REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HIGH COURT CIVIL APPEAL NO. 43 OF 2018

BONFACE KARIUKI WAHOME.....APPLICANT

VERSUS

PETER NZIKI NYAMAI.....1ST REPONDENT

ANNA NTHAMBI NZUKI.....2ND RESPONDENT

RULING

Before me is a Notice of Motion dated 27th November 2018, brought under order 42 rule 6, order 22 rule 22 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of law, seeking the following orders:-

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

b) THAT there be an interim stay of execution of the decree of the lower court in KAJIADO CM.C.C No. 214 of 2016 pending the hearing and determination of this Application.

c) THAT there be the stay of execution of the decree herein pending the hearing and determination of this Appeal against the judgement and order of the Honourable Magistrate against the Applicant/Appellant.

d) THAT costs if this Application be provided for.

This Notice of Motion Application is premised upon 10 grounds couches on the face of it as well as by a supporting Affidavit of Rina Welemba and other reasons adduced at the hearing thereof. It is asserted that the Respondents may execute the decree any time before this Application heard *inter-partes* as there is no stay of execution; that their instructing insurer has instructed them to file an appeal against the said Judgement; that the judgement that the memorandum of appeal has been filed was delivered on 25th October, 2018 in favor of the Respondents against the Appellant at a sum of Kshs. 1,665,000.00/= general damages plus costs and stay of execution granted by the lower court has expired; that the memorandum of appeal has already been filed and the Applicant will suffer substantial loss, injustice and will be highly prejudiced if stay of execution is not granted.

Further grounds are that the appeal will be rendered nugatory if the decree is executed; the Applicants appeal raises serious arguable issues with high chances of success; that the Applicant is ready to make an undertaking on security and abide by conditions which the court may set pending the hearing and determination of the Appeal; that the Respondent may not be able to refund the decretal amount in the likely event that the appeal is successful and lastly, the Respondent will not suffer prejudice, injustice or loss if Orders sought herein are granted.

The Applicant's case as captured in said supporting affidavit is that APA Insurance Company Ltd had insured the Appellant/Applicant against his claim which is the subject matter of this suit and has been handling the claim on its behalf under Insurance Policy. That the Company instructed Wangari Muchemi & Co. Advocates to handle this claim on behalf of the defendant who is their insured.

It was deponed that after the judgement was delivered in this matter the Company felt that the award of quantum of damages was excessive and an instruction was made to their Advocates to appeal on the same. It was asserted that the Appeal raises arguable issues with high chances of success as shown by the grounds therein.

The deponent swore that the Respondent may execute the lower court decree any time unless restrained by this court as stay granted by the lower court has expired. Further that the Applicants stands to suffer substantial loss as their good are likely to be attached and sold by public auction if decree is executed and that the insurance company is willing to pay after the appeal is heard and determined.

To Support their claim, the Applicants relied in the cases of ***Ahmed Ibrahim vs Abraham Mwangi, Mombasa HCCA No. 82 of 2012; Mombasa HC Misc.Appl. No.40 Of 2013 Gyka Mart Ltd Vs Mwana Mshiri Sungura.***

It was submitted that the Respondents did not indicate in their replying affidavit their capacity to refund the decretal amount if the same is paid out to them. Further that this Application has met the threshold provided for under rule order 42 rule 7 of the Civil Procedure Rules to warrant this Honourable Court grant the orders sought.

It was also submitted that there is nothing to show that the delay in filing this Application was inordinate as the Applicant in the supporting affidavit together with the annexures thereto have explained the reasons of delay if any in filing this Application. The Judgement was delivered on 25th October 2018 and the instant Application was filed on the 28th November 2018 and in the Applicant's view, if there is any delay the same is excusable and the Applicant has offered a plausible explanation for the same. Further that the Applicant is not guilty of any latches in filing the instant Application. The Applicant relied of the cases of ***Mohammed Abbas M.Somji v James Japheth Otieno (2009) eKLR and Devki Steel Mills -vs- Robert Aputo Amariati (2014) eKLR***.

It was therefore submitted that if there to be any prejudice to be occasioned to the Respondent, the same can be compensated by way of costs. It was also further submitted that he is willing to offer security for due performance of the decree and prays that the instant Application be allowed with costs.

The Respondents opposed the instant Application by way of a replying affidavit sworn by Peter Nzuki Nyamai who swore on behalf of both Respondents on the 8th January 2019.

He deponed that the instant Application has no merits since the threshold provided under order 42 rule 7 of the Civil Procedure Rules have not been complied with and these are the provisions to security for due performance of the decree, delay involved in the filing if the Application for stay of execution pending Appeal.

Further that, the Applicant cannot deny them the fruits of their Judgement by making a claim that the sum of Kshs. 1,665,000.00/= is on the higher side without coming up with a counter offer in the matter. It was asserted that the Applicant is suggesting on without prejudice an arbitrary figure of one million Kenya Shillings which can be taken as a basis for order of stay of execution which should be released to them and the balance of 665,000.00/= can be can be put in a fixed deposit Account in names of our lawyers to await the outcome of the Appeal.

