REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. E381 OF 2020

DIRECTLINE ASSURANCE CO. LTD.....APPLICANT

VERSUS

MARY CHEPKEMEI CHERUIYOT & JOSEPH KIPNG'ENO CHERUIYOT

(Suing as Administrators of the Estate of the late

KIPKOECH NG'ENOH aka DENNIS) .....RESPONDENTS

RULING

1. Before the court for determination is the motion dated 28th January 2021 seeking that pending the hearing and determination of the appeal herein the court be pleased to order a stay of execution of the ruling/judgment of the lower court delivered on 3rd December, 2020 in the declaratory suit **Nairobi CMCC No. 9114 of 2019 Mary Chepkemoi Cheruiyot and Joseph Kipngeno Cheruiyot (both suing as administrators ad litem of the Estate of) KipKoech Ng'enoh a.k.a Dennis v. Directline Assurance Company Limited.** The motion is expressed to be brought *inter alia* under Order 42 Rule 6 of the Civil Procedure Rules (CPR). The grounds on the face of the motion state that **Directline Assurance Company Limited** (hereafter the Applicant) being aggrieved with the decision in **Nairobi CMCC No. 9114 of 2019,** delivered on 3rd December, 2020, has preferred an appeal against the said judgment and is apprehensive that if stay of execution is not granted, the appeal will be rendered nugatory.

2. The motion is supported by an affidavit sworn by **Pauline Waruhiu** who describes herself as the Head of Claims and Legal at the Applicant Company which had insured motor vehicle registration number **KBG 729A** in respect of which both the primary and declaratory suit were instituted.

3. The deponent asserts that the appeal has a high chance of success and is apprehensive that in the event of a successful appeal, the Applicant would not be in a position to recoup the entire decretal amount of Kshs. 6,137,569.50 (as already confirmed on appeal) if paid out to the Respondents. The deponent further deposes the Respondents do not stand to suffer any prejudice that cannot be compensated by costs and/or interest. Finally, the deponent expressed readiness to furnish security as the court may deem fit to grant. She states that the motion was brought in a timeous manner.

4. The motion was opposed by way of a replying affidavit dated 1st March, 2021, sworn by the Respondent's counsel **Nelson Kaburu.** Counsel restating the history of the matter deposed to matters concerning the merits of the appeal and asserted that the motion is without merit and views it as an unjust action on the part of the Applicant.

5. The motion was canvassed by way of written submissions. For the Applicant**,** it was submitted the application satisfies the conditions as set out in Order 42 Rule 6 of the CPR and ought to be allowed. Relying on the decision in **Mukuma v Abuoga (1988) KLR 645** as cited in **Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR** and other decisions, counsel submitted that the appeal raises weighty issues; that substantial loss shall be visited on the Applicant should it be compelled to pay the decretal sum, as recovery of the sums from the Respondent would be impossible in the event of the appeal succeeding. Concerning the issue of balancing the rights of parties in an application for stay pending appeal, counsel relied on the cases of **Swanya Ltd v Daima Bank Ltd Civil Application No. 45 of 2001, Portritz Maternity v James Karanja HCCA No. 63 of 1997** among others. It was further submitted that the motion was timeously filed. Finally, counsel while placing reliance on **Simba Coach Limited v Kiriiyu Merchants Auctioneers [2019] eKLR** and **CIC General Insurance Group Ltd v Gerald Ochoki [2018] eKLR** reiterated the Applicant's willingness to furnish reasonable security in the sum of Kshs. 3,000,000/- consistent with the statutory limit under section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) Act.

6. On the part of the Respondents, counsel relied on **Directline Assurance Co. Ltd v Wilkinson Mwenda Erastus & Others [2016] eKLR**

and **The Monarch Insurance Co. Ltd v Moses Caleb Ochango [2019] eKLR** and invited the court to interrogate whether the appeal raises triable issues, and in particular whether sufficient cause has been demonstrated. It was counsel's contention that the grounds of appeal do not raise serious issues of law or fact and therefore no sufficient cause to justify the order sought. Finally, counsel submitted alternatively that if the court finds in favour of the Applicant, it should order the Applicant to pay to the Respondents the sum of Kshs. 3,000,000/- which is the admitted limit under the insurance policy and furnish security for the balance of Kshs. 3,137,569.5/- by way of deposit into joint interest earning account or into court.

7. 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.**

8. 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".***

9. Firstly, the merits of the appeal urged by the Respondents are not relevant at this stage. In an application of this nature, the key consideration is whether the Applicant has demonstrated the likelihood of substantial loss if stay of execution 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."***

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. <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>(<u>emphasis added</u>)"***

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 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).

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:-***
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> > ***"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."***

13. The Applicant deposed and in equal measure submitted the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds. Because the Applicant is apprehensive that it will be unable to recover the entire decretal sum of Kshs. 6,137,569.50/- from the Respondent should the appeal succeed. Once such apprehension is expressed the burden shifts upon the Respondent to demonstrate his means. The Respondents herein did not address themselves to this issue at all.

14. 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."***
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> See also **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, **Civil Application No. 322 of 2006 (UR 178/2006)**

15. The suit and ruling in Nairobi CMCC No. 9114 of 2019 (the declaratory suit) relates to a decree of Kshs. 6,137,569.50/- issued in Nairobi CMCC No. 6944 of 2016 (primary suit) and confirmed on appeal. The sum continues to accrue interest. The sum is substantial, and the Applicant has expressed apprehension that if it is paid out to the Respondent, it may be unable to recoup it, thus exposing the Applicant to substantial loss and rendering the appeal nugatory. Considering a similar scenario, the Court of Appeal in **Pressmaster Limited v John Elego & 103 others [2021] eKLR** stated:

> **[16]. "The applicant contends that most of the respondents are unemployed and will not be able to refund the money should the applicant's appeal succeed…. The fear that the respondents may not be able to refund the money is not unfounded. In the circumstances, we think it would be fair and just to grant a conditional order of stay of execution".**

16. 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 (or half of it as proposed by the Respondents) 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**, substantial loss is what must be prevented.

17. On the issue of security, the Applicant has indicated willingness to deposit security for the eventual due performance of the decree to the tune of Kshs. 3,000,000/- asserted to be the statutory limit under the law.

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. <u>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.</u> 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…".** (Emphasis added)

18. Finally, on the question on whether the motion was filed timeously, it is apparent that after the lower court ruling was delivered on 3rd December 2020 and stay granted for 30 days by the lower court. The Applicant filed its memorandum of appeal on 30th December 2020 and subsequently, the present motion on 5th February 2021. The period of delay in filing the present motion though unexplained by the Applicant is not inordinate.

19. In the circumstances, the court is persuaded to grant prayer 3 of the motion dated 28th January 2021, on condition that within 45 days, the Applicant will deposit a sum of Shs. 3000,000/- (Three Million) into an interest earning account in the joint names of the respective parties' advocates. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 23RD DAY OF SEPTEMBER 2021.

C. MEOLI

JUDGE

In the presence of:

Ms Muyaa h/b for Mr Kuria for Applicant

Mr Kaburu for Respondents

C/A: Carol