



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 732 of 2019**

**BRINKS SECURITY SERVICES LIMITED.....APPLICANT**

**-VERSUS-**

**NICKSON MWANGA ELIOJI .....RESPONDENT**

**RULING**

1. For determination is the motion dated 14<sup>th</sup> December 2020 by **Brinks Security Services Limited** (hereafter the Applicant) seeking an order to stay execution of the judgment and decree in **Milimani CMCC No. 6390 of 2017** together with all consequential orders pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Order 42 Rule 6(1) & (6) and Order 51 Rule 1 of the Civil Procedure Rules, *inter alia*. On grounds, among others, that being dissatisfied with the decision in **Milimani CMCC No. 6390 of 2017** delivered on 28<sup>th</sup> November 2019 the Applicant preferred this appeal and that the decree holder **Nickson Mwangi Elioji** (hereafter the Respondent) has now proceeded to proclaim its assets in execution and if not stayed will render the appeal nugatory.
2. The motion is supported by affidavits sworn by **Raymond Nzioka** who describes himself as the Human Resource Manager with the Applicant, and by **Jenifer Mutua**, counsel having conduct of the matter on behalf of the Applicant. To the effect that the Applicant is aggrieved by the judgment of the lower court delivered on 28<sup>th</sup> November 2019 and has preferred an; that the Applicant is apprehensive that the appeal will be rendered nugatory if execution is to proceed given the likelihood that the Applicant would be unable to recoup any decretal amount paid out to the Respondent. It is further deposed the Applicant has acted diligently and without delay in spite of the Covid-19 pandemic and that the appeal before the court is meritorious. Finally, the Applicant expresses readiness to deposit the entire decretal amount into court as security for performance of the decree.
3. The motion is opposed by way of a replying affidavit sworn by the Respondent. The deponent asserts that he is entitled to enjoy the fruits of successful litigation; that there was delay in filing the present application; and that the Applicant has failed to demonstrate what loss it would suffer if stay of execution is not granted. It was deposed in the alternative, that the court ought to order the Applicant to provide some form of security as condition for the order of stay pending appeal .
4. The motion was canvassed by way of written submissions. For the Applicant, it was submitted that the application has met the conditions as set out under Order 42 Rule 6 of the Civil Procedure Rules and that in granting an order to stay execution, the court exercises discretion governed by the Rules as stated in **Butt v Rent Restriction Tribunal [1982] KLR 417**. Secondly, the Applicant submitted the proclaimed goods are largely tools of trade and if the ongoing execution process is not halted, the appeal herein will be rendered nugatory and a mere academic exercise. Counsel relied on the decision in **Siegfried Busch v MCSK [2013] eKLR**. Thirdly, it was submitted that the motion was filed in a timely manner and that the Applicant is ready to furnish reasonable security for the due performance of the decree.
5. On the part of the Respondent, it was argued that Applicant ought to meet the conditions as set out under Order 42 Rule 6 and as pronounced by the court in **Antoine Ndiaye v African Virtual University (2015) eKLR** and in **Macharia T/A & Co. Advocates v East African Standard (No. 2) [2002] KLR 63**. Counsel pointed out that the delay of one (1) year in filing the motion was unreasonable. On the question of substantial loss, counsel while placing reliance on the case of James **Wangalwa & Another v Agnes Naliaka Cheseto (2012)eKLR** submitted that a regular process of execution does not amount to evidence of substantial loss, and an applicant must prove specific details of the substantial loss that it stands to suffer if stay of execution is not granted. Finally, the Respondent submitted he is entitled to the decretal sum and some form of security should be deposited by the Applicant as pronounced in **Edward Kamau & Another v Hannah Mukui Gichuki Misc. No. 78 of 2015**.
6. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that 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 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”.**

8. The basic question, and cornerstone to the exercise of the discretion 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.”**

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 4<sup>th</sup> 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 two courts... (emphasis added)”**

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. 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)**

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. The Applicant has expressed apprehension concerning the ability of the Respondent to pay back the decretal sum if paid out, and the

possibility that the appeal if successful may be rendered nugatory by this fact. Further, that the proclaimed goods are tools of trade and if sold will impede the operations of the Applicant. The Respondent's rebuttal is that the Applicant has failed to specifically demonstrate what substantial loss it is likely to suffer.

13. 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 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 respondent has not controverted the Applicant's assertions concerning his financial means, but merely reiterated his entitlement to the decretal sum. The decree in the lower court is for about Kshs 291,654.78 and has increased due to accumulation of interest. This is not an insubstantial sum. 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 not be able to recover the sums in the event of the appeal succeeding, thereby rendering the appeal nugatory. As stated in the **Shell case**, substantial loss is what must be prevented.

15. On the subject of security, the Applicant has indicated willingness to deposit security for the performance of the decree and thereby safeguard the Respondent's interests pending appeal. However, I would agree with the Respondent's complaint that the application was filed after a lengthy period of delay and the Applicant's explanation that no execution had commenced earlier is weak: they had not settled the decretal sum and the Respondent was therefore at all times entitled to execute. Nevertheless, the Applicants moved with alacrity once execution commenced. A perusal of the supplementary affidavit by the Applicant and particularly annexures **RN-5 to RN-9**, suggests that the Applicant were in the said period taking other steps to fast perfect the appeal. Besides, the decree herein is a money decree that continues to accrue interest and in the event the appeal fails, the Respondent will be adequately compensated.

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** 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. The Court is therefore satisfied that the motion dated 14<sup>th</sup> December 2020 is merited. The said motion is granted on condition that within 30 days of today's date, the Applicant will deposit the entire decretal sum into a joint interest earning account in the names of the parties' advocates. Costs will abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 12<sup>TH</sup> DAY OF AUGUST 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Ms Mutua for the Applicant**

**Respondent: N/A**

**C/A: Carol**