



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO. E366 OF 2020**

**PENINAH NDUTA KAMAU.....APPLICANT**

**VERSUS**

**PETERKIN LIHANDA.....1<sup>ST</sup> RESPONDENT**

**BARRACK OTIENO OGIGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The motion dated 5<sup>th</sup> January 2021 by **Peninah Nduta Kamau** (hereafter the Applicant) seeks inter alia orders to stay execution of the judgment and delivered on 7<sup>th</sup> December 2020 in **Milimani CMCC No. 4128 of 2012** pending the hearing and determination of the appeal and that issuance of the certified typed proceedings, judgment and certified decree be expedited to enable the Applicant to file the record of Appeal. The motion is expressed to be brought under Section 1A, 1B, 3A & 63(e) of the Civil Procedure Act and Order 42 Rules 6 & 13 (3) of the Civil Procedure Rules and is premised on grounds, among others, that being dissatisfied by the judgment in **Milimani CMCC No. 4128 of 2012** the Applicant has preferred an appeal and that if stay is denied, she may be exposed to substantial loss as she might not recover the decretal sum from **Peterkin Lihanda** (the 1<sup>st</sup> Respondent, hereafter the Respondent as the 2<sup>nd</sup> Respondent did not participate in the lower court suit or in the instant motion ) upon a successful appeal.

2. The affidavit in support of the motion is sworn by the Applicant. To the effect that the Applicant was aggrieved by the judgment of the lower court and her appeal has a reasonable chance of success and that if the Respondent executes the decree, she will suffer substantial loss and her appeal overtaken as the Respondent may be unable to refund any monies paid under the decree. She asserts that the Respondent will not be prejudiced by the motion and that she was willing to abide by any conditions attached to stay. She urged the court to note the adverse effects of the COVID-19 pandemic on the economy and that she is retired.

3. By his affidavit sworn in opposition to the motion, the Respondent attacks the motion as made in bad faith, without merit and as a ploy to prevent him from enjoying the fruits of successful litigation. He asserts that that the Applicant has not satisfied the conditions for an order of stay by demonstrating substantial loss to be suffered if the decretal sum is paid over, pointing out that it was 8 years since the suit was filed in the lower court. He urged that the Applicant, if successful ought to be ordered to bear costs of the motion and to provide security for due performance of the decree.

4. The court directed the parties to canvass the motion by way of written submissions. The parties have duly complied.

5. Counsel for the Applicant anchored her submissions on the provisions of Order 42 Rule 6 and reiterated the affidavit material and especially the Applicant's apprehension that the Respondent will not be able to refund decretal sum on the appeal succeeding. She highlighted the Respondent's averment that he intended to apply the decretal sums on his medical needs. Relying on **Commissioner of Domestic Taxes v Brookhouse Schools Limited [2021] eKLR** and **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** she argued that the motion is meritorious and reiterated the Applicant's willingness to furnish a bank guarantee as security. Some of her submissions are misplaced as they touch on the merits of the appeal.

6. On the part of the Respondent, it was argued based on **G.N Muema T/A Mt. View Maternity & Nursing Home v Miriam Maalim Bishara & Another [2018] eKLR** and the provisions of Order 42 Rule 6 that the three requirements in the latter must be met simultaneously. Citing **James Wangila & Another v Agnes Naliaka Cheseto [2021] eKLR** and **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** counsel submitted that it was incumbent on the Applicant to prove substantial loss and that the threat or process of lawful execution of itself does not amount to substantial loss. Counsel stated that the motion was not filed expeditiously and cited the decision in **Jaber Mohsen Ali & Another v Priscillah Boit & Another [2014] eKLR**. Counsel submitted that the Applicant ought to be ordered to provide security for due performance of the decree as held in **Focin Motorcycles Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR** and **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR**. He too prematurely

addressed the merits of the appeal.

7. The court has considered the material canvassed in respect of the motion. The power of the court to grant stay of execution pending appeal under Order 42 Rule 6 is discretionary. However, that discretion should be exercised judiciously. See **Butt V Rent Restriction Tribunal [1982] KLR 417**.

8. The 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 Applicants 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 Applicants”.**

9. It is undisputable that the motion was filed in a timeous manner, within 30 days of the judgment of the lower court. Concerning other considerations, the first question to be determined 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] e 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 sets 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 Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants 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)”**

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 Applicants, 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)

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:-**

**“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.”**

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997.**

13. The Applicant stated that she is apprehensive that the Respondent will be unable to refund the decretal sum on her appeal succeeding, which will render the appeal nugatory, or in her words, “overtaken”. As stated in the **Shell** case, substantial loss is the cornerstone of the jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules and is what must be prevented, as it would inevitably result in the successful appeal being rendered nugatory. Contrary to the Respondent’s assertion, the Applicant cannot possibly prove the financial means of the Respondent. It is enough that the applicant expresses apprehension concerning the Respondent’s ability to refund the decretal sum upon a successful appeal.

14. 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 Applicants 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 Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants 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.”**

15. The judgment in the lower court was for a sum of **Kshs 865,776/-** with costs and interest. This is a substantial sum, and the Applicant having expressed apprehension about the Respondent’s capacity to repay, the burden shifted on him to controvert the assertion by proving his means. He has not; indeed, he expresses the intention to utilize the decretal sums on his treatment. In the circumstances, it appears quite likely that the Applicant may indeed suffer substantial loss and her appeal rendered nugatory if stay is not granted. On her part, the Applicant has expressed willingness to provide a reasonable security so that the Respondent will not be prejudiced.

16. The words stated in **Nduhiu Gitahi & Another v 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** and others, 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. In view of the foregoing the court is persuaded that the motion dated 5<sup>th</sup> January 2021 is merited. There will be an order to stay execution pending appeal on condition that within 45 days of today’s date, the Applicant will deposit the sum of Shs.400,000/- (Four Hundred Thousand) into an interest earning account in the names of the parties’ advocates. I note that the parties advisedly did not address the prayer seeking expedition of typing of proceedings in the lower court. That is an administrative matter to be taken up with the concerned registry in the first instance, which course of action has evidently not been taken. The costs of the motion will abide by the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Ms Gatuhi**

**For the Respondent: Mr Lumumba**

**C/A: Carol**