REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 2 OF 2019

HENRY SAKWA MALOBA.....APPELLANT

VERSUS

BONFACE PAPANDO TSABUKO.....RESPONDENT

RULING

1. The application that I am tasked with determining is dated, 26th June 2020 and it is brought under the provisions of Section 1A, 3A, and 63 (e) of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, and Article 159 of the Constitution. In the application, the applicant seeks for orders of stay of execution of decree pending hearing and determination of their appeal.

2. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

> *"(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.*
>
> *(3) …*
>
> *(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."*

3. An applicant, for stay of execution of decree or order pending appeal, is under obligation to satisfy the conditions set out in Rule 6(2) of Order 42 aforementioned, namely:

> *"[a] that substantial loss may result to the applicant unless the order is made;*
>
> *[b] that the application has been made without unreasonable delay;*
>
> *[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given."*

4. When considering the grounds for granting or refusing to grant stay pending appeal, the court takes into account, according to the Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1979] eKLR, the following:

a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;

b) The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion;

c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings; and

d) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

5. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, as follows:

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

6. The appellant herein avers that he is likely to suffer substantial loss as his appeal is likely to be rendered nugatory, should stay not be granted. The decree herein is for an amount of Kshs. 170,000.00. The respondent, on his part, opposes the application, stating that grant of stay would amount to denying him the fruits of judgment in his favour.

7. The Court of Appeal, in *Vishram Ravji Halai vs. Thornton & Turpin (1963*) *Ltd* [1990] eKLR, held that whereas the power of the Court of Appeal to grant a stay pending appeal is unfettered, the jurisdiction of the High Court to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

8. To that, the court, in *Victory Construction vs. BM (a minor suing through next friend one PMM)* [2019] eKLR, added:

> *"… the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. According to section 1A(2) of the Civil Procedure Act "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."*

9. Similarly, in *Century Oil Trading Company Limited vs. Kenya Shell Limited* Nairobi [2008] eKLR, the court stated:

> *"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that … Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."*

10. In *Samvir Trustee Limited vs. Guardian Bank Limited* [2007] eKLR, it was said:

> *"… It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ..."*

11. The applicant has not, in his application, alluded to inability by respondent to refund the decretal sum should the appeal be allowed. He does not mention the substantial loss that he is likely to suffer, and has not adduced sufficient evidence to prove that he is likely to suffer substantial loss should the orders be denied.

12. The judgment herein was delivered on 11th December 2018. The application for stay of execution was made in January 2020, after a period of one year. It was said, in *Jaber Mohsen Ali & another vs. Priscillah Boit & another* [2014] eKLR, that:

> *"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is*

dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor vs. Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

13. The application herein was filed one year after judgment. The applicant has not offered any reason or explanation as to the delay. From the evidence, it is clear that he was only reminded of his rights after being summoned to show cause, in execution of the decree. It is, therefore, my finding that the application was made late in the day, and this imputes that the application was not made in good faith, but to delay and deny the respondent the fruits of his judgment.

14. With regard to security, it was said in *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, that:

> *"… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails."*

15. In *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, the court stated that*:*

> *"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor … Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."*

16. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, where it was stated that:

> *"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."*

17. The applicant herein has made no offer to furnish security, for the same has not be mentioned in his application. In as much as the same is discretionary, it is incumbent upon the applicant to offer such security as prescribed under Order 42 Rule 6. The applicant herein has not satisfied this said ground.

18. In an upshot, it is my finding and holding that the applicant herein has utterly failed to satisfy the prerequisite grounds for warrant grant of the orders sought, and, therefore, his application ought to, and, is hereby dismissed, with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November, 2020

W MUSYOKA

JUDGE