REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

HCCA NO. 173 OF 2018

(CONSOLIDATED WITH MISC. CIVIL CASE NO. 212 OF 2019)

JUSTINE NG'ANG'A NGARUIYA..... APPELLANT

VERSUS

1. PETER GITAU NJUGI .....1ST RESPONDENT

2. BUXTON FARMERS CO. LTD.....2ND RESPONDENT

R U L I N G

1. On 19th November 2019, the court ordered the consolidation of **HCCA 173 of 2018** with **Misc. C.C. No. 212 of 2019**, the lead file being the former. The court ordered that the applications filed on 11th June 2019 in the said former file and that filed on 12th June 2019 in the Miscellaneous Cause be canvassed together. The first application to be filed on 11th June 2019 is by **Justin Nganga Ngaruiya** the Appellant herein, who was an Interested Party in the lower court case from which the appeal arose. The said suit, **Limuru SPMCC No. 257 of 2011** had been filed by **Peter Gitau Njugi** (the plaintiff in the lower court and herein the 1st Respondent) against **Buxton Farmers Co. Ltd**. (the Defendant in the lower court now the 2nd Respondent). Judgment was entered in favour of the 1st Respondent against the 2nd Respondent. The Appellant's motion seeks orders to stay execution, pending the determination of the intended appeal, of the said judgment delivered on 11th April 2019. The judgment was delivered subsequent to the dismissal of an application by the Appellant seeking the review of the order to close the trial and to allow the Appellant and Defendant therein (Buxton Farmers Co. Ltd.) to adduce evidence.

2. Thus, the memorandum of appeal filed on 19th December 2019 related to the said ruling, delivered on 7th December 2018. It appears that the trial court proceeded to deliver its judgment on 11th April 2019, forcing the Appellant to abandon the initial application to this Court for stay of proceedings. The supporting affidavit to the instant sworn by the Appellant contains material germane to the appeal itself.

3. However, the deponent additionally asserts that he was denied a hearing in the subordinate court and that garnishee proceedings had commenced in respect of monies held in the bank account of the 2nd Respondent and that the 1st Respondent had already sought the release of the said monies, amounting to over Shs.3.5 million to himself and that he will suffer substantial loss and his appeal rendered nugatory in such an eventuality.

3. The 1st Respondent opposed the application by a replying affidavit filed on 15th July 2019. He pointed out that parties were accorded an opportunity to canvass their respective cases in the lower court; that he has a judgment in his favour, against which no appeal has been filed and that he is therefore entitled to the fruits of his judgment; that stay cannot issue on the basis of an intended appeal and that in any event, the monies in dispute were deposited upon his application in the trial court, and that any claim by the Appellant against the 2nd Respondent will be satisfied once determined and its existence should not frustrate the deponent in the execution of his lawful judgment.

4. In a supplementary affidavit, the Appellant deposed that despite the 1st Respondent having applied for the deposit, the monies in dispute properly belonged to him and not to the 2nd Respondent , and that upon his application to re-open the case being dismissed by the trial court, he had filed a memorandum of appeal on 19th December 2018 and that despite requesting and following up on the proceedings in the lower court, the proceedings had yet to be supplied as at November 2019. Hence the delay in filing his "substantive" appeal. He reiterates that he stands to suffer irreparable loss if the money in the bank is released, and the appeal will be rendered an academic exercise; that while his claim was against the 2nd Respondent the said company had wound up and he would be left without recourse if the monies are released to the 1st Respondent. That the 1st Respondent will not be prejudiced by his application being allowed as the money is held in an interest earning account.

6. The second application was filed by the 2nd Respondent against the 1st Respondent and the Appellant. The application is seeking leave to appeal out of time from the judgment in **Limuru SPMCC No. 257 of 2011.** The gist of the grounds on the face of the motion and in the supporting affidavit sworn by a director, **Peter Kahia Giathi** is that the 2nd Respondent had no notice of the delivery of the judgment and only learned of it on 31st May 2019 when served with a garnishee order to the 2nd Respondent's bank to attach the funds held in the said bank by way of execution of the decree and that the 2nd Respondent's request for proceedings in the lower court was still outstanding as the proceedings were not ready.

