REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 139 OF 2018

1. DAVID BETT

2. CHRISTOPHER KIRWA BUSIENEI..... APPELLANTS

VERSUS

JOSEPH NJUGUNA NG'ANG'A AND MARY WAIRIMU NJUGUNA

(Suing as Administrators of the estate of

JOSEPH GITAU KIVELENGE (DECEASED)

GOAL IRELAND.....RESPONDENTS

R U L I N G

1. Before me is an application by way of Notice of Motion filed on 9th November, 2018 and brought primarily under Order 42 rules 6(1) & 6(6) of the Civil Procedure Rules. The live prayer seeks an order to stay the execution of the judgment and decree issued by the Chief Magistrate's Court at Kiambu on 17th October, 2018 in **Thika CMCC No. 29 of 2016** pending the determination of the appeal herein.

2. The gist of the grounds in support of the motion is that the Appellants are aggrieved with and have appealed against the judgment of the court below wherein the Respondents were awarded a sum of **KShs.1,247,085/=** made up of general and special damages; that the Appellants are likely to suffer substantial loss and their appeal rendered nugatory if execution is not stayed. Because, the decretal sum is high, and 1st Respondent will be unable to refund any sums paid over to him in the event the appeal terminates in the Appellants' favour. These matters are further elaborated in the supporting affidavit sworn by the 1st Appellant.

3. The Respondents swore a replying affidavit in opposition to the motion. The gist is that having lost their son, on whom they dependent for financial support, they were rendered destitute and had placed their hopes on the outcome of the suit in the court below. They view the application as an abuse of the process, and made for the purpose of delaying their enjoyment of the fruits of the judgment appealed from.

4. The application was canvassed by way of written submissions. The Appellant submitted that they have moved the court without delay; that they stand to suffer substantial loss if compelled to pay the decretal sum in the event the appeal succeeds as demonstrated by their averments and evidence in the lower court.

5. Counsel argued that, the Respondents have not presented any evidence of their ability to refund the decretal amount should the appeal succeed. He cited the decision of the Court of Appeal in the case of ***National Industrial Credit Bank Limiuted vs Aquinas Francis Wasike & Another (UR)*** to support his proposition that the Respondents were obligated, upon doubt being cast on their financial ability, to prove their ability to refund the decretal sum upon the appeal succeeding. Other cases cited to support the proposition were **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua (2001) e KLR.** Finally, the Appellants expressed willingness to deposit a security for the performance of the decree if the appeal fails.

6. For their part, the Respondents argue that there was delay in bringing the stay motion. The Respondent's view was that the duty lay on the Appellants to prove that they would suffer substantial loss. Several decisions of the High Court were cited in support of the proposition that the said burden never shifts to the decree holder. They urged the court to balance the rights of all the parties through an order for security, but in any event urged the court to dismiss the application.

7. The court has considered the material canvassed in respect of the motion by the Appellant. 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.

8. At this stage, the court is not concerned with the merits or validity of the grounds of appeal which the Appellants have addressed in their submissions. Although the Appellants filed their motion some 9 days after the lapse of the 30 day period, the delay cannot be said to be inordinate. Further, the Appellants have offered to deposit security and have already complied with the initial order to deposit a sum of KShs.600,000/= which demonstrates good faith on their part.

9. Have the applicants 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] e 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. …..."

10. 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>"**

11. 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)

12. 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."

13. The Applicants have cited the averments made in the lower court and the evidence of the 1st and 2nd Respondents at the trial to the effect that they had no means of income and were dependent on the deceased. Indeed paragraphs 3, 4, 5 and 6 of the said Respondents; affidavit confirm that they have no means to refund the decretal sum, which is substantial, if the appeal succeeds.

14. In the off-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of

Appeal states 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."**

15. The Respondent's having admitted that they are impecunious, it is not clear to me what more evidence they expected the Appellants to bring before the court in proof of substantial loss. 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.

16. Weighing all the relevant matters, the court is persuaded to grant an order in terms of prayer 3 of the motion filed on 9th November, 2018 on condition that, within 21 days of today's date, the Applicant deposits into court a further sum of KShs.200,000/= so as to bring the total security deposited to a sum amounting to KShs.800,000/= (Eight Hundred Thousand). Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY 2019

…….

C. MEOLI

JUDGE

In The Presence of:-

For Applicant – No appearance

For Respondent – No appearance

Court Assistant – Nancy/Kevin