It was the deponent's averment that the Applicant will not suffer any substantial loss since his son was killed during the accident and blame was on the Applicant who did not challenge his testimony as his late son's income, age and dependency.

That the Application was filed a month after the issuance of the Judgement hence it was filed out of time. Further that the Applicant has not shown the security for the due performance of Judgement but simply states they undertake to provide the same. Lastly, it was asserted that he is capable of repaying any amount that the court shall grant after the hearing of the Appeal it exceeds the sum to be released to them and therefore the instant Application for stay of execution be rejected with costs to them.

Analysis and Determination

The parties filed written submissions, supporting and replying affidavits which I have considered. The issue for determination is whether the court should order stay of execution. The principles for granting stay of execution are enshrined under Order 42 rule 6(1) of the Civil Procedure Rules and the same stipulated as follows:-

> ***"No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside." appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application***
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> **Order 42, rule 6** states:
>
> ***"No order for stay of execution shall be made under sub-rule (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."***

In the case of ***Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006*****,** the learned judge Gikonyo J. held inter alia that ***stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.***

In ***Prilscot Company Limited v Monica Heho [2015] eKLR, H.C at Nairobi, Civil Appea No. 482 OF 2014*** the Learned Judge Sergon J. cited with approval the case of ***Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365)*** held that Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal. The learned judge observed further that the applicant must establish that; he stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for due performance of the decree or order.

In the case of Joackim ***Ngugi vs. G.Z Ulyate & 6 Others [2014] Nairobi HCCC No. 1029 of 1982,*** where the Learned Judge Mutungi J. held that an applicant for stay of execution under order 42 Rule 6 of the Civil Procedure Rules must: -

> ***(i). Satisfy the court that substantial loss may result unless the order is made;***
>
> ***(ii). The application must have been made without unreasonable delay and***
>
> ***(iii). The Applicant has to be prepared to offer security for the due performance of the decree.***

The question is what substantial loss the appellant will suffer if stay of enforcement of that order of the subordinate court is not made in its favour. The Applicant in its supporting affidavit at para 9 has deponed that the amount involved is high (Kshs. 1,665,000/=) and the plaintiff/respondents may not be financially able to refund if appeal succeeds. At para 10 of the same affidavit it is deponed that the applicant stands to suffer substantial loss, as their goods are likely to be attached and sold by public auction if decree is executed and the insurance company is willing to pay after the appeal is heard and determined. The question to ponder is therefore *what amounts to substantial loss?*

In ***Antoine Ndiaye v African Virtual University [2015] eKLR***, supra, the learned judge Gikonyo J. cited the holding in the case of ***Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*** where it was held that;

> ***"…substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".***

In ***Kenya Shell Limited vs. Kibiru [1986] KLR 410***, **Platt, Ag. JA** (as he then was) 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".***

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

> ***"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."*** **(See also the holding by Odunga J. in *Socfinac Company Limited V Nelphat Kimotho Muturi,*** supra.)

In ***Anne Njeri Mwangi v Muzaffer Musafee Essajee & another [2014] eKLR, H.C at Nairobi (Milimani), Civil Case No 49 of 2011,*** the leaned judge Havelock J. delivered himself as follows;

"As regards determination of what amounts to substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that:

> ***"...substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."***

Platt Ag JA again in the **Kenya Shell** case (supra) gave his observations as to the meaning of 'substantial loss' when he detailed:

> ***"The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents be unable to repay the decretal sum plus costs in two courts.*** *The learned judge later went on to say:* ***"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 cornerstone 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."***

In ***Feisal Amin Janmohammed T/A Dunyia Forwarders v Shami Trading Co. Ltd [2014] eKLR, H.C at Mombasa Civil Appeal No 62 of 2013,*** the learned judge Kasango J. while relying on the holding in **Civil Application No. Nai 15 of 2002 ABN Amro Bank, N. V –V- Le Mond Foods Limited** reiterated as follows;

"…The Court of Appeal in that case had this to say-

> ***"We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered***

nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank 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 were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on."

The Court proceeds in that judgment to state that it was only the Respondent who could counter the submission that it would be unable to refund the judgement amount if the appeal was successful."

In ***Prilscot Company Limited v Monica Heho [2015] eKLR, H.C at Nairobi, Civil Appea No. 482 OF 2014,*** *supra,* the learned judge Sergon J. cited the holding by Musinga J. in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** where it was stated that ***substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.***

In ***Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2014] eKLR, H.C at Nakuru Civil Case No. 148 of 2010*** the learned judge Enyara Emukule reiterated as follows;

"10. It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. **In Charles Wahome Gethi Vs. Angela Wairimu Gethi** ***(Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007),*** **the Court of Appeal held –**

"... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them."

