REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 135 OF 2019

GROUND SPACE CONSTRUCTION COMPANY LIMITED.....APPELLANT

VERSUS

JAMES OLONJE MUSINGE

(Suing as the personal representative of the estate of the late

ROGERS MUSITSA JUMBA (deceased)).....RESPONDENT

RULING

1. The Applicant herein, **Ground Space Construction Company Limited** is by the motion dated 16th September, 2019 seeking an order to stay execution pending the hearing of its appeal from the judgment of the lower court in **Kikuyu SPMCC No. 295 of 2017**. In the said suit, **James Olonje Musinge** (hereafter the Respondent) was awarded damages amounting to Kshs. 2, 691,550/= as compensation following the death of his son **Rogers Musitsa Jumba** in a road accident on 17th August, 2017 involving the Applicant's vehicle **KCD 337V**.

2. By their supporting affidavit and submissions, the Applicants state that the Respondent is a man of straw and will not be able to refund the decretal sums if paid out, thereby exposing the Applicant to substantial loss. The Applicants pledged to deposit half the decretal sum in a joint interest earning account and asserted that the Respondent will not suffer any prejudice.

3. The Respondent opposed the motion by swearing a replying affidavit asserting that the Applicant is bound to prove that he is impecunious and unable to refund the decretal sum in the event the appeal succeeds. To controvert the Applicant's depositions on his financial state, the Respondent deposed that he is the registered owner of land parcel **LR No. Lugari/Likoyani/Block1/Vihiga/250** measuring 1.20ha since December, 1989. He swore that the value of the property together with developments thereon is Kshs. 4,900,000/=. He attached a copy of the certificate of title and valuation report. Further, he rejected the offer of security in the form of a deposit of half the decretal sums asserting that the security must be adequate for the eventual performance of the decree. The Respondent did not attend the hearing in respect of the application and therefore no submissions were made on his behalf.

4. The court has considered the material canvassed in respect of the motion by both parties. The power of the court to grant stay of execution of a decree pending appeal is discretionary. However, the discretion should be exercised judiciously. See Butt **v Rent Restriction Tribunal [1982] KLR 417.**

5. The Applicant's prayer for stay of execution pending appeal, 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".

6. The first question 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] KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the Applicant 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."

7. 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. 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 the two courts…"

8. 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. 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."**

9. 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."

10. There is no dispute that the instant application was filed timeously. Regarding substantial loss, the Applicant asserts, correctly that the judgment sum is large. If indeed the money is paid over to the Respondent and is irrecoverable upon the appeal resolving in the applicants favour, the Applicant would suffer substantial loss. The Respondent has, in demonstrating his capacity furnished evidence of his landed property in Vihiga . While it cannot be disputed that the property may be of value, it would not be an easy task for the Applicants to sell the property in the event that became necessary. Difficulty in recovery of the decretal sum, not just inability to recover, is a relevant consideration.

11. Besides, it is pertinent that the decretal sum in the lower court was awarded to the Respondent not in his own name but as a legal representative of the estate of the deceased. From the pleadings in that court, there are other beneficiaries entitled to a share in the damages. It would in the circumstances be an arduous task for the Applicant to make recovery of the decretal sum once dissipated through distribution. On their part, the Applicants have pledged to deposit half of decretal sum in a joint interest earning account pending the determination of the appeal.

12. The words stated by the Court of Appeal in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR 621**, citing among others the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centers Limited [1984] 3 ALLER 198** are apt:

"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 judgment 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…".

13. In my considered view, considering all relevant factors, the justice of the matter lies in allowing the motion on the condition that the Applicant does deposit the sum of Kshs. 1,000,000/- (One Million) in an interest earning account in the joint names of the parties' advocates within 30 days of this ruling. The costs of the application are awarded to the Respondent in any event. It is so ordered.

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

C. MEOLI

JUDGE

In the presence of:

N/A for the Appellant

Mr Mogambi for the Respondent

Kevin:Court Assistant