



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 154 "A" OF 2020

GILOIL COMPANY LIMITED.....APPLICANT/APPELLANT

VERSUS

TIMOTHY NAMISI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The motion dated 19th March, 2021 by **Giloil Company Limited** (hereafter the Applicant) seeks an order to stay execution of the judgment and decree issued on 6th March, 2020 in **Milimani CMCC No. 6347 of 2018** pending the hearing and determination of the appeal filed herein. The motion is expressed to be brought under Order 42 Rules 6 (1) & (2) of the Civil Procedure Rules, inter alia. On grounds, among others, that being dissatisfied by the judgment in **Milimani CMCC No. 6347 of 2018** the Applicant has preferred an appeal and may be unable to recover any decretal sum paid in satisfaction of the decree from the 1st Respondent upon the appeal succeeding which eventuality would the appeal nugatory.

2. The affidavit in support of the motion was sworn by **James Kinyua** as an authorized representative of the Applicant. To the effect that the Applicant was aggrieved by the judgment of the lower court in **Milimani CMCC No. 6347 of 2018** delivered on 6th March, 2020 and has preferred an appeal. The deponent expresses apprehension that the Applicant is likely to suffer substantial loss arising from the likelihood that the 1st Respondent will be unable to refund any monies paid in satisfaction of the decree as his source of income is unknown; that an earlier offer to compromise the motion was withdrawn by the Respondent; that if stay is not granted the appeal, if successful, may be rendered nugatory. Finally, the deponent expressed the Applicant's willingness to abide by any conditions on stay as may be ordered by the court and asserted that the motion was timeously filed.

3. The motion was opposed by the replying affidavit deposited by **Namada Simoni**, counsel for the Respondent. Therein, he pointed out that parties herein had earlier agreed on terms of conditional stay pending appeal, but that the Applicant delayed the execution of account opening forms despite the 1st Respondent's performing his part thus prompting the 1st Respondent to withdraw from the agreement. Counsel took the view that the motion which does not meet the conditions for stay pending appeal, is a dilatory tactic and represents an abuse of process of the court.

4. The motion was canvassed by way of written submissions. For the Applicant, it was submitted that the motion was filed without undue delay after the collapse of the parties' mutual agreement on security. Counsel emphasized that the appeal herein will be rendered nugatory if stay is not granted as the 1st Respondent has not demonstrated ability to refund the any decretal sum paid to him should the appeal succeed. Reliance was placed on the case of **ABN AMRO Bank v Le Mode Foods Ltd Civil Application No. Nai. 15 of 2002** as cited in **Blue Shield Insurance Co. Ltd v George Thurairara Misc. Application No. 3 of 2008 (Meru)**. Finally, counsel reiterated the Applicant's willingness to provide security for the due performance of the decree. He urged the court to allow the motion.

5. The 1st Respondent's counsel citing the provisions Order 42 Rule 6 of the Civil Procedure Rules and the decisions in **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR** and **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, submitted that the Applicant has not demonstrated substantial loss and the motion is a dilatory gimmick. He asserted that the motion is without merit and ought to be dismissed. In the alternative, he urged that in the event the court is inclined to allow the motion, it should require the Applicant to furnish security for the due performance of the decree.

6. The court has considered the material canvassed in respect of the motion. 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**.

7. 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”.

8. The first question to be determined is whether the Applicant has demonstrated the likelihood of suffering 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] 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.”

9. 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 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. 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)”

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 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)

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.”

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

12. Counsel for the Applicant has asserted that the Applicant is likely to suffer substantial loss and the appeal rendered nugatory if stay is not granted as the 1st Respondent has not demonstrated his capacity to repay any monies paid to him under the decree. 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, because it inevitably results in the successful appeal being rendered nugatory. It is enough that the Applicant has expressed apprehension concerning the 1st Respondent’s financial means, which in this case has not been controverted.

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 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.”

14. The judgment in the lower court was for a sum of **Kshs 1,097,000/-** with costs and interest. This is a substantial sum, and the Applicant having expressed apprehension about the 1st Respondent’s capacity to repay, the burden shifted on him to controvert the assertion by proving his means. He has not and it is quite likely that the Applicant will suffer substantial loss and its appeal rendered nugatory if stay is not granted. On the issue of security it appears that the parties had attempted without success to agree on a mutually acceptable arrangement. Before this court, the Applicant has pledged to provide security for the due performance of the decree.

15. 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.....”

16. It is true that the motion was brought more than a year from the date of the judgment, but it appears that in the intervening period some sort of negotiations as to conditions for stay pending appeal were on going. These were unsuccessful and in the circumstances the delay in bringing the motion is not inordinate. In the result, the court is satisfied that the motion dated 19th March 2021 is merited and ought to be allowed on condition that within 30 days of today’s date, the Applicant deposits the sum of Shs. 800,000/- (Eight Hundred Thousand) into an interest earning account in the joint names of the parties’ advocates. The costs of the motion will abide by the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 18TH DAY OF NOVEMBER 2021.

C.MEOLI

JUDGE

IN THE PRESENCE OF:

MR NJUGUNA FOR THE APPLICANT

MR NAMADA FOR THE RESPONDENT

C/A: CAROL