REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISCELLANEOUS CIVIL APPLICATION NO. 540 OF 2019

AFRICAN MERCHANT ASSURANCE CO. LTD.....APPLICANT

-VERSUS-

NYAMAI KEA AND ANN SYOMBUA KIOKO

(Suing on behalf of the Estate of **VINCENT KYALO NYAMAI (Deceased).....RESPONDENTS**

RULING

1. The applicant herein, **African Merchant Assurance Co. Ltd**, has moved this court vide the application dated 20th November, 2019 seeking an order that this Court stays execution of the judgement and decree entered on 12th June, 2019 in Kithimani PMCC No. 111 of 2019 pending the hearing and determination of this appeal.

2. According to the Applicant, the default judgement was entered against the Applicant in the said case in which it was ordered to pay Kshs 3,303,325/- plus costs. It then instructed its advocates to apply for setting aside the said judgement and the said application was filed on 20th August, 2019 but in its ruling delivered on 30th October, 2019, the trial court dismissed the said application.

3. Aggrieved by the said decision, the Applicant instructed its advocates to appeal against the said decision and accordingly, an appeal was duly filed. In the meantime, the applicant is apprehensive that the Respondent may proceed to execute the said judgement before the hearing and determination of the said appeal. It was deposed that the Respondent's physical (sic) and means are unknown to the Applicant and the Applicant is reasonably apprehensive that if the decretal sum which is substantial is paid over to the Respondent, he would not be in a position to refund the same if the appeal succeeds. According to the Applicant the said appeal which is against the entire ruling has high chances of success.

4. It was further deposed that this application has been made without any unreasonable delay and the same will not occasion any prejudice to the Respondent.

5. In opposing the application, the Responded deposed that the entry of the default judgement was regular hence the applicant has no plausible appeal and its said appeal has very little chances of success as the trial court considered all relevant factors in arriving at its decision to dismiss the applicant's application to set aside the judgement. According to the Respondent, the Applicant has failed to show how it will suffer substantial loss should the execution proceed. According to the Respondent, the judgement given is reasonable and merited and it is only fair that the Respondents, as the successful litigants and dependants of the deceased be allowed to enjoy the fruits of the judgement as they stand to suffer immense prejudice should the stay be granted.

6. It was the Respondent's belief that in order to secure the interests of both parties, the applicant should be compelled to offer security by depositing the decretal sum plus costs of Kshs 3,713,929/- in court and/or a joint interest earning account pending the hearing of the intended appeal otherwise the application ought to be dismissed with costs.

Determination

7. I have considered the application, the supporting affidavit, the submissions filed as well as the authorities relied upon.

8. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> **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.**

9. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction 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. To the foregoing I would add that 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 nolonger 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.

10. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. 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… Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."**

11. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

> **"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 corner stone of both jurisdictions for granting a 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".**

12. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

> **"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were**

before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

13. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

14. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

15. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

16. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success.

17. In this case, the applicant contends that the Respondents are of unknown means hence the Applicant will suffer a loss if execution proceeds given that the Respondents will not be able to refund the decretal amount in the event that the appeal succeeds. However, it was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Lack of knowledge of the financial means of a successful litigant, is therefore not one of the grounds for denying him the fruits of his judgement. Suffice to state that he is, at this moment, the successful party and to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

18. In this case, unfortunately the Respondents have neither averred that they are capable of refunding the sum that may be paid to them nor have they disclosed their source of income. The law, appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

19. In Civil Application No. 238 of 2005; **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike** the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows:-

"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an 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."

20. Though none of the parties has alluded to the nature of the judgement, from the replying affidavit, it would seem that the Respondent claimed on behalf of a deceased person. Clearly therefore in the event that the Applicant succeeds in the appeal, recovery of the sum paid may be difficult particularly as the Respondent has not disclosed the estate's source of income, if any.

21. As regards to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** it was held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the latter case the amount in question was Kshs. 4,000,000.00. In this case going by the grounds of opposition, it would seem that the sum in contention is over Kshs 3,000,000.00.

22. On security, this court appreciates the legal position in **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR,** where it was held 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."**

23. I however I appreciate the sentiments expressed by the High Court in **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** that:

> **"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."**

24. In the premises, there will be a stay of execution pending this appeal on condition that the Applicant deposits the decretal sum in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date hereof.

25. However, as was appreciated by **Platt, JSC** in **Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989:**

> **"Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency."**

26. In the premises I direct the Applicant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

27. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Bore for Mr Nyasani for the Respondent

CA Geoffrey