REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E368 OF 2020

FARID FARAJ BUKHEIT.....1ST APPLICANT

MOHAMMED MUYO..... 2ND APPLICANT

-VERSUS-

CHARLES KARIUKI KARUNGU..... RESPONDENT

RULING

1. By their motion dated 21st December 2020 **Farid Faraj Bukheit** and **Mohammed Muyo** (hereafter the Applicants) seek an order to stay execution of the judgment and decree in **Milimani CMCC NO. 4135 of 2019** pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules, inter alia. On grounds, among others, that being dissatisfied by the judgment in **Milimani CMCC 4135 of 2019** delivered on 19th November 2020 the Applicants preferred the instant appeal; that the means of the decree holder **Charles Kariuki Karungu** (hereafter the Respondent) are unknown and therefore the Applicants are apprehensive that if the decretal sum is paid to him, he may be unable to make a refund should the appeal succeed, thereby rendering the appeal nugatory.

2. **Rina Welemba** who describes herself as a Legal Officer with APA Insurance Limited Company the Applicants' insurers, swore the affidavit in support of the motion. She deposed that the Applicants are aggrieved by the judgment of the lower court and have preferred an appeal; that the Applicants are apprehensive that the Respondent does not possess the means to repay any monies paid out to him under the decree, in the event of a successful appeal and the Applicants could consequently suffer substantial loss and their appeal rendered nugatory ; and that the Applicants are willing to deposit the entire decretal amount in court as security for eventual performance of the decree.

3. The motion was opposed by way of a replying affidavit sworn by the Respondent. He takes the view that the motion is frivolous and asserts that he is entitled to enjoy the fruits of successful litigation; that application was not filed in a timeous manner; that the appeal does not raise arguable issues. He urged that should the court be inclined to allow the application; it should impose a condition for the deposit of the entire decretal sum into a joint interest earning account.

4. The motion was canvassed by way of written submissions. For the Applicants**,** the submissions reiterated their affidavit material, and especially the assertion that the Respondents' financial means are unknown and the li, he may not be able to refund monies paid out to him were the appeal successful. Counsel cited the case of **Johnson Mwiruti Mburu v Smauel Macharia Ngure [2004] eKLR.** It was pointed out that the motion was filed timeously and that at this stage, the court is not concerned with the merit of the appeal, and that the Applicants have pledged to furnish reasonable security for the due performance of the decree.

5. The Respondent, relying on the case of **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365** , argued that the motion does not meet the requirements in Order 42 Rule 6 (2) of the Civil Procedure especially with respect to substantial loss. Counsel asserted that the Respondent being the successful litigant in the court below is entitled to the fruits of the litigation. He asserted that the Respondent cannot be denied his rights thereto merely because he has no means and referred to the case of **Machira T/A Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63** and urging release of payment to the Respondent and provision of adequate security by the Applicants.

6. The court has considered the material canvassed in respect of the motion. It is trite that the power of the court to grant stay of execution of a decree pending appeal under Order 42 Rule 6 is discretionary, and the discretion should be exercised judiciously. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417 held that**:

> **"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."

7. The motion herein 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 Court at this stage is not concerned with the arguability of the appeal. Secondly, there can be no disputing that the Applicants moved the Court in a timeous manner- about a month since the judgment appealed from. The key question for determination is whether the Applicant has 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] e 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 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. It is the Applicants' case that they will suffer substantial loss and the appeal rendered nugatory if payment of the decretal sum is made to the Respondent whose means are unknown. I understood the Respondent's rebuttal to be that the mere fact the decree holder is not a man of means should not deny him the immediate enjoyment of the fruits of his judgement. This is precisely the situation envisaged in the **Shell** case as to what could lead to substantial loss, ***"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**."*

13. The cornerstone of the court's exercise of its discretion to stay execution pending appeal is substantial loss, without which as the court held in the Shell case, "***it would be a rare case when an appeal would be rendered nugatory by some other event."*** The Applicants having expressed apprehension regarding the Respondent's means to make a refund of any monies paid out on the decree, it behove the Respondent to make a rebuttal. That is the legal position as stated by the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR**:

> **"This court has said before and it would bear repeating that while the legal duty is on an Applicant 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 applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant 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. The decretal sum in this case stands at **Kshs 1,313,453.50** with costs and interest. This is by no means a modest sum and if paid out and the appeal succeeded, and in the absence of evidence of the Respondent's means, the Applicants would no doubt suffer substantial loss if unable to recoup the monies and the appeal thereby rendered nugatory. As stated in the **Shell case,** substantial loss is what must be prevented.

15. The Applicants have indicated willingness to deposit security for the performance of the decree to safeguard the Respondent's interests pending appeal. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR,** citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

> **"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff……**
> **It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"**

16**.** Reviewing the foregoing the Court is persuaded to grant the motion dated 21st December 2020, on condition that the Applicants do within 30 days of today's date deposit the sum of **Shs. 1,315,453.50** into a joint interest earning account in the joint names of the parties' advocates. The costs of the application will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021.

C.MEOLI

JUDGE

In the presence of:

Ms. Wanjiru for Applicants

Mr Kagunda for the Respondent

C/A; Carole