11. Indeed as it was held in the said case (Charles Wahome Gethi vs. Angela Wairimu Gethi) the Applicant have not shown or suggested that they would suffer substantial loss rendering the appeal nugatory if the land were sold before the appeal were determined. On the balance there is no evidence that the Applicants would suffer substantial loss if a stay was not granted".

Applying the foregoing, to the instant case, the subject matter of the suit is the decretal amount which is payable to the Respondents and according the Appellant, if the order being sought herein is not granted and the Respondents proceed to execute the decree, it's goods will be attached and sold by way of public auction to raise the decretal amount. Therefore, if the Appeal succeeds, the Appellant will not be able to recover the said goods whence I find that the Appellant would likely to suffer substantial loss. This is further exacerbated by the fact that the Respondents will not be able to reimburse the Appellant as alleged by the Appellant since the same is not controverted by credible prove to the standard required by the law.

As regards Security, the Applicant supporting affidavit at para 11 has deposed that the Insurance Company is ready and willing to offer security for the decretal sum and is ready to abide by any condition that may be set by this court pending the hearing and determination of this Appeal. Under para 12, the Applicant is of the view that the Plaintiff will not be prejudiced as he will have security of the decretal sum in case the defendant's appeal is not successful and will enjoy his fruits of judgement as the money will accrue interest. On the other hand, the Respondents argued in their submissions dated 13th of February 2019 as well as deposed under para 8 of its replying affidavit that the Applicant has not shown the security for the due performance judgement but simply states they undertake to provide security.

It is trite law that a litigant must enjoy the fruits of his/her judgement. ***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. <u>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.</u> 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".

In view of the above decision, it is noteworthy that a litigant that has lost his case has a right to appeal against the findings of the court. It follows therefore that a matter is deemed concluded after going through its due course all the way to the apex court if need be. But also it must be understood that until and unless the Judgement/Decree has been set aside by the superior court, remains in force capable of being executed. The Courts therefore must balance the two competing interest of the decree holder and that of the appellant. (See the case of ***Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR)***

In the case of ***Anne Njeri Mwangi v Muzaffer Musafee Essajee & another, S****upra,* the learned judge Havelock j. rendered himself as follows;

"**…**As regards **Rule 6(2)(b)** in relation to security for costs, the Court in ***Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR*** Mabeya, J held as follows;

> **"As I stated in the case of *Kenya Commercial Bank Limited Vs Sun City Properties Limited & 5 Others [2012] eKLR "in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. … In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case."***

In ***Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocate****s* Justice Gikonyo the Court stated that:

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

In view of the foregoing, the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.

The law is that as stated by the Court of Appeal in ***National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005***, the evidential burden is on the respondent to prove that he is able to refund. I am of the view that the Respondent has not discharged the burden to prove that she has resources to pay back the decretal sum. The Respondents merely stated that they are capable of repaying the decretal amount that the Court grants after hearing and determination of the Appeal if it exceeds the sum to be released to the Respondents. it is my considered view that since the stay under the provisions of Order 42 Rule 6 is conditional, and one of the conditions is that the Applicant must be prepared to furnish the security for the due performance of the decree, the applicant ought to furnish the same, with the full decretal amount of Kshs. 1,665,000/=, to the court. In the case of ***Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR,*** it was stated that: _

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

I concur with the above cited decision and hereby find the instant suit as such. The other consideration is whether there was undue delay. The judgment was delivered on 25th October, 2018 and this application was filed on 28th November 2018. The Appellant submitted that there is nothing to show that the delay in filing the instant application was inordinate as the applicant in the supporting affidavit together with the annexures thereto have explained the reasons of delay if any in filing this application. Further submission that if there was any delay the same is excusable and the applicant has offered a plausible explanation to that effect. Lastly, that the applicant is not guilty of any laches in filing this application. The Application herein was filed about a month after the judgement has been delivered and I find that the same cannot be said to be unreasonable or undue delay.

It is on those grounds alone and in the interest of justice that I shall exercise my discretion in favour of the appellant and make the following orders_

1. The application has met the threshold for granting the order of stay. I will therefore allow the application and order that there be a conditional stay of execution of the orders/decree of the lower court issued on the 25th of October 2018 pending hearing and determination of this appeal on the terms that

   a) The Appellant/Applicant do deposit the security for the decretal amount Kshs. 1, 665, 000/= (one million six hundred and sixty-five thousand Kenya shillings.) in an interest earning account in the joint names of the counsels on record for appellant and the respondent.

   b) The amount be deposited within twenty-one days from the date hereof. Costs shall abide the outcome of the appeal.

2. The appellant to compile, file and serve a record of appeal upon the respondent within 45 days from the date hereof.

3. The Respondents shall have costs of the application to abide by the outcome of the appeal.

It is so ordered.

Dated, Delivered and Signed in open court at Kajiado this 27th February 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Musyoka for Mr. Mucheru for the Applicant