REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 153 OF 2019

TERESIA NDUTA MUCHIRI .....1ST APPLICANT

KENNEDY MUCHIRI KAMANDE.....2ND APPLICANT

VERSUS

TABITHA MBURU (suing as the Administrator & Legal Representative of the

Estate of Fredrick Mbugua Mwaura Deceased).....RESPONDENT

RULING

1. By their motion dated 24th October 2019 and filed on 25th October, 2019, **Teresia Nduta Muchiri** and **Kennedy Muchiri Kamande**, (hereafter the Applicants) seek an order to stay execution of the judgment in **Githunguri CMCC No. 34 of 2018** pending appeal. The judgment was delivered on 26th September, 2019 for the total sum of Kshs. 3,152,250/=.

2. The motion is expressed to be brought under Order 42 Rules 1 and 6 of the Civil Procedure Rules. The grounds on the face of the motion are *inter alia* that the decretal sum is substantial, and the Applicants are apprehensive that if paid out to the decree holder, she may be unable to refund it in the event of the appeal succeeding, thereby exposing the Applicants to substantial loss, and rendering the appeal nugatory; that the Applicants are prepared to offer adequate security for the eventual performance of the decree if upheld. These grounds are further amplified in the supporting affidavit sworn by **Rina Welemba** who describes herself as Legal Officer in the insurance company that provided insurance cover to the Applicants. The affidavit emphasizes that the decree holder's means are unknown and that the Applicants are apprehensive that they may not recover any sums paid out in the event the appeal succeeds and that they have a good appeal.

3. For her part, the decree holder and Respondent **Tabitha Mburu** (suing as the administrator and legal representative of the Estate of **Fredrick Mbugua Mwaura - deceased**) opposed the motion through a replying affidavit. Therein she deposes that the application is without merit and was brought to delay the fruits of her lawful judgment; that the appeal has no chances of success, and that the application ought to be dismissed; but in the event it is allowed, a condition ought to be imposed for the deposit of the entire decretal sum of Kshs. 3,335,331.25 in a joint interest earning account in the names of both parties' advocates.

4. The motion was canvassed by way of written submissions. The Applicants' submissions address the issues of timeousness, arguability of the appeal, security for the performance of the decree and the likelihood of substantial loss and other matters such as the balance of convenience which are not relevant to an application of this nature. Asserting that they moved the court in a timeous manner and that they have an arguable appeal, the Applicants state that the appeal will be rendered nugatory if the orders sought are declined; that the Respondent has not demonstrated her financial means to refund any sums paid out and that the Applicants are willing to deposit adequate security for the future performance of the decree. Several authorities were relied on including **Kenindia Assurance Co. Ltd v Samuel & Another [2004] eKLR** wherein the Court of Appeal decision in **Niazsons (Kenya) Ltd V. China Road and Bridge Corporation (K) Ltd [2001] KLR 12** was cited.

5. The Respondent's submissions were pegged on Order 42 Rule 6 of the Civil Procedure Rules which lays out the requirements and it was argued that the application is not merited. Citing the case of **Antoine Ndiaye v African Virtual University [2015] eKLR,** the Respondent asserted that the onus lies with the Applicants to prove substantial loss, and in this instance, the fact that the Respondent cannot repay the decretal sum if the appeal succeeds. She urged the court to order that half the decretal sum be paid to the her and the balance be deposited in an interest earning account, should the court grant the application.

6. 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.**

7. The Applicants' motion is pegged upon 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 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] 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 the two courts…(</u>**emphasis added**<u>)</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. At this stage, the court is not concerned with the merits of the appeal and arguability thereof is not a relevant consideration. There is no doubt that the instant motion was filed in a timely manner, within one month of the judgment of the lower court. Regarding substantial loss, the decretal sum is fairly substantial. The Applicants express apprehension that the Respondent's means are unknown and that she may be

unable to refund any monies paid out to her, in the event of a successful appeal. It is not the duty of the Applicants to establish the the Respondent's means in this regard, as has been argued by the Respondent.

13. In the oft-cited 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 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. By her replying affidavit, the Respondent herein has not demonstrated her financial means to repay the decretal sum. Given the substantial amounts involved it was ever more important for the Respondent to adduce some sort of proof of her means. It may well be, in the absence of such proof, that the Applicants would indeed be unable to recover the sums herein or part thereof if paid out to the Respondent. As stated in the **Shell** case, substantial loss is what must be prevented.

15. On the issue of security, the Applicants have indicated willingness to deposit security for the eventual due performance of the decree. 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…".**

16. In the circumstances, the court is satisfied that the motion is for granting. Prayer 3 of the motion dated 24/10/2019 is allowed on condition that the within 30 days of today's date, the Applicants deposit a sum of Kshs. 1,500,000/- [ONE MILLION FIVE HUNDRED THOUSAND] into a joint interest earning account in the names of the parties' advocates herein. This sum is inclusive of the sum of Kshs. 1,000,000/= already deposited into court on 15/11/2019 pursuant to the order of this court dated 25/10/2019, which latter sum the court hereby orders released to the Applicants for purposes of being deposited in the joint account in the 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:

N/A for the Applicants

N/A for the Respondent

Kevin: Court Assistant