REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO. 309 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 23(3)(F)

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26, LAWS OF KENYA, SECTIONS 8,9, & 10

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF

REPUBLIC.....APPLICANT

VERSUS

THE GOVERNOR, NAIROBI CITY COUNTY....1ST RESPONDENT

THE MINISTER, FINANCE AND

ECONOMIC PLANNING-

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

THE CHIEF ACCOUNTING OFFICER,

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

AND

SALIMA ENTERPRISES LIMITED.....*EX PARTE* APPLICANT

AND

THE CO-OPERATIVE BANK

OF KENYA LIMITED.....INTERESTED PARTY

RULING

Introduction

1. This Ruling disposes two applications, namely, the Notice of Motion dated 22nd May 2018 filed by the *ex parte* applicant (herein after referred to as the first application) and the Notice of Motion dated 6th December 2018 filed by the Respondents (herein after referred to as the second Application).

2. The two applications seek diametrically opposed orders. Whereas the first application seeks orders to enforce the decree in favour of the applicant, the second application seeks to stay the same decree pending appeal to the Court of Appeal.

3. For the sake of brevity, I will consider the two applications separately.

The first application

4. The *ex parte* applicant in the first application seeks the following orders:-

> *i. Spent.*
>
> *ii. **That** the Respondent/contemnors be denied audience completely until, they purge the contempt herein.*
>
> *iii. **That** the property of the contemnor's employer/Respondent, Nairobi County Government being various amounts of money in cash form domiciled in Co-operative Bank of Kenya Limited and belonging to the Nairobi County Government in Kenya Shillings Account No. 01150232396600 City Halland any other account belonging to the Nairobi County Government held in the same branch and any other branch be attached and sequestrated to answer and satisfy the judgment and decree of this court in this matter and as per the consent orders of 9th January 2018 for the amount of Kenya Shillings Six Hundred Million (Ksh. 600,000,000/=) plus interests at court rates with effect from 9th January 2018 until payment in full.*
>
> *iv. **That** the said amounts of money sequestrated under order 3 above be immediately paid to the applicant through their advocates account number 0102004708300 held at Standard Chartered Bank Limited Westlands Branch in the name of Kinyanjui Kirimi & Co Advocates by close of business 23rd May 2018, (now past) or such other time as the court may direct.*
>
> *v. **That** if the attachment and sequestration of the said sums of monies in the said accounts in order 3 herein above does not satisfy in full the said decretal amounts herein, the Respondents and or any person, officer or employee acting under their authority or direction within the Nairobi County Government be arrested and committed to civil jail for such periods as the court may direct or until full payment is received.*
>
> *vi. **That** Co-operative Bank of Kenya Limited through its Managing Director be directed to implement the orders issued herein.*
>
> *vii. **That** the costs of this application be provided for.*

Factual Matrix

5. The applicant in support of the first application states that despite various orders and a consent dated 9th January 2018 decreeing that Ksh. 600 million be paid within 21 days, the Respondents have failed to pay, and, that, the applicant has not been able to enforce warrants of arrest issued against the Respondents.

6. The applicant states that it has discovered the Respondents' money held in its bank account number 01150232396600 and several other accounts in the bank and wishes to attach the same in settlement of the decretal amounts.

Legal foundation of the application

7. The first application is premised on the provisions of Order 22, Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010, Sections 63 and 64 of the Civil Procedure Act,[1]Section 4 of the Fair Administrative Action Act,[2] the Contempt of Court Act [3]and Article 159 of the Constitution.

Respondents' grounds of opposition

8. On 5th June 2018 by the firm of Kithi & Co Advocates, the then advocates on record for the Respondents filed grounds of opposition stating that the application lacks grounds; it is defective and lacks merit.

Interested Party's grounds of opposition and Replying Affidavit

9. The Interested Party, The Co-operative Bank of Kenya Limited, filed grounds of opposition on 4th June 2018. It states that the application is untenable in that it offends Order 29 Rule 2 of the Civil Procedure Rules.[4] It also states that the execution proceedings against the Respondent, a government within of Article 6(2) of the Constitution offends the provisions of Order 29 Rule 4 of the Civil Procedure Rules, 2010 which expressly prohibits the grant of execution orders against the government.

