



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E337 OF 2020**

**RICHARD THANDE.....APPLICANT**

**VERSUS**

**W. KRISTINA PRATT.....RESPONDENT**

**RULING**

1. The motion dated 30<sup>th</sup> November, 2020 by **Richard Thande** (hereafter the Applicant) seeks an order to stay execution pending the hearing and determination of the appeal, of the judgment delivered on 25<sup>th</sup> November, 2020 in **Milimani CMCC No. 8148 of 2018**, in favour of **W.Kristina Pratt** (hereafter the Respondent) and that the memorandum of appeal be deemed as duly filed. The motion is expressed to be brought under Order 42 Rules 6 of the Civil Procedure Rules, inter alia. On grounds, among others, that being dissatisfied with the decision against him the Applicant has preferred an appeal and if stay of execution is not granted substantial loss may result, as the decretal sums paid over may not be recovered.

2. The affidavit in support of the motion is sworn by the Applicant. In amplifying the grounds on the face of the motion he states that the motion was filed expeditiously, that his appeal has reasonable chances of success and that if the Respondent proceeds to execute the decree, the appeal, if successful, will be rendered nugatory as the Applicant “*is not likely to recover the aforementioned amounts*” .

3. The motion was opposed by way of grounds of opposition dated 8<sup>th</sup> February 2021. To the effect that the motion is frivolous, vexatious and an abuse of the court process; that the motion is misconceived and bad in law as it is anchored on a fatally defective notice of appeal; that the intended appeal has no chances of success as disclosed by the grounds of appeal in the “draft” memorandum of appeal; that the Applicant has not demonstrated evidence of substantial loss; that the court is enjoined to balance the Applicant’s right of appeal with the Respondent’s right to enjoy the fruits of judgment and; that the Applicant has not provided security for the due performance of the decree.

4. The motion was canvassed by way of written submissions followed by oral highlighting. On behalf of the Applicant, it was submitted that the motion and appeal were filed expeditiously in six days after the decision of the lower court. Counsel further asserted that the appeal is arguable and has a reasonably high chance of success and may be rendered nugatory if the court denies the prayer for stay of execution; that if execution is not stayed and the decretal sum is paid out to the Respondent, upon a successful appeal the Applicant may encounter difficulty in the recovery of the decretal sum which is substantial. He asserted that the Respondent has not demonstrated that she can refund the decretal sums and that the fact that she loaned money to the Applicant in the past is not a demonstration of her present means. Further that the imposition of the condition for security is not a mandatory requirement where there is an arguable appeal with a high chance of success. The Applicant’s counsel relied on the Court of Appeal decision in **Oraro & Rachier Advocates v Co-operative Bank Kenya Limited, Civil Application No. Nai. 358 of 1999** to support his submissions. The Applicant therefore submitted that the motion is merited and should be allowed.

5. On the part of the Respondent, counsel underscored the three requirements under Order 42 Rule 6 of the Civil Procedure Rules which must be met to warrant the court’s exercise of its discretion pursuant to the provisions. He distinguished these requirements from the considerations for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules which include the question whether the appeal is arguable. Concerning substantial loss, he cited the decision in **James Wangila & Another v Agnes Naliaka Cheseto [2012] eKLR** to contend that the fact of execution of itself is not evidence of substantial loss and that the capacity of the Respondent to repay any monies paid under the decree is evidenced by the fact that the suit in the lower court arose from a loan of Shs.5 million from the Respondent to the Applicant, and that the Applicant has not demonstrated otherwise. He viewed the motion as a ploy aimed at depriving the Respondent of the fruits of successful litigation.

6. Regarding security he asserted that it was a non-negotiable requirement under Order 42 Rule 6(2) of the Civil Procedure Rules and urged the court to balance the rights of the parties. He cited **Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR** and other decisions to

justify the assertion that the requirement for security for the due performance of the decree is a mandatory condition to be satisfied and pointed out that the Applicant has not demonstrated willingness or capacity to furnish such security. Reiterating that the present motion was not brought under Rule 5(2)(b) of the Court of Appeal Rules, he contended that the decision in **Oraro & Rachier Advocates** relied on by the Applicant cannot apply. He concluded by stating that the motion does not satisfy the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules and ought to be dismissed with costs.

