REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 248 OF 2020

ANTHONY KIILU MUSAU..... APPLICANT

-VERSUS-

JOS (Minor suing by next friend SO) .....RESPONDENT

RULING

1. The amended motion dated 28th July 2020 By Anthony Kiilu Musau, (hereafter the Applicant seeks an order to stay execution of the judgment delivered by the **Mburu**, SPM in **Nairobi CMCC No. 7194 of 2014**, pending the hearing and determination of the appeal filed herein. The motion is expressed to be brought under Order 42 Rule 6(2) of the Civil Procedure Rules inter alia. On grounds that *being* dissatisfied with the decision in **Milimani CMCC No. 7194 of 2014,** delivered on 29th May, 2020 the Applicant has preferred an appeal against the decision and that he is apprehensive if stay is not granted the appeal will be rendered nugatory.

2. The motion is supported by two affidavits sworn by the Applicant**,** dated 30th July, 2020 and 27th January, 2021 respectively, which amplify the grounds on the face of the motion. He deposes that if stay of execution is not granted the Respondent will proceed with execution despite the pendency of the appeal herein, thus rendering it nugatory; that the Applicant is apprehensive he will suffer substantial loss in that in the event of a successful appeal, he would not be able to recoup the decretal amount if paid out to the Respondent whose financial means are unknown. The Applicant further deposes that he is financially constrained on account of his failing health, being a retiree and the economic effects of the prevailing Covid-19 Pandemic. However, he expressed readiness to furnish reasonable security for the performance of the decree if upheld.

3. The motion was opposed by way of a replying affidavit dated 7th July, 2020 and sworn by the Respondent's counsel **Nelson Kaburu.** Counsel stated that he was duly authorized by **Salat Adero**, the Respondent, to do so. The affidavit raises matters relating to the merits of the appeal in opposing the motion. He deposes that if the court is persuaded to grant the motion it should impose a condition requiring the Applicant to provide security by depositing the entire decretal sum into an interest earning account.

4. On 20th April, 2021 parties agreed that the motion be determined on the basis of their respective material already filed.

5. 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.**The Applicant's prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which in part 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. There is no doubt that the motion herein was timeously filed within 30 days of the judgment. The first issue arising 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 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."

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. <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>"**

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. <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).

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. The Applicant deposed that the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds, as there is a likelihood that the Respondent will be unable to refund the decretal sum should the appeal succeed. Despite this deposition, the Respondent did not deem it necessary to address himself on the issue of substantial loss. 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."

See also **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, **Civil Application No. 322 of 2006 (UR 178/2006**)

11. The judgment in the lower court was for a total award of Kshs. 950,000/- with costs and interest. Counsel for the Respondent stated at the

hearing that the decretal sum stood at Kshs.1,300,000/- odd as of April 2021. This is a substantial sum, and the Applicant has expressed apprehension that if it is paid out to the Respondent, he may be unable to make a refund if the appeal succeeds, thus exposing the Applicant to substantial loss thereby rendering the appeal nugatory. The Court is of the view that given the substantial amounts in the decree, and in the absence of proof of the Respondent's financial means, it may well be that if the decretal sum is paid out, the Applicant may be unable to recover the sums in the event of the appeal succeeding, thereby rendering the appeal nugatory. As stated in the **Shell Case**, (supra) substantial loss is what must be prevented.

12. On the issue of security, the Applicant has indicated willingness to deposit security for the eventual due performance of the decree. However, he had stated that he is financially constrained to deposit the entire decretal sum due to his poor health, having retired from formal employment and the economic effects of the Covid-19 Pandemic. Counsel for the Respondent argued that if this court is inclined to allow the motion, the Applicant should be ordered to deposit the trial courts' award in a joint interest earning account.

13. 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…".**

14. The Court, while ensuring security for the eventual performance of the decree should exercise care not impose a condition that is so onerous as to defeat the right of appeal. The interests of both parties must be evenly balanced. Considering all the foregoing, this Court is persuaded that the motion dated 28th July 2020 is merited and is granted, conditional upon the Applicant depositing a sum of Kshs. 600,000/- (Six Hundred Thousand) into an interest earning account in the joint names of the parties' advocates within 30 days of today's date. Costs of the motion will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 22ND DAY OF JULY 2021

C. MEOLI

JUDGE

In the presence of:

For the Applicant: Ms Wanjiru h/b for Mr Nguli

For the Respondent: Mr Kaburu

C/A: Carol