REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 320 OF 2015

FRANCIS JOHN WAYANGE……..1ST PETITIONER

ROBERT PAUL GACHOKA WANYANGE….……2ND PETITIONER

VERSUS

ANTI-CORRUPTION AGENCY……..1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS….……2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE……..…….3RD RESPONDENT

THE OCS INDUSTRIAL AREA POLICE STATION..…4TH RESPONDENT

RULING

1. By Notice of Motion dated 29th November 2018, **Anti-counterfeit Agency**, the applicant, moved this Court seeking a stay of execution of the Judgment and Decree given on 23rd November 2018 pending appeal.

2. The Motion is brought under rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (**The Mutunga Rules**). The application is based on the grounds on the face of the motion to wit; that the applicant being dissatisfied with the judgment and decree, wishes to appeal against that decision in exercise of its statutory right of appeal; that the right of appeal will be rendered futile if stay is not granted and that the application has been made timeously. The applicant contends that the decree will be paid by the public hence there is good reason to grant stay.

3. The motion is also supported by an affidavit by **Naylor Mukofu** sworn on 29th November 2018. She deposes that at one part of the judgment, paragraph 22, the Court awarded the petitioner Ksh300,000/- as general damages compensation while at paragraph 23(c) the court awarded Ksh500,000/- as general damages compensation. The applicant contends, therefore, that there is an error apparent on the face of the record which should be attended to by way of review. The applicant, however states that wishes to appeal against the decision.

4. The petitioners/respondents filed a replying affidavit by the 1st respondent sworn on 16th January 2019. He deposes that although there are two figures in the judgment, it is clear that the global award was Kshs500,000/- and that despite the orders of the Court, the applicant is still holding onto the respondents' property.

5. The respondents contend that after delivery of the judgment, the decree was served on the applicant together with letter of demand for release of the gas cylinders to no avail. They further contend that the purported notice of appeal has never been served on them and that although the applicant was allowed to address the court, the applicant never filed a response to the petition. The respondents also argue that it is not possible to seek review and appeal at the same time.

6. I have considered this application and the response there to. The applicant seeks stay of execution of the judgment and decree of this Court delivered on 23rd November 2018 pending appeal. The reasons advanced in support of the applicant are, first; that the applicant intends to appeal and, therefore, if stay is not granted, the appeal will be in vain. Second, that there is an error apparent on the face of the record which should be attended to by way of review. The applicant's contention on this aspect is that there are two figures in the judgment, namely; Ksh300,000 and 500,000, hence asks the court to order stay of execution pending appeal. The applicant further contends that this being money decrees, the money will be paid by the public thus the reasons why the Court should allow the application and grant stay of execution.

7. The respondents on their part contend that the application is not merited; that there is one clear award of Kshs500,000/- and that in any

event, the applicant has not even served the Notice of Appeal. The respondents further argue that the applicant cannot seek review and appeal at the sometime, and that there was no response to the petition. They contend, therefore, that the application should not be granted given that the applicant has failed to release the respondents' gas cylinders.

8. The applicant seeks stay of execution pending appeal. It has come under rule 32 of the Mutunga Rules, which provides that an appeal or second appeal shall not operate as a stay of execution or proceedings in decree or order appealed. Rule 32(2) states that an application for stay of execution may be made informally immediately following the delivery of judgment or ruling and that the court may issue such orders as it deems fit and just. Sub rule(3) is to the effect that a formal application for stay may be filed within 14 days of the decision appealed from or within such time as the Court may direct.

9. The rule requires that an application for stay be filed timeously. The present application was filed on 29th November 2018 while the judgment was delivered on 23rd November. That was indeed within the contemplated timelines under the rule.

10. There are, however, other considerations that the Court should take into account when considering such an application. Complementary to rule 32, is the Civil Procedure Rules. Order 42 rule 6(1) and (2) provides that:

> ***1. No appeal or 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 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 application being made, to consider such application and make such order thereon as may to it seem just, and 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 such order set aside.***
>
> ***2. No order of stay 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 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***

11. Just like rule 32 of the **Mutunga rules,** Order 42 rule 6 requires timely filing of the application. The Order, however also requires the applicant to show to the satisfaction of the court, that it will suffer substantial loss and that it has offered security for the due performance of the decree as the court may deem fit.

14. Considering the grounds for granting stay pending appeal the Court of Appeal stated in the case of ***Butt v Rent Restriction Tribunal*** *(*Civil App No. NAI 6 of 1979) **that**;

> ***i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***
>
> ***ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***
>
> ***iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.***
>
> ***iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.***

13. What is clear from Order 42 rule 6 as well as the above decision is that the Court exercises judicial discretion and like any discretion, it should act judicially. Further, whether or not to grant stay, the Court will have to consider the circumstances of the case.

