REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 140 OF 2018

PHINEAS KABERIA alias PHINEAS KABERIA M'ITHIKA....APPELLANT

VERSUS

JOSEPH GACHOKI GAKUYA.....RESPONDENT

R U L I N G

1. By a Motion on Notice dated 21st December, 2018 brought under ***Order 42 Rule 6 of the Civil Procedure Rules,*** the applicant sought an order for a stay of execution of the judgment and decree made on 10th December, 2018 in Maua CMCC NO. 91 of 2018 pending the hearing and determination of the appeal.

2. The grounds upon which the application was made were set out in the body of the Motion and the supporting affidavit of Phineas Kaberia sworn on 21st December 2018. It was contended that the judgment was for a sum of Kshs. 2,856,113/- for which the respondent had already applied for execution. That if execution is levied, the applicant will suffer substantial loss and the appeal will be rendered nugatory as the respondent has no known assets or means of repaying back the decretal, sum were the appeal to succeed.

3. The respondent opposed the application through the replying affidavit of Joseph Gachoki Gakuya sworn on 15th January, 2019. He deponed that as a result of the accident, he had suffered extensive injuries with incapacitation assessed at 50% and continues to require specialized care and treatment. That the application and appeal was brought in bad faith and was an attempt to stop him from realizing the fruits of his judgment. That the applicant will suffer no prejudice if the amount is settled in full or as the court may deem fit in the interest of justice.

4. The application was canvassed by way of written submissions. The appellant submitted that he has met the threshold grant of the orders sought. He relied on **Antoine Ndiaye v. African Virtual University [2015] eKLR** and **Selestica Limited v. Gold Rock Development Ltd [2015] eKLR** in support of his submissions.

5. On the other hand, the respondent submitted that the applicant had neither discharged his duty in evidence nor proved that he was incapable of refunding the decretal sum. That the appeal has no arguable grounds with any chances of success. The cases of **Antoine Ndiaye v. African Virtual University (supra)** and **Masisi Mwita v. Damaris Wanjiku [2016] eKLR** were relied on in support of those submissions.

6. The three pre-requisite conditions in an application for stay of execution pending appeal are set out in ***Order 42 Rule 6(2) of the Civil Procedure Rules***. These are that; the application should be made timeously, that if the stay sought is not granted, the applicant will suffer substantial loss and the grant of such security for the performance of the decree.

7. On the first requirement, the impugned judgment was made on 10th and the decree issued on 17th December, 2018 respectively. The application was filed on 21st December, 2018. That was a period of less than 10 days. Clearly, the application was filed timeously and that requirement was met by the applicant.

8. On substantial loss, the applicant contended that the decree was for a colossal sum. That the respondent has no known assets or means to refund the decretal sum if the amount decreed is paid over and the appeal succeeds.. That he will therefore suffer substantial loss if the stay is not granted.

9. **In *Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema [2012] eKLR*** Odunga J held:-

"It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid.

In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay."

10. Substantial loss is the cornerstone of any application for stay of execution. This is so considering that there are always two contending principles in play, the decree holder's right to enjoy the fruits of his judgment and the appellant's undoubted right to challenge the subject decision on appeal. The court must balance between these two competing and valid interests.

11. In my view, substantial loss is any loss that is real and of value. There may be no mathematical formulae to prove substantial loss. It is an objective concept where, in money decrees, the applicant is under an obligation to show that if he pays over the money as decreed, he may not recover the same, if the appeal succeeds.

12. In this regard, what an applicant has to do is to state on oath that he believes that if the money is paid over to the respondent, the respondent may not be in a position to repay it back and that the money will be beyond reach. To my mind, once an applicant does so, he will have discharged his obligation under this head and the evidentiary burden shifts to the respondent.

13. Once the evidentiary burden shifts as aforesaid, it is incumbent upon the respondent to show that, if the money is paid over, he will be able to repay it. Simply put, once an applicant swears that he believes that the respondent is a man of straw, he will not be expected to do anything more. This is because, in the ordinary cause of events, it is not possible for anyone to know and prove the net-worth of another. One cannot know the other's financial ability. It is for the respondent to prove by way of evidence that he is not a man of straw. He is obligated to satisfy the court that, if the money is paid over to him, he will be able to refund the same if the appeal is successful. That the money will not be beyond the court if the appeal succeeds.

14. **In *National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005*, the Court of Appeal stated:-**

"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 an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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."

15. Applying the foregoing criteria to this case, the applicant averred that he will suffer substantial loss as the respondent had no known assets or means to refund the decretal sum if paid over and the appeal succeeded. On his part, the respondent decided to keep silent on that allegation. He never demonstrated that he is a man of means. That if the money is paid over to him, he will be able to refund the same were the appeal to succeed. The respondent bore the evidential burden to prove that he is not a man of straw as alleged as for he is the one with the special knowledge of his financial ability. Accordingly, I am of the view and hold that the applicant has proved that he would suffer substantial loss if the stay is not granted.

16. The last requirement is security. The applicant asserted that he was ready to deposit the decretal amount in a joint interest earning account in the names of the parties' advocates. To my mind that is sufficient security and the applicant has satisfied the last requirement.

17. Accordingly, the application is hereby allowed. The applicant is to deposit the decretal sum in an interest bearing account in the joint names of the advocates on record for the appellant and respondent. The amount is to be deposited within 30 days from the date hereof in default execution to issue. Costs be in the cause.

It is so ordered.

DATED and DELIVERED at Meru this 30th day of May, 2019.

A. MABEYA

JUDGE