10. The Interested Party also stated that the application offends the provisions of Article 207 (2) & (3) of the Constitution, which provides the manner in which revenue accounts shall be operated. It also stated that the application offends section 109 of the Public Finance Management Act[5], which prohibits the operation of the county revenue accounts except in accordance with the Constitution and an approval from the Controller of Budget.

11. Lilian Kioko, the Interested Party's Branch Manager at the City Hall Branch swore the Replying Affidavit dated 4th June 2018. She

deposed that the orders sought are in the nature of *garnishee* orders, which cannot issue against the revenue accounts belonging to a County Government. She averred that the application is fatally incompetent for offending the provisions of Order 29 (4) of the Civil Procedure Rules, Article 6(2) and 207 (2) & (3) of the Constitution, section 21 of the Government Proceedings Act[6] and section 109 of the Public Finance Management Act,[7] hence, the application lacks basis in law.

Determination

12. From the above opposing positions taken by the parties, I find that from the first application, only two issues fall for determination. *First*, whether the application is fatally and incurably defective. *Second*, whether the applicant has demonstrated any grounds to warrant any of the orders sought. I will address and determine these issues together since they are intertwined.

13. Mr. Kirimi, the *ex parte* applicant's counsel in support of his application argued that the applicant has gone full circle in the execution process. He submitted that the applicant obtained an order of *Mandamus* and instituted contempt proceedings and all efforts to arrest the Respondents have been in vain. Citing *Fredrick Kamunde v Tharaka Nithi County Government & 2 Others*[8] he urged that sequestration is one of the available remedies, and, it is an order of last resort. He submitted that the contempt of court act does not preclude sequestration as a remedy for state organs in contempt of court orders. He pointed out that the Respondents only filed grounds of opposition and failed to give an explanation. Citing *Republic v The Registrar of Titles Nairobi Registry & 5 Others,*[9] he submitted that the Interested Party is in contempt of this courts order.

14. Mr. Harrisson Kinyanjui, the Respondents' counsel relied on the grounds of opposition filed by his predecessors referred to above and pointed out that there is an application for stay pending in the court of appeal being CA No. 190 of 2018, and a pending appeal.

15. Miss Areri, counsel for the Interested Party submissions were essentially a replica of their grounds of opposition and the Interested Party's Replying affidavit.

16. I now proceed to address the legal competence of the first application. This warrants a close examination of the provisions of the law cited by the applicant. Counsel for the Interested Party assaulted the first application on several legal fronts. *First*, she correctly pointed out that the application offends Order 29 Rule (2) & (4) of the Civil Procedure Rules and the Government Proceedings Act.[10]

17. Order 29 Rule 2 (2) of the Civil Procedure Rules provides that no order against the Government may be made under –(a) Order 14, rule 4 (impounding documents); (b) Order 22 (Execution of decrees and orders); (c) Order 23 (Attachment of debts); (d) Order 40 (Injunctions); (e) Order 41 (Appointment of receiver).

18. In addition, Order 29 Rule 4(1) of the Civil Procedure Rules provides that no order for the attachment of debts under Order 23 or for the appointment of a receiver under Order 41 shall be made or have effect in respect of any money due or accruing or alleged to be due or accruing from the government.

19. To buttress her argument, Miss Areri submitted that the County Government of Nairobi is a government within the meaning of Article 6(2) of the Constitution. It was also her submission that the application offends the Government proceedings Act.[11]

20. A reading of the clear provisions of Order 29 Rule 2 (2) & 4 of the Civil Procedure Rules, 2010 leave me with no doubt that the said provisions expressly prohibit the grant of execution orders against the government. In addition, the application offends the express provisions of section 21 of the Government Proceedings Act,[12]which provide for Satisfaction of orders against the Government. In fact, section 21 (5) of the Government Proceedings Act[13] provides that "this section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party."