7. The 1st Respondent in his replying affidavit filed on 15.7.2019 opposed the application. He views the application as one in a series of tactics employed by the 2nd Respondent and the Appellant in the alleged collusion aimed at denying him the fruits of his judgment. Regarding alleged lack of notice of judgment to the 2nd Respondent, he acknowledges that judgment initially set for December 2018 was postponed on several occasions but asserts that any party could have tracked the developments and that the eventual notice of delivery was placed on the court's notice board. Further he deposes that no reason has been given for the failure to file a memorandum of appeal or the attachment of such draft to the 2nd Respondent's application. To his mind the application is an afterthought. The two applications were canvassed by way of written submissions.

8. For the Appellant, it is submitted, after setting out the history of the matter, that the Appellant stands to suffer substantial loss as the 1st Respondent's means to refund the decretal sum are unknown and that in all likelihood his appeal will be rendered nugatory. He relied on the case of **Butt v Rent Restriction Tribunal [1982] KLR 417 and National Industrial Credit Bank Ltd. V Aquinas Francis Wasike & Another [2006].** It was asserted that the Applicant filed his appeal without delay and filed the instant application upon the imminent threat of execution by way of garnishee proceedings; that the appeal challenges the ruling of the lower court that denied the Appellant a hearing and that the interests of the 1st Respondent are protected as the monies in dispute are held in an interest earning account. The court was urged to exercise its discretion in a manner that does not prevent the appeal and thereby cause prejudice upon the Appellant. The submissions did not make any reference to the application by the 2nd Respondent. I do not see on record any submissions filed by the 2nd Respondent.

9. The 1st Respondent's submissions in respect of the Appellant's application was that the orders sought cannot issue as the Appellant was not the party against whom execution had commenced by way of garnishee proceedings, but rather the 2nd Respondent against whom the Appellant had lodged a counterclaim and there was no nexus therefore between the two claims and moreover, as garnishee proceedings relate to money held by the 2nd Respondent's bank, there is no evidence that the Appellant will suffer substantial loss if the money is paid to the 1st Respondent. That in any event no appeal has been filed in respect of the judgment of 11th April 2019. On this score, counsel relied on High Court decision in **Raymond M. Omboga v Austine Pyan Maraga [2010] eKLR.** The 1st Respondent contends that there was unreasonable and unexplained delay in bringing the application to stay the judgment delivered two months before, on 11th April 2019, the Appellant having requested copies of proceedings and judgment on 16th April 2019. As regards security, the 1st Respondent asserts that no offer of security has been made by the Appellant. In the circumstances, the court was urged to dismiss the Appellants application.

10. In opposition to the 2nd Respondent's motion, the 1st Respondent's submission reiterated material in his affidavit and relying on the principles in **Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & Others [2014] e KLR** urged the court to find that the 2nd Respondent is underserving of the orders sought, having failed to satisfy the conditions therein. The 1st Respondent asserts that the 2nd Respondent is guilty of unreasonable and unexplained delay, and has not attached a draft memorandum of appeal and contends that he will be unduly prejudiced by the delayed conclusion of litigation as his enjoyment of the fruits of his judgment is frustrated due to the indolent and tardy conduct on the part of the 2nd Respondent. The court was urged to allow the litigation to come to an end by dismissing the two motions.

11. The court has considered the material canvassed in respect of the two motions. The Appellant's motion is brought primarily 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".**

12. From a plain reading of these provisions, it is self-evident that the existence of an appeal in respect of an order or judgment is the condition precedent to the making of an application for stay of such order or judgment, pending appeal. That said, it is undisputed in this case that the Appellant first approached this Court in respect of the ruling of the lower court delivered on 7th December 2018 which effectively ruled out the possibility of the case in the lower court being reopened and the Appellant and 2nd Respondent being allowed to tender evidence, before the judgment was delivered. Indeed, the judgment was delivered by the lower court on 11th April 2019 albeit after several adjournments.

13. The Appellant was evidently aware of this judgment as at 16th April 2019 when he wrote to the court seeking copies of the proceedings and judgment (see annexure **JNN 9** to the Appellant's supporting affidavit).From his depositions and submissions, the Appellant clearly anchors the instant application to the memorandum of appeal filed in relation to the ruling of 7th December 2018. Without preempting the outcome of this appeal, if the said appeal were allowed, the judgment subsequently delivered would automatically fall by the wayside. The court does not share the Appellant's position that the memorandum of appeal as it stands sufficiently anchors the present motion, the facts of the matter notwithstanding.

