REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 26 OF 2020

KENYAN ALLIANCE INSURANCE COMPANY.....APPELLANT

VERSUS

1. NDAMBUKI KILOLO MUSYUKI

2. TABITHA NGINA NDAMBUKI

(*Suing as the father, daughter and personal representatives of the estate of*

MIRIAM MONTHE NDAMBUKI (*Deceased*).....RESPONDENTS

RULING

1. By a Motion on Notice dated 3rd March, 2020, the applicant herein seeks the following orders:

> **1) This Application be certified as urgent and the same be heard *ex-parte* in the first instance.**
>
> **2) There be a temporary stay of execution of decree emanating from the judgment that was delivered on 29th March 2018 and Ruling delivered on 19th February 2020 pending inter-parties hearing and determination of this application.**
>
> **3) There be a stay of execution of decree emanating from the judgment that was delivered on 29th March 2018 and Ruling delivered on 19th February 2020 pending the hearing and determination of this Appeal.**
>
> **4) This Honourable Court does issue such further orders or directions that it may deem fit to grant in the interest of justice.**
>
> **5) The costs of this application be in the cause.**

2. In the support of the Application, the Applicants filed an affidavit sworn by **Antony Kariuki,** the applicant's legal manager. According to the said affidavit, a ruling was delivered on 19th February, 2020 while judgement was delivered on 29th March, 2028 both of which the applicant desires to appeal against. It was disclosed that by the said decisions the lower court struck out the defence and failed to recognise that the deceased was an uninsured passenger within the meaning of section 4(1) and 5(b)(ii) of the ***Insurance (Motor Vehicle Third Party Risks) Act*.**

3. It was deposed that the appeal raises serious issues of law and fact and has very high chances of success. It was deposed that the Respondents are of unknown means hence the appellant will suffer a huge loss if execution proceeds given that the Respondents will not be able to refund the decretal amount in the event that the appeal succeeds. The applicants averred that they are willing to provide security for due performance as may be ordered by this court hence the Respondents stand no prejudice.

4. In opposition to the application the Respondents filed grounds of opposition to the effect that the application is frivolous, incompetent and vexatious; bad in law, incompetent, misconceived and incurably defective; an abuse of the court process; an afterthought and brought in bad faith; and brought after inordinate delay and is solely aimed at frustrating the process of execution. It was contended that the applicant had not offered any security for cots hence should be ordered to release to the Respondents half of the principal sum and costs amounting to Kshs 589,921.00 and deposit the balance of a similar amount in court within fourteen (14) days. It was contended that the applicant has not given good reasons as to why the application should be allowed and that the application is improperly before this court.

5. In the submissions filed in support of the application it was reiterated the facts contained in the supporting affidavit and relied on **National**

Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] and **Mohamed Said Mohamed vs. Julius Mwongolo Mwatus Mbs Misc. Appl. No. 448 of 2011**.

6. On behalf of the Respondents the foregoing grounds of opposition were restated and the Respondents relied on **Captain Motorcycles Manufacturing Company Limited vs. Jane Muthoni Mberere & Anor Nairobi Miscellaneous Civil Appl No. 22 of 2020** and **Beatrice Munene vs. Molly Wangui Gitahi Machakos H.C.C. Appeal No. 249 of 2013.**

Determination

7. I have considered the application, the affidavit in support of the application, the grounds of opposition and 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 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.

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.**

11. 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."**

12. 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."

13. 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".

14. 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."

15. 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."

16. 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."

17. 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.**

18. 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.

19. In this case, the applicant contends that the Respondents are of unknown means hence the appellant will suffer a huge 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.

20. 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.**

21. 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."**

22. This court cannot, however, close its eyes to the fact that the Respondents are personal representatives of the estate 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 Respondents have not disclosed the estate's source of income, if any.

23. 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 1,200,000.00.

24. 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."**

25. 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."**

26. 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. Since the proceedings are ready, let the record of appeal be filed and served within the said period. In default of compliance with the above, this application shall be deemed to have been dismissed.

27. As the applicant did not comply with the directions of this court to furnish soft copies, the costs of this application are awarded to the Respondents in any event.

28. It is so ordered.

Read, signed and delivered in open Court at Machakos this 17th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey