



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO 79 OF 2019**

**ELIUD MUGO KAGAI.....APPELLANT**

**VERSUS**

**WILSON M. NJENGA.....RESPONDENT**

**R U L I N G**

1. The appeal herein was filed on 23<sup>rd</sup> May 2019, subsequent to which the Applicant **Eliud Mugo Kagai** filed an application on 28<sup>th</sup> October 2019 seeking stay of execution later replaced by the amended notice of motion filed on 4<sup>th</sup> November 2019.

2. The live prayers in the motion are Nos. 3 and 4 which seek stay execution pending appeal and the release of the Applicant's vehicle **Reg. No. KAS 081 H** seized in execution of warrants of attachment, pending determination of the appeal. On grounds that the Applicant will suffer substantial loss should the sale of his motor vehicle proceed and is likely to face disciplinary action at his workplace at the United States of America (USA) embassy, Nairobi if execution is not stayed. That is the gist of his grounds and affidavit supporting the motion. The replying affidavit was sworn by counsel for Wilson M. Njenga, the Respondent and highlights the failure by the Applicant to comply with conditions earlier given in the lower court and by this court for deposit of cash as security; and rubbishes claims that the Applicant will suffer substantial loss. During oral canvassing of the application, parties urged the material contained in the respective affidavits.

3. In the quintessential decision of the Court of Appeal in **Shell Ltd v Kibiru and Another [1986] KLR, Platt JA** set out two different circumstances when substantial loss could arise as follows:

**“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...”**

4. 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)

5. Earlier on, **Hancox J A** 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 questions 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.”**

6. In the instant case, the judgment of the lower court was delivered on 23rd April 2019, and a decree issued in May 2019. On 24th May 2019 the Applicant applied to stay execution pending appeal. The motion in the lower court was allowed on 13th August 2019 on condition that the Applicant deposits the entire decretal sum into court. The Applicant did not comply with the conditions and when execution commenced in October 2019, he approached this court seeking to stay execution. He however did not comply with the condition to deposit half the decretal sum given at *ex parte* stage in the order granting temporary stay.

7. The Applicant has indeed moved the court without unreasonable delay. The decree in this case is substantial and while the Applicant and Respondent are both gainfully employed, the Respondent did not deem it necessary to swear an affidavit to demonstrate the ability to refund these monies if the appeal resolves in the Applicant's favour.

8. The Respondent has emphasized the fact that the Applicant has twice made similar applications, once in the lower court and before this court. The provisions of Order 42 r 6(1) of the Civil Procedure Rule allow this. The rule provides that:

**“6. (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.”** (emphasis added)

9. Whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty.... to consider” an application for stay made to it and to make any orders it deems fit. The High Court acting as an appellate court in such case exercises what can be termed as “original jurisdiction, which in my reading of the rule is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof.

10. Indeed, in this case the Applicant's failure to comply may well be evidence that making the payments could result in great hardship as envisaged in the Shell case. Thus, it cannot be said that he is unlikely to suffer substantial loss and thereby rendering his appeal nugatory if execution proceeds. It appears that the Applicants' motor vehicle had already been attached by the time of the amended application. It is not clear whether or not the said vehicle has been sold and whether it can be treated as proposed by the Applicants' advocate as security.

11. Further the court notes that the record of appeal herein has already been filed which means that the appeal can be perfected for hearing. The words stated in **Nduhiu Gitahi and Another -Vs- 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** 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.....”**

(See also **James Wangalwa & Another -Vs- Agnes Naliaka**

**Cheseto [2012] eKLR.)**

12. In the circumstances, the court is inclined to grant the prayer to stay execution pending the hearing on the appeal, on condition that the Applicant deposits a sum of KShs.200,000 (Two Hundred Thousand) into court within 14 days of today's date. The costs of the application will abide the outcome of the appeal.

13. The record of appeal filed by the Appellant appears to be in order and the court directs that the appeal be canvassed through simultaneous written skeletal submissions with oral highlighting at the hearing. The parties are to appear before the Deputy Registrar on 19th August 2020 to take a hearing date for the appeal during the service week to be held in this court in September 2020.

**SIGNED AND DELIVERED ELECTRONICALLY THIS 30<sup>TH</sup> JULY DAY OF, 2020.**

**C. MEOLI**

**JUDGE**