



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. E022 OF 2021

MICHAEL KINYUA NAMU.....1ST APPELLANT

LILIAN WAWIRA NZIOKI.....2ND APPELLANT

=VERSUS=

PATRICIA MBINYA MUASYA (*Suing as the grandmother*)

and personal representative of the estate of

ROBINSON MUASYA (*Deceased*).....1ST RESPONDENT

AUTO CATS INTERNATIONAL LIMITED.....2ND RESPONDENT

RULING

1. By a Motion on Notice dated 24th February, 2021, the applicant herein 14th March, 2020, the applicants herein seek the following orders:

1) SPENT.

2) SPENT

3) THAT There be a temporary stay of execution of decree emanating from the judgment that was delivered on 10th February 2021 pending the hearing and determination of the Appeal being Machakos HCCA NO. 22 OF 2021 Michael Kinyua Namu & Another VS Patricia Mbinya Muasya (*Suing as the grandmother and personal representative of the estate of Robinson Muasya.*)

4) THAT this Honourable Court does issue such further orders or directions that it may deem fit to grant in the interest of justice.

5) THAT the costs of this application be in the cause.

2. The application was supported by an affidavit sworn by Lilian Wawira Nzioki, the 2nd Applicant herein. According to the deponent judgement being appealed from was delivered on 10th February, 2021. Having considered the same, the applicants are of the view that the award was extremely excessive considering the facts of the case. In her view the appeal raises serious issues of fact and has a very high chance of success hence the stay ought to be granted.

3. It was deposed that the 1st Respondent is of unknown means hence the Appellants stand to suffer a huge loss if execution was to proceed given that the 1st Respondent will not be able to refund the decretal amount in the event the appeal succeeds. The Applicants undertook to provide security for due performance as may be ordered by this court. and proposed security guarantees in that regard.

4. In opposition to the application the 1st Respondent, while seeking the dismissal of the application, filed the following grounds of opposition:

1. THAT the Applicants' application is:

a) Frivolous, incompetent and vexatious.

b) Bad in law.

c) Incurably defective.

d) An abuse of the court process.

e) An afterthought and brought in bad faith.

2. **THAT** the Application is solely aimed at frustrating the process of execution from its timing.

3. **THAT** the Applicants have not offered any security for costs and should be ordered to release to the 1st Respondent half of the principal sum and costs amounting to Kshs. 791,130/= and deposit the remaining half of Kshs. 791,130/= in court within (14) fourteen days to demonstrate their seriousness.

4. **THAT** the application is bad in law, incompetent and misconceived.

5. **THAT** the Applicants have not given good reasons as to why the application should be allowed.

6. **THAT** the application is improperly before this court.

5. On behalf of the applicants it was submitted that this application was made without undue delay and that they have offered to deposit the decretal amount as security for due performance of the decree. Based on Order 42 Rule 6 of the *Civil Procedure Rules*, it was submitted that the Appellants have satisfied the conditions thereunder. The applicants relied on **Daniel Githaiga -vs- Thomas Kabui Muituma Nairobi HCCA No 627 of 2016.**

6. In this case it was submitted that the subject matter in dispute in the matter is the sum that was awarded to the 1st Respondent as general damages totalling to Kshs. 1,403,898.75/= plus costs and interest. To the Applicants, if this sum is paid to the 1st Respondent, she will not be able to refund the same once the Appellants' appeal succeeds since in the 1st Respondent's grounds, she has not shown or exhibited any evidence to prove that she has any assets or means that would enable her refund the decretal sum if the same is paid to her and as such the Appellants' averments as set out in their application that the Plaintiff is of unknown means have been vindicated. Therefore, given that the 1st Respondent has not proved that she will be in a position to refund the decretal amount, if an order for stay is not granted, and if the decretal amount is paid, the appeal will be rendered nugatory. Reliance was placed on the Court of Appeal in the case of **National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another [2006] eKLR.**

7. According to the applicant, the above case shows that the burden of proving capacity and capability to refund the decretal amounts is on the 1st Respondent. In this matter, it was submitted that as the resources of the 1st Respondent remain unknown, the 1st Respondent has therefore failed to demonstrate to the required standard in law that she can refund the decretal amount if the Appeal succeeds. Based on that it was submitted that the Appellants have satisfied that they will suffer substantial loss if stay of execution pending appeal is not granted.

8. As regards the delay, it was submitted that judgment was delivered on 10th February 2021 while the instant application was filed on 24th February 2021. It is thus clear, according to the Applicants, that the instant application was made without undue delay and as such the second limb for granting stay pending appeal has been satisfied.

9. Regarding the requirement for security for due performance it was submitted that the Applicants/Appellants have categorically stated that they are ready and willing to provide security for due performance by expressing their willingness to deposit the decretal amount in court or in a joint interest earning account in the name of the parties Advocates or provide such security as this court may order.

10. It was therefore prayed that the Notice of motion dated 24th February 2021 be allowed in the interest of justice.

11. On behalf of the 1st Respondent it was submitted, based on a number of authorities, that the appeal herein is on quantum only and not liability. According to the 1st Respondent, as the Appellants have not offered security for costs, this Court should order half of the decretal sum of Kshs. 791,130/= be released to the plaintiff within (14) fourteen days from the date of this ruling and deposit the remaining half of Kshs. 791,130/= in court within the same period to demonstrate their seriousness in lodging an appeal as has been the practice of courts of late where an appeal is based on quantum alone.

12. According to the 1st Respondent as all legal procedural requirements were followed in having this case heard and determined, the Appellants/Applicants application dated 24th February 2021 lacks merit and the court was urged to dismiss it with costs.

Determination

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

14. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.”

15. 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.

16. In **Stephen Boro Gittha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, Nyamu, JA on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

17. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

18. 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.”

19. 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”.

20. 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.”

21. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **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.”

22. 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.”

23. 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.**

24. 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.**

25. 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.

26. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal,

and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.

27. Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement. See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another (supra); Mukuma vs. Abuoga [1988] KLR 645.

28. As was stated by Kuloba, J in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:

“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.”

29. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another (supra).

30. 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 defendants any sums paid in satisfaction of the decree. See Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

31. The next issue for consideration is the issue of security. It is true that under Order 42 rule 6 aforesaid, the applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. However, as already stated above the Court must similarly consider the overriding objective and balance the interest of the parties to the suit. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

32. In this case, the appeal is directed at the quantum of damages only. Since liability is not in dispute it must be appreciated that at the end of the day the Respondent will be entitled to some amount.

33. Accordingly, taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the Applicants pay to the Respondent half of the decretal sum being Kshs. 791,130/= and deposits the other half in joint interest earning account(s) in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos. The said conditions to be met within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

34. The costs of the application are awarded to the Respondent.

35. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kariuki for the applicant

Miss Mutinda for Mrs Mutunga for the Respondent

CA Geoffrey