



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 68 OF 2018**

MATIGARI GENERAL MERCHANTS LIMITED.....1<sup>ST</sup> APPELLANT

PAUL MUCHINA KABIRA.....2<sup>ND</sup> APPELLANT

VERSUS

**NELLY WAIRIMU MUTHONI & FRANCIS MUIRURI WAINAINA**

*(Suing as the Legal administrators to the estate of*

*the late Kennedy Kieruka Wainaina-Deceased).....RESPONDENTS*

**(An Appeal from the Judgment and Decree of the Senior Resident Magistrate's Court**

**of Kenya at Kangundo (Hon. M. Opanga) delivered on the 15<sup>th</sup> day of May, 2018)**

IN

**THE REPUBLIC OF KENYA**

**IN THE PRINCIPAL MAGISTRATE'S COURT AT KANGUNDO**

**CIVIL SUIT NO 134 OF 2016**

**NELLY WAIRIMU MUTHONI & FRANCIS MUIRURI WAINAINA**

*(Suing as the Legal administrators to the estate of*

*the late Kennedy Kieruka Wainaina-Deceased).....PLAINTIFFS*

VERSUS

MATIGARI GENERAL MERCHANTS LIMITED.....1<sup>ST</sup> DEFENDANT

PAUL MUCHINA KABIRA.....2<sup>ND</sup> DEFENDANT

**RULING**

1. By a Motion on Notice dated 29<sup>th</sup> June, 2018, the applicants herein seek the following orders:

- a) **THAT** this Application be certified as urgent and be heard ex-parte in the first instance.

- b) **THAT service of this Application be dispensed with in the first instance and such orders necessary be issued on the same.**
- c) **THAT there be stay of execution pending the hearing and determination of this Application.**
- d) **THAT there be stay of execution pending the hearing and determination of this Appeal filed by the Appellant/Applicant herein.**
- e) **THAT costs of this Application be in the cause.**

2. The application was supported by an affidavit sworn by **Erastus Mbaka**, who described herself as a Legal Officer of CIC General Insurance Limited who are the 1<sup>st</sup> Appellants/Applicants insurers.

3. According to the deponent, he was fully conversant with the issues relating to **Kangundo PMCC NO. 134 of 2016 - Nelly Wairimu Muthoni & Francis Muiruri Wainaina (suing as the legal administrators to the estate of the late Kennedy Kieruka Wainaina - Deceased) vs. Matigari General Merchants Limited & Paul Muchina Kabira** and **Machakos HCCA No. 68 of 2018 - Matigari General Merchants Limited & Paul Muchina Kabira vs. Nelly Wairimu Muthoni & Francis Muiruri Wainaina (suing as the legal administrators to the estate of the late KENNEDY KIERUKA WAINAINA - Deceased).**

4. According to the deponent, the Appellants/Applicants herein had been sued following an accident involving the 1<sup>st</sup> Appellant/Applicant's motor vehicle registration number KCA 115 B and the deceased's motor cycle registration number KMCQ 775T which occurred on or about August 30, 2015 along Kangundo Road. It was deposed that the 1<sup>st</sup> Appellant/Applicant's motor vehicle in question was at all material times to the aforesaid accident insured by Messer's CIC General Insurance Limited who as per their contractual obligation under the insurance policy instructed the firm of J. Maluki & Co. Advocates to defend the claim. It was averred that the said advocates on record informed the insurance company that Judgment in **Kangundo PMCC NO. 134 of 2016 - Nelly Wairimu Muthoni & Francis Muiruri Wainaina (suing as the legal administrators to the estate of the late Kennedy Kieruka Wainaina - Deceased) vs. Matigari General Merchants Limited & Paul Muchina Kabira** was delivered against the Appellants/Applicants for a gross sum of Kshs. 4,492,389.00 as plus interest at Court rates and costs on May 15, 2018 by **Honourable M. Opanga, S.R.M.**

5. Being dissatisfied with the said Judgment in particular on the issue of damages awarded at Kshs. 5,615,486.40 as loss of dependency and Kshs. 200,000.00 as loss of expectation of life and Kshs. 100,000.00 for pain and suffering payable to the Plaintiffs and upon the advice of the Advocates on record, the insurance company instructed them to proceed and lodge the Appeal herein. Based on the advice from the said advocates, it was deposed that this Appeal has overwhelming chances of success, is arguable and has merit.

6. It was however deposed that the Appellants/Applicants were granted Thirty (30) days stay of execution which lapsed on June 16, 2018 hence the applicants were apprehensive that execution was imminent and unless this this Application is granted, the Appellants/Applicants stand to suffer substantial loss which cannot be compensated if the execution proceeds and in the likely event that the Appeal herein succeeds.