14. However, the court is wary of giving undue weight to the absence of a specific memorandum of appeal concerning the judgment delivered after the ruling impugned in the existing memorandum of appeal. The memorandum of appeal can be amended to suit the changed facts of the case. In a certain sense, the ruling impugned gave birth to the judgment and the 1st Respondent cannot rely on the absence of a memorandum of appeal citing the judgment of 11th April 2019, to defeat the Appellant's motion.In short, the court is satisfied that the instant application has an anchor, though imperfect, in terms of the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

15. Now turning to considerations in respect of an application for stay of execution pending appeal, has the Applicant demonstrated 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**. Holdings 2,3 and 4 therein are particularly relevant. 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.**
>
> **5. …..**"

16. The ruling by **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 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. <u>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…</u>(**emphasis added**)"**

17. 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. <u>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</u>."** (emphasis added)

18. 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."**

19. The Appellant has asserted that if the sums subject to the garnishee order in execution are released, he will be without recourse as the 2nd Respondent has become moribund and he may never recover his monies if the appeal resolves in his favour. In submissions, he pointed out

that the 1st Respondent has no known means of repaying this sum. The 1st Respondent's answer is that there is no nexus between the claims of the 1st Respondent and the Appellant as against the 2nd Respondent and that if the Appellant were successful, he would be able to pursue his claim against the 2nd Respondent. Secondly that the execution in respect of the judgment of the lower court is against the 2nd Respondent and not the Appellant.

20. It appears however from the material before the court that the Appellant and the 1st Respondent were before the lower court laying claims to the same set of shares in the 2nd Respondent company. Annexture **"PG N1"** to the 1st Respondent's replying affidavit filed on 15th July 2020 is the Appellant's defence and counterclaim in the lower court. In that pleading the Appellant averred that the 2nd Respondent had fraudulently transferred his 25 shares therein to the 1st Respondent who was a stranger to him and sought judgment in respect of shares due to him and accrued dividends since 2010.

21. While it is true that the prayers were sought against the 2nd Respondent who was the Defendant in the lower court, it is apparent that the Appellant imputed impersonation and fraud on the part of the 1st Respondent as well. From this pleading, the copy of decree annexed to the Appellant's affidavit as annexure **"JN4"** and the history of this matter as contained in the submissions of the Appellant, it is apparent that there was a nexus between the Appellant's and the 1st Respondent's claims against the 2nd Respondent in so far as the Appellant claimed that certain shares registered in the 1st Respondent's name rightfully belonged to him.

22. It appears that because neither the 2nd Respondent nor the Appellant gave evidence, the 1st Respondent's claim to all the 290 shares was allowed against the 2nd Respondent by the trial court. So that while the judgment in the lower court was against the 2nd Respondent, it impacted upon the Appellant's claim as evidently the shares in dispute could only belong to one of the disputants; the 1st Respondent or the Appellant. In that context it is possible to appreciate the Appellant's apprehension that once the 1st Respondent was paid the sums held in the 2nd Respondent's account which are fairly substantial, it may well be impossible to get recourse in the event his appeal succeeds.More so as the 1st Respondent has not demonstrated his ability to refund such payments in such an eventuality.

23. In the oft-cited 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 Applicant 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 applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant 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."**

24. Thus, while it may be correct that the 1st Respondent is entitled to the fruits of his judgment, there was no evidence of his financial capacity to refund the decretal sum if the appeal succeeds. The Appellant would suffer substantial loss as his appeal would have been rendered nugatory. Regarding timeliness, the Appellant first approached the court in December 2018 after the delivery of the lower court ruling. However, although it appears that by 16th April 2019, he had become aware of the judgment of the lower court, it was not until the 11th June 2019 that he filed his present application. It appears that the Appellant's motion was prompted by the garnishee process initiated through the 1st Respondent's motion dated 30th June 2019 (Appellant's anexure **(JNN6)"** and the garnishee orders of even date issued exparte by the court **[**Appellant's **annexure JNN7].**

25. In his submissions, the Appellant asserts that prior to these proceedings there was no real threat of execution hence the failure to apply. Moreover, that he moved the court only 11 days since the execution process began. In my view, although this explanation defies the asserted claims of the Appellant regarding sums held, the delay in this case is not unreasonable, being only two months. One would have expected that given the contest to shares in the lower court and the Appellant's awareness of the monies held on account, the Appellant would have moved faster in seeking to stay the execution of the decree.