21. A reading of the provisions of the law cited above leaves with no doubt that the first application offends the said provisions, it is legally and incurably incompetent and unsustainable. On this ground alone, the first application falls.

22. The *second* of assault mounted by Miss Areri is that the application is in the nature a *garnishee.* Order 29 Rule 2 (2) (c) provides that no orders against the government can be issued under Order 23 which provides for attachment of debts. Indeed, Order 29 Rule 4 referred to above prohibits issuance of orders against the government for attachment of debts. To the extent that the instant application seeks to attach a debt or deposit in a bank account within meaning of Order 23, it offends the said provisions, and, is unsustainable.

23. *Third,* the applicant cited Order 22, which provides for execution proceedings, but carefully avoided citing Order 23, which provides for attachment of debts or deposits. Attachment of Debts and Credits is provided for under order 23 of the Civil Procedure Rules. By failing to invoke Order 23, the applicant did not make its case better because Order 29 (2) cited above expressly prohibitions execution against the government.

24. The *fourth* ground upon which this application must collapse is that whereas Order 22 provides for execution proceedings and Order 23 provides for garnishee proceedings. Both Order 22 and 23 do not provide for sequestration against the government. The procedure adopted by the applicant renders the application incompetent. The above provisions being the express legal requirements cannot be cured by invoking Article 159 the applicant has cited.

25. *Fifth*, the applicant cited sections 63 and 64 of the Civil Procedure Act.[14]These sections are irrelevant to the application before me. Section 63 provides for supplemental proceedings in the following words:-

> *In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*

a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

e) make such other interlocutory orders as may appear to the court to be just and convenient.

26. The above section has nothing to do with sequestration proceedings. I propose to say no more. Also cited is section 64, which provides for compensation for arrest, attachment or injunction on insufficient grounds. It provides as follows:-

(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under section 63—

a) it appears to the court that the arrest, attachment or injunction was applied for on insufficient grounds; or

b) the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the court, and the court may, upon such application, award against the plaintiff by its order such amount, not exceeding two thousand shillings, as it deems a reasonable compensation to the defendant for the expense or injury caused to him: Provided that, a court shall not award under this section an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining an application under subsection (1) shall bar any suit for compensation in respect of the arrest, attachment or injunction.

27. Clearly, section 64 has nothing to do with sequestration proceedings. This leads me to the need to define the meaning of sequestration. The word “sequestration” is derived from the Latin *sequestrare* which means “to place in safekeeping” and it was first attested to in the 1510s as “to seize by authority and to confiscate.”[15] “Sequestration,” is defined as the act of taking temporary possession of someone's property until they have paid money that is owed or obeyed a court order.[16]In law, sequestration is the act of removing, separating, or seizing anything from the possession of its owner under process of law for the benefit of creditors or the state.[17]

28. The Law Dictionary defines it as a writ authorizing the taking into the custody of the law of the real and personal estate (or rents, issues, and profits) of a defendant who is in contempt, and holding the same until he shall comply.[18] A sequestration order is a formal declaration that a debtor is insolvent. The order is granted either at the instance of the debtor himself (voluntary surrender) or at the instance of one or more of the debtor's creditors (compulsory sequestration).

29. The main purpose of a sequestration order is to score the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors. Executing against the property of a debtor who is in insolvent circumstances inevitably results in one or a few creditors being paid, and the rest receiving little or nothing at all. The legal machinery which comes into operation on sequestration is designed to ensure that whatever assets the debtor has are liquidated and distributed among all his creditors in accordance with a predetermined (and fair) order of preference.

30. The law proceeds from the premise that, once an order of sequestration is granted, a *concursus creditorum* (a “coming together of the creditors”) is established, and that the interests of creditors as a group enjoy preference over the interests of individual creditors. The debtor is divested of his estate, and may not burden it with any further debts. A creditor's right to recover his claim in full by judicial proceedings is replaced by his right, on proving a claim against the insolvent estate, to share with all other proved creditors in the proceeds of the estate assets.