7. According to the deponent, he was advised by the Advocates on record that during the hearing, the Plaintiffs' evidence was that they were being supported by the deceased hence if execution is allowed and the judgment sum paid, the Plaintiffs will not be able to refund the decretal amount if the Appeal eventually succeeds. To the deponent, the amount involved herein is huge totalling Kshs. 4,492,398 and the 1<sup>st</sup> Appellant/Applicant stands to suffer great hardship in its business operations if the same is paid while the Appeal herein proceeds.

8. The applicants disclosed that they are willing to abide by any conditional terms of stay to be given by this Honourable Court. In addition, the applicants' insurers were willing and able to provide security by depositing in Court or a joint interest earning account in the names of the advocates on record part of the decretal amount being Kshs. 1,500,000 and secure the balance by way of a bank guarantee or insurance bond pending the outcome of this Appeal.

9. To the applicants, this application was made in good faith and there was no unreasonable delay in bringing the same.

10. According to the deponent, as the 1<sup>st</sup> Appellants/Applicants insurer, CIC General Insurance Limited has a contractual and statutory obligation to provide legal representation to the Appellants/Applicants for all matters arising out of the contract of insurance between the said insurance company and the 1<sup>st</sup> Appellant/Applicant herein. Further, since section 10 as read with section 5 (b) (iv) of the **Insurance (Motor Vehicles Third Party Risks) Act** obligates the said insurance company to settle all claims arising out of the insurance contract between the insurance company and the 1<sup>st</sup> Appellants/Applicant up to the statutory limit of Kshs. 3,000,000.00 per claim, CIC General Insurance Limited has an interest in the Appeal herein as the 1<sup>st</sup> Appellants/Applicants' insurer.

11. It was the deponent's' view that there is no legal requirement that parties to a suit are the only persons who can swear affidavits on matters concerning the suit.

12. In this case, it was deposed that the said advocates were unable to get the Appellants/Applicants to swear the Affidavit in support of the Notice of Motion application dated June 29, 2018 without an unreasonable amount of delay hence they requested a representative of CIC General Insurance Limited to swear the aforesaid affidavit. However the deponent was fully conversant with the facts of this Appeal as well as the facts of the matter appealed from.

13. It was reiterated that if the sum of Kshs. 2,378,963.00 is paid out to the Respondents herein, the Appellants/Applicants will have no means of recovering the same if the Appeal herein succeeds since in their evidence before the trial court, the Respondents' evidence was that they were being supported by the deceased hence if the aforesaid sum is paid to them and the Appeal herein succeeds, the Respondents will not be able to refund the said sum.

14. To the deponent, the Respondents did not demonstrate that they have the ability to pay back the sum of Kshs. 2,378,963.00 if the Appeal herein succeeds. Based on legal advice, it was deposed that the Appellants/Applicants have satisfied the conditions for grant of the prayers sought in the Notice of Motion application dated June 29, 2018.

15. The application was however opposed by the Respondents who averred that the application was not made in good faith and was aimed at delaying payments in the matter and derail them from enjoying the fruits of their judgement.

16. According to the respondents, the application was incompetent since it was supported by an affidavit sworn by a non-party to these proceedings without evidence that he was authorised to do so.

17. However the Respondents averred that in the event that this Court was amenable to the grant of the stay sought it ought to do so on condition that the applicants be ordered to pay half of the decretal sum being Kshs 2,378,963/- and deposit the other half of a similar sum in a joint account.

### **Determination**

18. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

19. 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.*

20. 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.

21. 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."

22. 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."**

23. 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."**

24. Dealing with the contention that there was no evidence that the 1<sup>st</sup> 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."**

25. Therefore the mere fact that the decree holder is not a man of means does not necessarily justify him 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"**.

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

27. The law, however 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**.

28. 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. Suffice to say 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.

29. In this case, the applicants have deposed that in their evidence before the trial court, the Respondents' evidence was that they were being

supported by the deceased hence if the aforesaid sum is paid to them and the Appeal herein succeeds, the Respondents will not be able to refund the said sum. Whereas, ordinarily such an averment ought to emanate from the applicant, the said averment was not controverted by the Respondents. In this case, the decree holder is an estate of the deceased. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondents have not disclosed the estate's source of income.

30. In addition, the decree sum is over Kshs 4.5 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.

31. Therefore with respect 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. Therefore if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

32. While in this case, it is not contended that the applicant's insurers are likely to fold up, the amount herein was awarded to an estate of the deceased. However, the applicants' appeal intends to challenge only the quantum of damages as opposed to liability, a realisation that at the end of the day some amount is likely to be awarded to the Respondents.

33. In the premises, there will be a stay of execution pending this appeal on condition that the Applicants remit to the Respondents one third of the decretal sum and deposit the other two thirds 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.

34. The costs of this application will be in the appeal.

35. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of January, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Kilonzo for Mr Musyimi for the Appellant/Applicant.**

**CA Geoffrey**