14. From the wording of Order 42 rule 6, the guiding principle is that the applicant should show that he will suffer substantial loss if stay is not granted. As to what substantial loss is, this has been the subject of consideration by Courts. In ***James Wangalwa & another v Agnes Naliaka Cheseto*** *[*2012]eKLR, the Court observed that;

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 appeai....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"***

15. In ***Equity Bank Ltd v Taiga Adams Company Ltd*** [2006] eKLR, the Court again stated that *the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he is a person of no means.*

16, In ***Machira T/A Machira & Co Advocates v East African Standard (No 2*** [2002] 2 KLR 63, The Court went on to state that in attempting to convince a court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court was made it clear that; ***" it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do."***

17. I have carefully read through the application and the supporting affidavit. The applicant has not at all attempted to establish that it will suffer substantial loss if stay is not granted. The applicant has not even alleged that the respondents are people of no means so that if the intended appeal does eventually succeed, they will not be able to refund the decretal sum should execution proceed. In other words, the applicant has merely alleged that the appeal will be in vain. That is not the meaning of substantial loss as contemplated by Order 42 rule 6. The applicant must do much more than mere assertion that there will be loss to satisfy the Court that it deserves the exercise of discretion in its favour.

18. The Court has also to balance interests of the applicant and those of the successful party; that is, the decree holder, who has gone through litigation and obtained a decree in his favour. In this regard, the Court stated as much in ***Machira T/A Machira & Co Advocates v East African Standard (No 2*** [(supra) that;

> ***"[Io]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".***

19. Taking into account the facts of the application and the depositions in the supporting affidavit, and on the strength of the authorities cited above, I am not satisfied that the applicant has met the threshold for grant of the application on grounds of substantial loss.

20. I must also say that I have really agonized over this application. The applicant seems to be undecided on what it really wants. Although the application is clearly for stay pending appeal, it also intimates that this Court can attend to the problem by way of review. The applicant is however clear that it is dissatisfied with the judgment and resultant decree and wishes to appeal. In that regard and from the tone of the application the application is really for stay of execution pending appeal.

21. That the applicant is interested in appealing against the judgment is not in doubt, and in order to show that intention, it has attached a copy of a copy of Notice of Appeal. Although not a requirement that one must have filed a Notice of Appeal to apply for stay, nonetheless a Notice signifies real intention to appeal. I have, however, examined that annexture and the same is not court stamped or signed by the Deputy Registrar. I have also perused the court file but could not trace a copy in the file. Further still, the respondents contend that the Notice of Appeal has never been served on them. Had that been a requirement, it would not have aided the applicant.

22. I earlier alluded to the fact that the applicant was blowing for both review and appeal. The issue for review was not categorical. The reason though why the applicant was talking about review, was because the judgment contains two different figures. At paragraph 22 of the judgment there is the figure of **Kshs, 300,000,** white at paragraph 23 (c) the amount mentioned is **Kshs. 500,000.** The applicant terms this an error apparent on the face of the record. The respondents on their part argue that the applicant cannot go for both appeal and review and that the judgment shows that the court awarded Kshs. 500,000.

23. I have perused the judgment of the court. at paragraph 22, the Judge stated;

> ***"I am however cognizant that this court may grant the petitioners general damages to recognize and vindicate the petitioners' rights which have been violated. I would therefore award the petitioners Kshs. 300,000/= for the violations I have found."***

24. Paragraph 23 contains the final orders the court made. And at 23 (c), the court stated; ***"The petitioners are awarded Kshs. 500,000/= as general damages as against the 1st respondent."***

25. This shows a distinct difference between the two amounts. Reading the judgment of the court, it is clear that paragraph 22 contains the basis or reasoning for the award and that the court was redressing violation of the petitioners' rights. It must then be that the amount of Ksks. 500, 000 appearing at paragraph 23(c) is an error. It should have been Kshs. 300, 000/=. The question that arises is whether this court can correct that error now and in the present application.

26. Having concluded that there is an error on the face of the record, the court exercise its powers under the slip rule under section 99 of the Civil Procedure Act to correct the error. That being the case and being satisfied that there is genuine error this court exercises the powers given under section 99 and hereby corrects the amount in paragraph 23 (c) to read **Kshs. 300, 000/=** instead of **Kshs. 500, 000/=**

27. Having considered the application, the response and submissions and considering the law and authorities, the application for stay is declined and dismissed. The judgment is, however, hereby reviewed at paragraph 23(c) by deleting the amount of **Kshs. 500, 000/=** and replacing it with **Kshs. 300,000/=**. Each party do bear their own costs of the application.

Dated, Signed and Delivered at Nairobi this 14th Day of March 2019

E C MWITA

JUDGE