



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E356 OF 2020

NJUCA CONSOLIDATED LIMITED.....1ST APPLICANT

BONIFACE MODICK KHAGULA.....2ND APPLICANT

VERSUS

CAROLINE AKINYI OLANG'O.....1ST RESPONDENT

MWANGO FRED EZRA.....2ND RESPONDENT

RULING

1. The motion dated 18th January 2021 by **Njuca Consolidated Limited** and **Boniface Modick Khagula** (hereafter the Applicants) seeks an order to stay execution of the judgment and decree in **Milimani CMCC 5080 of 2017** pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Order 42 Rules 1 & 6 of the Civil Procedure Rules, inter alia. On grounds, among others, that being dissatisfied by the ruling in **Milimani CMCC 5080 of 2017** delivered on 1st December 2020 the Applicants have preferred an appeal and that the Respondents may be unable to refund the decretal sum should the appeal succeed, thus rendering the appeal nugatory.

2. The affidavit in support of the motion is sworn by **Gitongah Mwangi** who describes himself as an authorized representative of the 1st Applicants. To the effect that the Applicants were aggrieved by the judgment of the lower court in **Milimani CMCC 5080 of 2017** delivered on 12th May 2020 and have preferred an appeal from the said judgment being **Nairobi Civil Appeal No. 186 of 2020**, and that subsequently, the Applicants applied in the lower court to stay execution thereof pending appeal; that by its ruling delivered on 10th September, 2020, the lower court granted the Applicants stay on condition within 21 days of the ruling date, they would pay to **Caroline Akinyi Olang'o** and **Mwango Fred Ezra** (the Respondents herein) one-third of the decretal sum being Kshs. 2,462,686.70 and deposit the balance amounting to Kshs 4,925,737.30 in a joint account in the name of both parties' advocates. That a subsequent application by the Applicants to review these conditions was dismissed by the court on 1st December, 2020. Hence the instant appeal.

3. The deponent states that the Applicants' insurer had in compliance with the conditions paid to the Respondents a sum of Kshs. 3,000,000/-; that the balance on the decretal sum is Kshs. 4,388,060 which is a large amount, and if execution were to proceed, the Applicants would suffer substantial loss as the Respondents' means are unknown. It was pointed out that the motion was made timeously, and the Respondents will suffer no prejudice having already received in part satisfaction of the decree a sum of Kshs. 3,000,000/-.

4. The motion was opposed by the replying affidavit sworn by **Caroline Akinyi Olang'o**, the 1st Respondent on her own behalf and on behalf of her co-Respondent. Therein, she states the Applicants have failed to prove that she is incapable of refunding the decretal sum and have not demonstrated substantial loss. She deposed that though the motion was filed in a timeously, the Applicants must satisfy other requirements stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules. Further that the outstanding payment was not intended to go to the Respondents directly but to a bank account, hence outside the Respondents' reach and therefore there was no risk of substantial loss. She asserted that the Applicants having failed to fully comply with the conditions in the lower court should not be granted the orders sought; and moreover, that monies paid out to the Respondents were not security for the performance of the decree. In her view the motion is devoid of merit, bad in law and an abuse of the court process.

5. On 11th February 2021 the court directed the parties to canvass the motion by way of written submissions. The parties duly complied. For the Applicants it was submitted that their motion was filed without undue delay and that sufficient cause has been demonstrated to grant an order of stay pending appeal as the appeal was arguable and had high chances of success. It was further submitted that the appeal herein will be rendered nugatory if stay is not granted as the Respondents have failed to demonstrate their ability to refund the decretal sum should the appeal succeed. Counsel placed reliance on **Kenindia Assurance Co. Ltd v Samuel [2004] eKLR** where the court based its decision on the Court of Appeal decision in **Niazsons (Kenya) Ltd v China Road and Bridge Corporation (K) Ltd HCC. No 126/1999**. The Applicants asserted that they were willing to offer security by way of bank guarantee for the due performance of the decree having already paid out part

of the decretal sum to the Respondents.

6. On the part of the Respondents, it was pointed out that the lower court had already ordered the decretal sum to be deposited in a joint interest earning account, and hence the likelihood of substantial loss was diminished. Besides, that the regular process of execution of a lawful judgment could not be evidence of substantial loss as stated in **James Wangalwa and Another v Agnes Naliaka [2012] eKLR**. The Respondents argued that all requirements of Order 42 Rule 6 (2) must be satisfied in an application for stay of execution pending appeal as held in **G.N Muema P/A (sic) Mt. View Maternity & Nursing Home v Mirima Maalim Bishar & Another [2018] eKLR**. The Respondents urged the Court, if it was inclined to allow the motion to order that the balance of the entire decretal sum be deposited in a joint interest earning account. Counsel relied on the case of **Gianfranco Manethi and Another v Africa Merchant Assurance Company Limited [2019] eKLR**.

7. The court has considered the material canvassed in respect of the motion. The power of the court to grant stay of execution of a decree pending appeal under Order 42 Rule 6 is discretionary. However, that discretion should be exercised judiciously. The decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** offers useful guidance on the exercise of this discretion, as follows:

“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 Applicants 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. ...”

8. The 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 Applicants 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 Applicants”.

9. The first question to be determined is whether the Applicants have 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.”

10. 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 Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants 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...(emphasis added)”

11. 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 Applicants, 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.”
(emphasis added)

12. 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.”

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997 .**

13. Counsel for the Applicants argues that the appeal has high chances of success and that the Applicants would suffer irreparable loss which I understand to mean substantial loss as the decretal sum outstanding is large and if paid out, the Respondents would be unable to refund it in the event the appeal succeeds. That the Respondents have not demonstrated their capacity to repay such monies. As stated in the **Shell** case, substantial loss is the cornerstone of the jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules and is what must be prevented, because it inevitably results in the successful appeal being rendered nugatory. The Respondents’ answer to the Applicants’ apprehension on their means to repay the decretal sum misses the point. There is no burden as such upon the Applicant to prove the means possessed by the decree holder, which is high impossible. It is enough that the applicant expresses apprehension concerning the respondent’s financial means.

14. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicants 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 Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants 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.”

15. The judgment in the lower court was for a sum of **Kshs 7,388,060** with costs and interest. **This is a substantial sum, and the Applicants having expressed apprehension about the Respondents’ capacity to repay, the burden shifted on them to controvert the assertion by proving their means. They have not and it is quite likely that the Applicants will suffer substantial loss and their appeal rendered nugatory if stay is not granted. The Applicants are willing to give security for the performance of the decree by way of bank guarantee for the balance thereof on the judgment having already remitted Kshs. 3,000,000/= to the Respondent.**

16. 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** and others, 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.....”

17. There are two appeals emanating from the same suit in the lower Court. The instant appeal **Nairobi Civil Appeal No E356 of 2020** relates to a ruling on an application to review stay conditions imposed in respect of the earlier appeal, namely, **Nairobi Civil Appeal No. 186 of 2020** which relates to the judgment of the lower court delivered on 12th May 2020. It is imperative that the instant appeal be heard first and in an expedited manner. Pending such hearing, this Court orders that there be stay of execution pending appeal as prayed in prayer (3) of the motion dated 18th January 2021, conditional upon the Applicants depositing into Court the sum of Shs. 500,000/- [Five Hundred

Thousand] within 30 days of today's date. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH JULY 2021.

C. MEOLI

JUDGE

In the presence of:

Mr Mukasa for Applicants

Ms Onyimbo for Respondents

C/A; Carol