REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 43 OF 2020

GODFREY WAINAINA KINYANJUI.....1ST APPELLANT/APPLICANT

MOSES MUTUA.....2ND APPELLANT/APPLICANT

VERSUS

JOSEPH MWIKYA MUSAA.....RESPONDENT

RULING

1. By a Motion on Notice dated 10th August, 2020, the applicant herein seeks a stay of execution of the judgement and/or decree delivered in Machakos CMCC No. 185 of 2018 pending the hearing and determination of this appeal.

2. The application was supported by an affidavit sworn by **Jacqueline Ndirangu**, the legal officer of Fidelity Shield Insurance Company Ltd, the Applicants' insurer in respect of the subject claim. According to the deponent, on 29th June, 2020 the Respondent sent a draft decree to their advocates and they instructed their advocates to lodge an appeal on behalf of the insured/Applicants. Pursuant thereto an appeal was lodged on 7th July, 2020 which appeal the deponent believes raises serious arguable issues with a high likelihood of success. However, as there is no stay of execution, the Respondent may execute the decree anytime.

3. It was deposed that save for the delay in getting the fruits of his judgement, the Respondent will not be prejudiced in any way if the stay is granted pending the appeal. The deponent disclosed that they are ready to abide by any court's direction and pay up any security or costs as may be directed by the court in the event that the appeal is dismissed.

4. In their submissions, it was contended that the appeal would be rendered nugatory if execution proceedings are allowed to commence as gist of the appeal is issue of liability and reduction of the damages awarded to the respondent which have high chances of success. Secondly, substantial loss shall be occasioned to applicants if no stay orders are granted as their properties shall have to be carted away and sold to satisfy the decree if their insurer will not have settled and /or satisfied the decree. It was submitted that the decretal sum is also colossal and the respondent means of refunding the decretal sum if paid to him despite his steady employment is unverifiable as there is no affidavit of means of the respondent filed herein to indicate his capability to pay back the decretal amount if the same is paid to him and the appeal succeeds hence the applicants request and pray for orders which shall secure the decretal amount for any successful party and specifically humbly prays that the same to be put in a fixed joint interest earning account of both parties' counsels.

5. It was further submitted that there is no replying affidavit filed herein which has indicated the prejudice the respondent shall suffer if any if the stay orders are granted as he is still in employment as per evidence tendered in the trial court and prejudice, if any, can be compensated by an award of costs as the decretal sum shall still be secure and be available to him if the appeal is dismissed.

6. It was further submitted that the applicants are willing to offer security for due performance of the decree and abide with any other conditions the court may set hence they humbly pray for stay orders as requirements for grant of the same have been met as clear from grounds relied upon and averments contained in the supporting affidavit. The applicants, in support of their submissions relied on **Mombasa HCCA No. 82 of 2012 - Abraham Mwangi -vs- Ahmed Ibrahim** and **Mombasa HC Misc. Appl. No.40 of 2013 - Gyka Fuel Mart Ltd -vs- Bwana Mshiri Sungura.**

7. It was submitted that the applicants have filed this application timeously and if there is any delay in filing this application the same was not inordinate as the applicants through their Insurer legal officer in the supporting affidavit together with the annexures thereto have explained the reason of any delay in filing this application. In any case, it was submitted that if there was any delay the same is excusable and the applicants have offered a plausible explanation for the same as abovementioned hence the applicants are not guilty of any latches in filing

this application. The applicants further relied on **Mombasa HCC Miscellaneous Civil. Appli. No 16 of 2009 - Mohammed Abbas M. Somji vs. James Japheth Otieno [2009] eKLR** and **Nairobi HCCC No. 559 of 2014 - Devki Steel Mills-vs- Robert Aputo Amariati [2014] eKLR.**

8. The application was however opposed by the Respondent vide a replying affidavit sworn on 19th August, 2019. According to the Respondent, the application does not satisfy the conditions laid down in Order 42 Rule 6(2) of the ***Civil Procedure Rules***. It was disclosed that on 11th June, 2020, judgement on liability was entered against the Applicants at 10% and the award of damages was not excessive hence the Appeal has no chances of success whatsoever. It was therefore deposed that this application has been brought with the sole intention of denying the Respondent from enjoying the fruits if his lawfully obtained judgement. In the Respondent's view, no cogent or sufficient reasons have been advanced to warrant the grant of the orders sought as the deponent of the supporting affidavit has not demonstrated what substantial loss the Applicants will suffer if the stay is not granted.

9. According to the Respondent, he is a man of means being the Principal of Mbuani Secondary School employed by TSC hence able and willing to refund the decretal sum which now stands at Kshs 517,941/-.

10. In his submissions, the Respondent contended that the deponent of the supporting affidavit, being the legal officer of the insurance company as opposed to the applicants, has not demonstrated what substantial loss the applicants will suffer as he is not a party to the suit. According to the Respondent, substantial loss is a matter of fact and the person who can suffer the loss is the Applicants hence the Applicants ought to have sworn the supporting affidavit themselves and demonstrate what loss they will suffer if stay is not granted and execution proceeds.