7. The court has considered the material canvassed in respect of the motion. First, the prayer seeking the admission of the appeal (prayer (5)) appears misconceived as the memorandum of appeal was filed on 1<sup>st</sup> December 2020, just six days since the decision appealed from. Possibly realizing this, counsel for the Applicant only urged the prayer for stay of execution, thereby abandoning prayer 5 of the motion.

8. The power of the court to grant stay of execution of a decree pending appeal under Order 42 Rule 6 is discretionary. However, that discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417**. As the Respondent has correctly pointed out, the present motion is not one brought under Rule 5(2) (b) of the Court of Appeal rules and at this stage, this court is not concerned with the merits of the appeal.

9. The prayer for stay of execution pending appeal is anchored on 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”.**

10. 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.”**

11. 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)”**

12. 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)

13. 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.**

14. The Applicant argues his appeal will be rendered nugatory by the fact that he may be unable to recover any monies paid to the Respondent in satisfaction of the decree if stay is denied; and that the Respondent has not demonstrated her capacity to repay such monies. 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. Contrary to the Respondent’s submission, the Applicant is not expected to prove the means or lack thereof of the Respondent, and it is enough that the Applicant expresses apprehension concerning the ability of the Respondent to refund the decretal sum upon a successful appeal.

15. 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.”**

16. The decretal amount owing is a total sum of **Kshs. 6,776,103.52/-**. This is a substantial sum, and the Applicant having expressed apprehension about recouping the amount on successful appeal, the burden shifted on the Respondent to controvert the assertion by proving her means. She has not done so, and indeed did not deem it necessary to swear an affidavit choosing instead to rely on the fact of her loan to the Applicant giving rise to the lower court suit. This is not an adequate rebuttal in my view, and it may well be that the Applicant will suffer substantial loss and his appeal rendered nugatory if stay is not granted.

17. Concerning security, the court is not persuaded by the Applicant’s argument that it is not a mandatory condition to granting an order of stay of execution where there is an arguable appeal. The argument runs afoul of the language of Rule 6 (2) of Order 42 of the Civil Procedure Rules and pronouncements of superior courts thereon as the Respondent correctly countered. This court has already observed that the requirements applicable to motions brought under Order 42 Rule 6 of the Civil Procedure Rules differ from those applicable under Rule 5 (2) (b) of the Court of Appeal Rules.

18. Applications for stay of execution pending appeal from the subordinate court to this court are premised on Order 42 Rule 6 which prescribes three requirements, including furnishing of security, to be met by the successful applicant. As stated in the **Shell** case, if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given, but parallel with that is the equally important consideration that a successful litigant, should not be deprived of the fruits of a judgment in his favour without just cause. The Applicant’s undoubted right of appeal must be balanced against the Respondent’s rights to the fruits of her judgment.

19. In this regard, 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 ...advantage 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.....”**

20. Similarly, this court must also hold the ring even-handedly in order not to prejudice any party pending the determination of the appeal. The Applicant has not offered any security and justifies his stance by asserting erroneously that it is not a mandatory requirement. After the oral highlighting of submissions by parties on 30th June 2021, this court granted the Applicant’s request for interim stay of execution pending this ruling. The order was subject to the condition that the Applicant was to deposit into court the sum of Shs.2.5million within 14 days. Five months later there is no evidence that the Applicant complied with that condition. The Applicant’s non-compliance and his sustained but untenable stance regarding the requirement for security gives the impression that the Applicant while keen to obtain stay orders is himself reluctant to offer security to the Respondent. The court cannot allow the tipping of the scales in such a skewed manner.

21. In view of the foregoing, and in balancing the interests of both parties, the court will grant prayer 4 of the motion dated 30th November 2020, on condition that the Applicant deposits into court the sum of Shs. 5000,000/- (Five Million) within 21 days of today’s date failing

which execution shall proceed. Costs will be in the cause.

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

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: N/A**

**For the Respondent: Ms Bundi h/b for Mr Gitonga**

**C/A: Carol**