26. The delay of two months does not seem to the court unreasonable or prejudicial to the 1st Respondent. At any rate, and this is relevant to the next consideration, the disputed sums are in an interest earning account in the 2nd Respondent's bank account. This substantial sum appears adequate to cover the eventual decree to be performed by the 2nd Respondent towards the 1st Respondent or the Appellant. In my own opinion this sum forms adequate security for purposes of the requirement of Order 42 Rule 6 of the Civil Procedure Rules.

27. 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……"**

28. In view of all the foregoing, this Court is persuaded to grant the motion filed on 11th June 2019 on condition that the sums which were the subject of the garnishee order in the lower court remain in the account as security for the performance of the eventual decree. Secondly, and as a further condition for the stay, the Appellant is directed and accordingly granted leave to amend within 30 (thirty) days of today's date, the memorandum of appeal filed on 19th December 2018 in a manner consistent with the reality of the judgment delivered on 11th April

2019.Thirdly the court directs the Appellant to take necessary steps to perfect the appeal, now that he asserts that the record of appeal has been filed, to expedite the hearing of the appeal. The Appellant will bear the costs occasioned by this application in any event.

29. Turning now to the 2nd Respondent's motion, it is expressed to be brought under Section 79G of the Civil Procedure Act which provides that:

> **"Every appeal from the subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.**
>
> **Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal on time."**

30. The successful applicant must demonstrate ***"good and sufficient cause for not filing the appeal in time."*** In **Thuita Mwangi v Kenya Airways [2003]e KLR,** the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

> **"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."**

31. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

> **"(T)he underlying principles a court should consider in exercise of such discretion include;**
>
> **1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
>
> **4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
>
> **5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
>
> **6. Whether the application has been brought without undue delay.**
>
> **7. ....."**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017[e KLR.**

32. There is no dispute that the judgment of the lower court, initially set for 17th December 2018 was postponed on several occasions before eventual delivery on 11th April 2019. There is no evidence that any notice was served on the parties beyond the one placed on the court's notice board. However, the 2nd Respondent would have kept abreast of the date had it applied some diligence. Nevertheless, it appears that the 2nd Respondent learned of the judgment on 31st May 2019 upon being served with the garnishee application and order dated 30th May 2019 and attached as annexure **JNN6** to the Appellant's supporting affidavit. It took another 11 days before the 2nd Respondent filed the application for leave. Two months of delay, given the circumstances of the delivery of the judgment and the 2nd Respondent's explanation is not unreasonable. Besides, there is material before the court through the Appellant that as of December 2018 the proceedings of the lower court had not been supplied. That said, 2nd Respondent like the 1st Respondent could have been more proactive by keeping itself informed on the dates of the judgment of the lower court.

33. As pointed out by the 1st Respondent, the 2nd Respondent has not attempted to demonstrate that it has a viable appeal through a draft memorandum. This however is not a mandatory requirement as the judgment of the court in **Thuita Mwangi** clearly states. The more salient consideration upon which the 1st Respondent has placed much weight is the degree of prejudice he is likely to suffer. Evidently the lower court suit had been filed in 2011 and had remained unconcluded until 2018. It is not clear who the guilty party was, but clearly, the court finally put its foot down to conclude the case.

34. The 2nd Respondent is aggrieved with the outcome of the case. The sum involved is substantial and a portion of it is claimed by two different parties; the Appellant, and the 1st Respondent. The 1st Respondent will suffer some degree of prejudice if extension of time is granted to the 2nd Respondent. However, the said fruits are safely held in an interest earning account. Besides, the Appellant has in submissions confirmed that the record of appeal has been filed, indicating that the copies of proceedings and judgment are now ready.

Balancing the interests of all the parties in the circumstances of this case, the court is of the view that the justice of the case tilts in favour of allowing the extension sought by the 2nd Respondent. In the court's considered view, there is nothing to suggest that despite the undisputed delay in the lower court and in bringing this application justice cannot be ultimately done between the parties. See **Ivita v Kyumbu [1984] KLR 441**.

35. In the result, the court is persuaded to grant the 2nd Respondent's application filed on 12th June 2019. The 2nd Respondent is granted leave to file a memorandum of appeal within 21 days of today's date. Upon being filed, the said appeal is to be consolidated with the appeal filed in HCCA No. 173 of 2018 where a record of appeal is said to have been already prepared. The 2nd Respondent will bear the costs occasioned by its own application.

SIGNED AND DELIVERED ELECTRONICALLY THIS 23RD DAY OF OCTOBER, 2020.

C. MEOLI

JUDGE