REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 42 OF 2018

DAVID GITAU.....1ST APPELLANT/APPLICANT

JOSEPH KIVATI WAMBUA.....2ND APPELLANT/APPLICANT

VERSUS

SILVANUS MUKILA MUINDI

IRENE KAVENI MUKILA (Suing as the Legal Representative

of the estate of **ERICK MBITHI MUKILA- DECEASED.....RESPONDENTS**

RULING

1. The only prayer that remains for the determination by this court in the Notice of Motion dated 27th September, 2018 is the request by the Applicants to set aside the orders of the trial court made on 18.8.2018 and 26.9.2018 and for a stay of execution of the judgement delivered on 11.4.2018 together with the decree and all consequential orders in **Machakos CMCC No. 482 of 2015, Silvanus Mukila Muindi and Irene Kaveni Mukila (Suing as the Legal Representatives of the Estate of Erick Mbithi Mukila (Deceased) v David Gitau and Joseph Kivati Wambua** pending the hearing of the Applicant's appeal, prayer 1 and 2 having been granted in the interim.

2. The Respondents opposed the application through a replying affidavit sworn on 2nd October, 2018 by Silvanus Mukila Muindi.

3. The application is premised on the grounds that the Applicants being dissatisfied with the ruling delivered on 26.9.2018 dismissing the application for extension of time and being aggrieved with the judgement on quantum of damages delivered by the trial court on 11.4.2018 has filed an appeal. It is the Applicant's position that their delay in complying with the orders of the lower court granting conditional stay of execution that culminated in the respondents taking out warrants of attachment was occasioned by the delayed issuance of the directions by the respective court registries on whether the deposit was duly done with the deputy registrar or not. The Applicant avers that he is willing to deposit security for due performance of the orders of this honourable court upon conclusion of the appeal. Further, that the appellant's goods have already been proclaimed and the threat of attachment is real and thus if the stay orders are not granted, the appeal would be rendered nugatory.

4. The application is supported by the affidavit of Dominic M Mulyungi, the advocate in personal conduct of the suit on behalf of the applicants averring that the appeal was filed on 7.5.2018 and after an interim stay was granted on 17.8.2018, a bankers cheque was issued on the same date and the same was forwarded to the Deputy Registrar vide letter dated 17.8.18, however on 22.8.18 but his office staff was informed by the Registry Staff that the Deputy Registrar had directed that the deposit be made in the lower courts. On 22.8.18 the deposit was made in the lower court by which time the orders issued on 17.8.18 had lapsed and thus the matter was fixed for mention before the trial court to indicate non-compliance whereupon on 6.9.18 the respondents took out warrants of attachment and prompted the applicants to file an application on 13.9.2018 for extension of time to comply. It is the deponent's averment that the ruling in respect of his application was made on 26.9.2018 by which time the warrants were issued which was long after the deposit of the decretal sum. The Applicant avers that he is willing to deposit security for due performance of the orders of the court upon conclusion of the appeal. Further, that the applicants' goods have already been proclaimed and the threat of attachment is real and thus if the stay orders are not granted, the appeal would be rendered nugatory.

5. The Respondent in opposition to the application, averred that the application lacks merit, is bad in law and an abuse of the court process; that the Applicant seeks to set aside the orders issued on 26.9.2018 dismissing the application dated 18.8.2018 in **CMCC 482 of 2015** (the Primary Suit) through the instant appeal; the appeal is on the quantum whereas in the application dated 18.8.18 the court noted the non-compliance of the appellants with the court orders and there is no appeal from the said order therefore the instant appeal is not the proper forum to overturn the orders issued on 26.9.2018 and hence the application ought to be dismissed with costs.

6. The advocates for the parties agreed to dispose the application through written submissions.

7. The Applicants urged the court to exercise its discretion in their favour as per the decision of the Court of Appeal in **National Bank of Kenya Limited v Alfred Owino Bala, Kisii HCCA 93 of 2014** where the Court held that discretion ought to be exercised in a manner that would not prevent an appeal, further that there was already a deposit of the decretal amount that is sufficient security for costs in the matter. The Applicants submitted that they have fulfilled the requirements for granting of the orders of stay pending appeal as elicited in the case of **Chanan Agricultual Contractors (K) Ltd v Nicodemus Mugara (2006) eKLR.** On the aspect of having filed an appeal, learned counsel submitted that Civil Appeal 42 of 2018 that has been filed is yet to be heard and determined. On arguability of the appeal, counsel summited that the appeal raises factual issues affecting quantum. On the condition of sufficient cause, counsel submitted that should the instant application fail, the intended appeal will be rendered nugatory. On the issue of substantial loss, counsel submitted that the decretal amount is substantial and the appellants will not be able to recover the same from the respondents if the appeal succeeds. On the condition of a timely application, counsel submitted that the record bears witness.

