REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 2 OF 2018

MARGARET NJERI MWICIGI.....APPELLANT

VERSUS

ROSE NYAMBURA KAMANDE.....RESPONDENT

(Suing as the administrator of the estate of the late Michael Kiarii Njoroge - deceased)

R U L I N G

1. This is an application by way of Notice of Motion filed on 29th January, 2018 brought under Order 42 rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A and 63(e) of the Civil Procedure Act seeking stay of execution of the decree in Thika CMCC 635 of 2015 pending the hearing and determination of this appeal.

2. The application is premised on grounds that the Appellant is dissatisfied with the judgment in the lower court and has commenced the appeal process and that execution is imminent.

3. **Caroline Kimeto** swore the affidavit in support of the application. She deposed that on 15/12/2017, judgment was entered for the Respondent for a sum of Kshs. 1,945,240/=; that the Applicant is dissatisfied with the said judgment and anticipates execution of the said decree; that the Respondent is not well endowed financially and in the event the appeal succeeds, the decretal sum if released, will not be recoverable.

4. Rose Nyambura Kamande, the Respondent filed a replying affidavit in opposition to the motion, asserting inter alia, that the appeal has minimal chances of success and in any event the Appellant should deposit at least Kshs. 2,036,240/= as security if the prayer for stay is to be granted.

5. The application was canvassed by way of oral submissions. Mr. Mwaura, counsel for the Appellant expressed the Appellant's apprehension that the Appellant will not be able to recover any decretal sum paid to the Respondent as she has not disclosed her financial capability. He urged the court to grant an order to stay execution pending appeal and pledged that the Appellant is willing to deposit half of the decretal sum in court.

6. Mr. Nganga, counsel for the Respondent opposed the application. He submitted that the Appellant should pay half of the decretal sum directly to the Respondent and to deposit the balance into court or alternatively, the entire decretal sum to be deposited into a joint account in the names of the advocates of the parties. Reliance was placed on the case of **Amal Hauliers Ltd v Abdulnasir Abukar Hassan (2017) eKLR** where the court directed that half of the decretal sum be paid to the Respondent and the other half to be deposited in a joint interest earning account.

7. Counsel stated that there was no proof that the Respondent could not pay back the decretal sum. He argued that a decree holder should not be denied the fruits of her judgment based on her being impecunious. He called to his aid the case of **Samwel Kimutai Korir (suing as personal and Legal Representative of estate of Chelangat Silevia) v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College (2017)eKLR.**

8. The court has considered the material canvassed in respect of the motion by the Appellants. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must: -

i) approach the court without unreasonable delay.

ii) satisfy the court that substantial loss may result unless the order sought is granted.

iii) furnish security for the due performance of the decree appealed from.

9. At this stage, the court is not concerned with the merits or validity of the grounds of appeal which the Respondent has addressed in her replying affidavit. Although the Appellants filed their motion some 14 days after the lapse of the 30 day stay period, the delay cannot be said to be inordinate.

10. Has the Appellant demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

Holdings 2,3 and 4 therein are particularly relevant. These are that:

> **"1. …..**
>
> **2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**
>
> **3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**
>
> **4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.**
>
> **5. ….."**

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> **"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>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 would be unable to repay the decretal sum plus costs in two courts…</u>"**

12. The learned Judge continued to observe that:-

> **"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. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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</u>."** (emphasis added)

13. Earlier on, **Hancox JA** in his ruling observed that:

> **"It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,… render the appeal nugatory.**
>
> **This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**
>
> **"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."**
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."**

14. The Appellants in this matter have expressed the apprehension that they may not recover the decretal sum if the appeal succeeds as the Respondent's means are unknown, and their appeal if successful will have been rendered nugatory. The Respondent while demanding payment of half the decretal sum did not address the question of her means to refund such sums if the appeal were to succeed.

15. In the oft-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated that:

> **"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation**

that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."

16. The Respondent having failed to controvert the assertions that she had no known means , did not discharge the evidential burden. Nevertheless, the words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR,** citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** remain relevant in an application of this nature:

"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff……
It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"

That too is the import of part of the court's observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

17. Weighing all the relevant matters, the court is persuaded to grant an order in terms of prayer 3 of the motion filed on 29th January, 2018 on condition that, within 21 days of today's date, the Appellant deposits into a joint interest earning account in the names of the respective parties' advocates a sum of Sh.1,500, 000/- (One Million Five Hundred Thousand). Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In the presence of:

Mr**.** Bosire holding brief for Mr. Mbigi for Appellant

Mr. Mugo holding brief for Mr. Nganga for Respondent

Court Assistant – Nancy/Kevin