11. It was submitted the respondent has filed a replying affidavit to the application and averred that he is a man of means and he is able and willing to refund the decretal amount should the appeal succeed, an assertion which has not been controverted by the defendant/applicant through further affidavit. Indeed, nowhere in the defendant/applicants supporting affidavit has the financial ability of the plaintiff/respondent been questioned.

12. In view of the foregoing this court was urged to find that the applicant has not satisfied the Conditions in Order 42 Rule 6(2) of the ***Civil Procedure Rules*** and dismiss the application. In support of the submissions the Respondent relied on the case of **Mutua Kilonzo vs. Kioko David Machakos - HCCC No 62 of 2008** where the court dismissed an application for stay pending appeal for monetary decree as the applicant failed to prove how he will suffer substantial loss while warning executives in Insurance Companies and Advocates for parties to desist from swearing affidavits on contested matters and for which they have no personal knowledge. However, the Respondent was of the view that should the court in exercise of its discretion be inclined to allow the application, it should order that a sum of Kenya Shillings 258,970/= be paid to the respondent and the balance be deposited in court pending the hearing and determination of the appeal.

Determination

13. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

14. 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.***

15. 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 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.

16. 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.**

17. The same position was adopted by **Kimaru, J** in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

> **"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."**

18. 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."**

19. 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".**

20. 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."**

21. 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."**

22. 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."**

23. 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.**

24. 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 since lack of means per se is not necessarily a ground for granting stay. As 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. Suffice to state that the respondent, at this moment, is the successful party and in order 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.

25. In this application however, the Appellant has not placed before the Court material upon which it believes that its appeal if successful would be rendered nugatory if the stay is not granted. It is not for example deposed in the supporting affidavit that the Respondent's position is so precarious that he is unlikely to refund the decretal sum once the same is paid over to him. Conversely, the deponent of the supporting affidavit has not deposed that if compelled to pay the decretal sum the insurance company is likely to fold up. To the contrary, it seems to be the insurance company's case that it is financially solid. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

> **"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. This is what substantial loss would entail.''**

26. In this case the allusion to the Respondent's ability to refund the decretal sum if paid over to him appeared for the first time in the submissions rather than in the supporting affidavit. That being a factual issue, ought to have been deposed to in the supporting affidavit rather than being sneaked in in the submissions. That, with due respect is not the way in which such an important factual issue ought to be introduced.

27. In this case though it was the applicant's case that unless the stay is granted, the appeal will be rendered nugatory, it was not explained in what manner that eventually would happen. The Applicants have not explained what loss, if any, they stand to suffer if the stay is not granted. The difficulty that the deponent of the supporting affidavit found himself in can be explained on the ground that the supporting affidavit was sworn by a legal officer of the insurance company rather than the applicants themselves. This clearly made it difficult to depose to the position of the applicants. I associate myself with the sentiments of **Lenaola, J** (as he then was) in **Mutua Kilonzo vs. Kioko David Machakos - HCCC No 62 of 2008** where he expressed himself as hereunder:

> **"To my mind, the Applicant has failed to establish what loss he will suffer if the decree is executed. I say this with respect because Lilian Munyiri aforesaid is an officer at Gateway Company Ltd and has not stated that she personally knows the means of the Respondent. She merely states that from evidence at the trial he is a man of straw. How that conclusion is reached and based on what evidence, I cannot tell. It is now a catchphrase that every Respondent in an application for stay of execution is called a man of no means. That is all fine if there is evidence to back up that position. If for example, the job done or other means of living are clearly deponed (sic) to, then it is easy to fathom what means the Respondent has. Ringera, J in Lalji Bhimji put is succinctly when he stated thus;**
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> > **'…he (the applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh to impossible or at least very difficult to obtain back the decretal amount in the event the intended appeal succeeding. Such persuasion must spring from affidavits or evidence on record.'**
>
> **…….**
>
> **Let this also be a warning that as far as possible, executives in Insurance Companies and advocates for parties should unless absolutely necessary or clearly from the record desist from swearing affidavits on contested matters and for which they have no personal knowledge."**

28. In this case the applicants have not disclosed their grounds for believing that the Respondent would not be able to refund the decretal sum

herein. The supporting affidavit, as rightly pointed by the Respondent, is deposed to by an agent of the applicants' insurers. She has not disclosed her source of information that the Respondent will be unable to refund the decretal sum if paid over to him. In my view it is not sufficient to simply make a bare averment that the Respondent will not be able to refund. As far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement that ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief. In those circumstances even if the Respondent has not shown his source of income, as was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

29. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicants.

30. In this case the applicant has not even disclosed the nature of the judgement. The Respondent contends that he is employed by the Teachers Service Commissioner as a principal of a secondary school. The onus is upon the Applicants to disclose to the court their liability in the decree in order to enable the Court gauge whether or not it is so heavy that it merits the brakes being applied on the Respondent's vehicle towards the realisation of his fruits of the decree. Without doing so there is no basis upon which the Court can stay the decree.

31. In the premises I find no merit in this application which I hereby dismiss with costs.

32. It is so ordered.

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

G V ODUNGA

JUDGE

In the presence of:

Mr Munguti for Mrs Muchemi for the Applicant/Appellant

Mr Muumbi for Mr Sila for the Respondent

CA Geoffrey