REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E320 OF 2020

MOHAMMED OMAR SHARIFF..APPLICANT/APPLICANT

VERSUS

JAFFER OMAR SHARIFF ALIAS

SHARIFF NOOR OMAR...RESPONDENT

ANISA SHARIFF MOHAMED ....INTERESTED PARTY

RULING

1. The motion dated 10th December, 2020 by **Mohammed Omar Shariff** (hereafter the Applicant) is seeking orders to stay execution of the orders issued on 11th November 2020 and 30th April 2020 in **Milimani CMCC No. 7837 of 2017 Mohammed Omar Shariff v Jaffer Omar Shariff**, firstly, pending ascertainment by the court of incomes for the period commencing November, 2017 to August, 2019 received from flats erected on **LR No. 209/11114 IR 71823** South C Nairobi, and secondly, pending the hearing of the appeal; and that the court file in the lower court matter *"be placed before this court for determination of this Application and the substantive Appeal"*. The motion is expressed to be brought under Section 1A, 1B, 3A & 65 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. On grounds, among others, that being dissatisfied with the ruling delivered by the subordinate court on 29th October, 2020 the Applicant has preferred an appeal and that **Jaffer Omar Shariff**, the Respondent, has evinced an intention to execute on the basis of a decree arising from a faulty order and that such execution will render the appeal nugatory.

2. The motion is supported by the Applicant's affidavit. It is difficult to follow the depositions therein but it appears that the Applicant and the Respondent had recorded a consent on 16th January 2018 concerning the payment of rents allegedly amounting to Sh.2,815,994/- as claimed by the Respondent and that subsequently, the court ordered that accounts be supplied by the Applicant; which order was complied with , but that the Respondent extracted a faulty order on 11th November 2020 that is contrary to the ruling of 29th October 2020 amending previous orders relating to sums payable under the consent pending ascertainment by the court and thereafter took out warrants of execution against the Applicant. The Applicant deposes that he does not owe any monies to the Respondent as the amounts are yet to be ascertained and his appeal will be rendered nugatory if stay orders are not granted.

3. The motion was opposed through the replying affidavit sworn by the Respondent. The Respondent narrates the background of this matter as follows. That the parties are siblings; that the Applicant claiming to be a joint tenant with the Respondent had sued the Respondent in the lower court concerning his share of income due from rents earned from premises erected on land Parcel **LR. No**. **2019/11114 IR 71823** (hereafter the suit premises); that on 16th January 2018 a consent which the Respondent claims was made under coercion was recorded between the parties, on terms that the Respondent was restrained from evicting, interfering with or collecting rents from the tenants. He deposes that a further term was that with effect from November 2017 until the determination of the suit, the rental income from the suit premises would be distributed in the ratio of 60: 40 in favour of the Respondent and that the Applicant would effect such payment of the Respondent's share of rent by the 10th of every successive month; and that pursuant to the consent, the Applicant took up the management of the suit premises from the date of consent to August 2019 but defaulted in remittance of the share due to the Respondent while giving various reasons and excuses.

4. Hence the Respondent's motion dated 29th August 2019 to enforce the consent, which culminated in the ruling of 30th April 2020 which inter alia ordered the rendering of accounts by the Applicant and issuance of warrants of attachment against the Applicant for the accrued sum of Sh. 2,815,944/-; that no accounts were rendered and instead the Applicant filed a motion dated 21st July 2020 seeking to stop the execution of the consent order, which motion failed. The Respondent denies that the court varied the orders of the 30th April 2020 and deposes that subsequently the order of 30th April 2020 was unilaterally and illegally altered upon correspondence to the Court by the Applicant's counsel to give rise to the order of 11th November 2020 which the Respondent protests against.

5. It is the Respondent's view that the instant motion is intended to curtail his enjoyment of the fruits of successful litigation; that the Applicant has approached the court with unclean hands; that the impugned ruling was delivered on 29th October, 2020 and the unexplained delay in presenting the motion is inordinate, prejudicial, unreasonable and contumelious. It is deposed that the Applicant has not demonstrated substantial loss or indicated willingness to furnish security for the due performance of the decree; and lastly that the appeal offends the provisions of Section 67(2) of the Civil Procedure Act as it effectively targets the consent order of 16th January 2018 and/ or related rulings/orders of 30th April 2020 and 29th October 2020. And that in any event, the appeal against the former ruling is time barred under section 79G of the Civil Procedure Act. Like the Applicant, the Respondent included in his affidavit argumentative material not suited to an affidavit.

