendant only pending the hearing and determination of the appeal ON CONDITION that the Applicant deposits one and half… of the decretal sum and costs into a joint escrow account in the names of the parties' Counsel within thirty (30) days of the opening of the said bank account."**

**[24]** There is further no dispute that the appellant duly complied with the Court Order and caused the subject funds to be deposited in **Account No. TD-300-******1** at **Housing Finance**, Eldoret Branch, in the joint names of **Karira & Company Advocates** and **Limo R.K. & Company Advocates.** Since those funds were intended as security for the due performance of the decree, the appellant is, in my considered view, entitled to the same. It is noteworthy that the Court was explicit that stay was only applicable in the case of the 1st defendant, who is the appellant herein; and not the Attorney General; and therefore the respondent would not be prejudiced at all should those funds be released, for nothing stopped him from levying execution against the Attorney General during the pendency of the appeal. That option is still available to him.

**[25]** I note too that, in his written submissions, counsel for the appellant was of the view that there is an error apparent on the face of the record in that, whereas the appellant was absolved from liability, his appeal was dismissed. He therefore submitted that the dismissal order is not in conformity with the Judgment and invited the Court to correct that error *suo motu*. I however find no such error. The Court made its finding at Paragraph 25 of the Judgment dated **3 September 2020** that the appellant had no role to play in the unlawful confinement of the respondent; and that the trial court erred in attributing liability to him for the respondent's false imprisonment. In the premises, it would follow that to that extent the appeal was successful. It was for that reason that in its concluding remarks at Paragraph 30, the Court stated that:

> **"In the result, <u>save to the extent aforementioned</u>, it is my considered finding that the appeal lacks merit and is hereby dismissed with costs. For the avoidance of doubt, the lower court's judgment and decree are hereby upheld, but only as against the Attorney General. The appellant is hereby absolved from liability in the matter."**(emphasis added)

**[26]** In the result, having found that there is no valid reason for staying the release of the subject funds, there is merit in the appellant's application dated **21 September 2020**. The same is hereby allowed and orders granted as hereunder:

> **[a]** That the funds deposited and currently being held at **HFCK** in Joint Account No. TD-300-******1 under the names of **Karira & Company Advocates** and **Limo R.K. & Company Advocates** be released to the appellant together with interest earned therefrom.
>
> **[b]** That each party shall bear their own costs of the application.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH, 2021**

**OLGA SEWE**

**<u>JUDGE</u>**