8. Counsel for the Applicants has not addressed the prayer by the Applicants to set aside the orders of the trial court made on 18.8.2018 and 26.9.2018

9. In reply, the Respondent asserted that the pleadings of the applicants bear witness that there has been non-compliance with the orders issued in the lower court. Further, counsel submitted that the financial ability of the applicants is unknown being that the affidavit contains facts that are not within the personal knowledge of the deponent. Counsel discounted the instant appeal that only attacks the judgement issued on 11.4.2018 and not the orders made on 26.9.2018 and 18.8.2018 and as it stands, the said orders have not been appealed against. Counsel emphasized that an application for review or setting aside cannot be brought to this court on an appeal that does not deal with what took place on 18.8.2018 and 26.9.2018 and urged that the application be dismissed with costs.

10. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously and be done in a way so as not to close the door of discretion. At the preliminary stage, I wish to point out that the orders of the trial court that were made on 18.8.2018 that the applicants have referred to in their prayer 3 have not been brought to the attention of the court vide relevant annextures and thus the court is unable to make a finding on the same.

11. The instant application is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

> **"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."**

12. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

> **"1. 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.**
>
> **2. The general principle 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.**
>
> **3. 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.**
>
> **4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
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> **5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

13. In the case at hand which unless the applicants put their house in order will be relegated to an academic exercise, the Applicants have established that they will suffer substantial loss if the intended execution is not stayed because there is already money deposited bank. It also follows that if the Respondents execute the judgement and the Applicants' appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory. On the other hand the Respondents have not disclosed any source of income that he would use to refund the Applicants the decretal amount should the appeal succeed.

14. Was the application filed without unreasonable delay? The application has been filed four months after the delivery of the judgement. It is noted that the appeal was filed on 7th May, 2018 quite within time after the delivery of judgement and thus signaling the Applicant's interest in pursuing the appeal. It is only after the applicants were served with the proclamation that the intention to execute the decree by the

Respondent dawned on them. Be that as it may, there is thus no inordinate delay on the part of the Applicant.

15. The Applicant has indicated its readiness to furnish security for the due performance of the decree, and in any event the money is already deposited bank and this is sufficient security going by the finding in the Court of Appeal decision in **National Bank of Kenya Limited v Alfred Owino Bala, Kisii HCCA 93 of 2014**. The Respondents' concern has been taken care of by the Applicants depositing the decretal amount, but the applicants' concerns have yet to be addressed hence the present application.

16. A perusal of the memorandum of appeal shows that the Applicants are appealing against the decision on quantum and I find the said appeal to be arguable.

17. In the circumstances, I find that the application partially succeeds and grant a stay of execution of the judgement delivered on 11.4.2018 together with the decree and all consequential orders in **Machakos CMCC No. 482 of 2015, Silvanus Mukila Muindi and Irene Kaveni Mukila (Suing as the Legal Representatives of the Estate of Erick Mbithi Mukila (Deceased) v David Gitau and Joseph Kivati Wambua** pending the hearing of the Applicant's appeal.

18. With regard to the application to set aside the orders issued on 26.9.2018, I find that the grounds elicited in the application amount to a new and important matter of evidence that warrants an application for review and thus it is upto the applicants to move the trial court to review the said decision in line with the provisions of Order 45 of the Civil Procedure Rules that provide that any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered new and important matter that could not be produced by him at the time when the decree was issued or the order was made, it is also open to the court to make such an order if the court finds sufficient reason to do so. Hence I decline to set aside the orders made on the 26/09/2018 by the lower court.

19. The costs of the application shall abide the outcome of the appeal.

It is so ordered.

Dated and delivered at Machakos this 24th day of April, 2019.

D.K. KEMEI

JUDGE