6. The motion was canvassed by way of written submissions. Although the Applicant's counsel correctly started by setting out the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules, he proceeded to argue the requirements for stay of execution in the Court of Appeal. Thus, citing the Court of Appeal decision in **Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others [2013] eKLR** and the High Court case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** counsel proceeded to submit that the appeal herein raises arguable and substantive points of law which ought to be addressed by the court and that if stay of execution is not granted, the Applicant will suffer substantial loss , rendering the appeal nugatory. He called to his aid the decision in **Director of Public Prosecution v Perry Mansukh Kansagara & 8 Other [2020] eKLR** and invoked the provisions of Article 165 (6) & (7) of the Constitution of Kenya, 2010, in urging the court to invoke its supervisory jurisdiction over subordinate courts and call for the lower court file that is the subject of the appeal. The court was urged to allow the motion.

7. The Respondent's counsel contended that the motion is not merited. Citing the decisions in **Gladwell Wangechi Kibiru v Lord Melvin John Blackburn & 4 Others [2015] eKLR, Kenya Shell Limited v Kibiru (1986) KLR 410, James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** among others to argue that the Respondent was entitled to the fruits of his litigation and the onus was on the Applicant to demonstrate the likelihood of substantial loss if stay of execution is not granted and that the Applicant had not discharged the burden. Counsel asserted that there was unreasonable and unexplained delay in filing the instant motion. Further citing **Absalom Dova v Tabro Transporters [2013] eKLR**, among others**,** counsel emphasized that there was an existing unsatisfied decree in the Respondent's favour hence the Applicant ought to be required to provide security for due performance thereof.

8. Counsel took the position that the application does not rise to the requisite threshold to warrant issuance of an order calling for the lower court file in exercise of the Court's supervisory powers. He relied on the decision in **Republic v Jackson Mutuku Maweu [2019] eKLR**.

9. 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 to which the parties have adverted in the course of canvassing the instant motion. The power of the court to grant stay of execution pending appeal is discretionary, however the discretion should be exercised judiciously. See **Butt v Rent Restriction Tribunal [1982] KLR 417.**

10. 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".**

11. The 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."

12. 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 **Platt 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)**"**

13. 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)

14. 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."**

15. The Applicant has reiterated in his affidavit and submissions that he will suffer substantial loss and his appeal rendered nugatory if stay of execution is not granted and the Respondent will proceed to levy execution through alleged defective warrants of attachment. Nowhere does he state how substantial loss will occur. Instead, he has asserted his own versions of the proper orders arising out of the rulings of 30 th April and 29th October 2020 but appearing to admit that the former ruling did allow attachment of his goods for the recovery of the sum of Shs. 2,815,994/-, albeit asserting that the phrase "*or… such sums as may be ascertained by the court"* was omitted. Indeed, contrary to the contents of the copy of the ruling of 30th April 2020, attached to the Applicant's affidavit, the second limb of the amended order extracted pursuant to the ruling of 29th October (annexure marked "**Exhibit 1h"** to the Applicant's affidavit) states as follows:

> **"THAT an order be and is hereby issued attaching the properties of the Respondent (Applicant herein) pursuant to consent orders made on 16th January 2018 amounting to KShs. 2815,994/- or against such terms as may be ascertained by this Honorable Court".**

16. The Applicant will have the opportunity to canvass his appeal at the right time and to demonstrate how the trial court erred by issuing the subject orders. For the purpose of this motion however, the Applicant was required to demonstrate substantial loss either because of the difficulties arising from satisfying the decree or the Respondent's inability to refund monies paid out. The decision in **Chris Munga N. Bichange** related to an application for stay execution pending appeal in the Court of Appeal and was primarily premised on Rule 5(2) (b) of the Court of Appeal Rules. The jurisdiction of the court under **Rule 5 (2) (b)** of Court of Appeal Rules is also discretionary and in exercise thereof, the Court of Appeal must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the same would be rendered nugatory.

17. As stated in the **Shell** case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what must be prevented. Therefore, without evidence of substantial loss, it is difficult to justify the denial of the Respondent's right to monies apparently due to him pursuant to the consent of the parties and the order of the lower court. Or to see how the appeal will be rendered nugatory. Not a single averment has been made concerning any difficulties encountered in satisfying the partial decree or concerning the Respondent's capacity or lack thereof to refund any monies paid out by the Applicant. The legal duty to establish such inability rests upon the Applicant. See **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR**.

18. In my view, the Applicant has failed to demonstrate substantial loss as would ultimately render the appeal nugatory. As stated in the **Shell** case, where 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**.** Nothing more needs to be said except that prayer 4 of the motion cannot be entertained by this court as it was already canvassed in the court below, while prayer 5 is superfluous and without legal basis. The Applicant having availed himself of the appeal procedure cannot also purport to invoke the court's supervisory jurisdiction to pursue other avenues concerning the same dispute. The motion

dated 10th December 2020 is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28Th OCTOBER 2021

C.MEOLI

JUDGE

IN THE PRESENCE OF:

MR KIPTOO FOR THE APPLICANT

MR KINARO FOR THE RESPONDENT

C/A; CAROL