31. The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once, the rights of the general body of creditors have to be taken into consideration. A single creditor can thereafter enter into no transaction with regard to estate matters to the prejudice of the general body. The claim of each creditor must be dealt with, as it existed at the issue of the order.

32. The chief effects of a sequestration order are to divest the insolvent of all his assets and to deprive the insolvent of full contractual capacity. Other consequences include criminal liability on the part of the insolvent acts committed both before and during sequestration. The insolvent may also obtain relief from the effects of certain legal proceedings.

33. The foregoing paragraphs explain with sufficient detail the nature, scope, effect and legal basis for the order of sequestration. I am unable to fit the circumstances of this case within the ambit of the order of sequestration eloquently explained above. Differently stated, even if the application survived the legal infirmities it suffers from discussed above, it would still fail on grounds that in the circumstances of this case, there is no legal basis upon which the orders sought can be justified. The case does not involve an insolvent Judgment Debtor or creditor.

34. The first application also seeks an order that the Respondent/contemnors be denied audience completely until, they purge the contempt herein. Interestingly, the applicant’s counsel did not address this prayer in his submissions. The Respondent and the Interested Party’s counsel did not addressed it also. I find no basis upon which to consider this prayer. Nevertheless, I will express my mind on the legal

position to guide the court when invited to deny an alleged contemnor the right to be head.

35. As was correctly held by the court of Appeal in *A.B & another v R.B*[19] under our constitutional framework, there is no general rule that a court cannot hear a person(s) in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster.[20]

36. Way back in 1952, Lord Denning, LJ articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to a fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril.[21] *In Hadkinson vs.Hadkinson,*[22] the eminent Law Lord stated:-

> *"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."*

37. In *Rose Detho v. Ratilal Automobiles Ltd & 6 Others,*[23] the Court of Appeal emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, *Githinji, JA* expressed himself as follows:-

> *"Has the contemnor a right to be heard. This is indeed an everyday question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to the general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt"(Emphasis added)*

38. The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. In exercising the discretion the court will have to satisfy itself on the question *"whether, taking into account all the circumstances of the case, it is in the interests of justice to hear or not to hear the contemnor."* Refusing to hear a contemnor is a step that the court will only take where the contempt himself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Denning in *Hadkinson v Hadkinson*[24] and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make.

39. Refusal to hear a party to the proceeding on merits is a drastic step and such a serious penalty should not be imposed on him except in grave and extraordinary situations. As stated above, the applicant did not address this prayer in his submission neither do I find any grounds in the material presented to this court.

40. I now turn to address the second application by the Respondents seeking to stay these proceedings pending the determination and outcome of Nairobi Court of Appeal Civil Appeal Application No. 190 of 2018.

41. The grounds cited in support of the application are that if the execution is permitted, the Respondents will suffer grave injustice. The Respondents state that the judgment sum is over Ksh. 600 Million, and if execution proceeds, they will result is loss of public funds. They contend that if execution proceeds, they may not recover the money.

42. In addition, the Respondents state that the jurisdiction under Order 53 of the Civil Procedure Rules does not impose security for the stay to be granted, and, that, the applicants have a right to be heard before the Court of Appeal. The Respondents also cite their right to access justice under Article 48 of the Constitution and this courts unfettered discretion to grant the order sought. Lastly, the Respondents state if the stay is refused, should the appeal succeed, it will be rendered a mere academic exercise.

The *ex parte* applicant's is Replying Affidavit

43. Hanif Gulam, a director of the *ex parte* applicant in opposition to the application swore the Replying Affidavit dated 28th February 2019. He averred *inter alia* that the application is mischievous, misleading, frivolous, and vexatious and a gross abuse of the court process. He deposed that the application is an afterthought, and, that it was filed after an unreasonable delay. He also averred that it has no legal basis. In addition, he stated that all the matters raised in the application have been raised before and dismissed, and in any event, the Respondents failed to honour part of a consent order.

Determination

44. In his submissions in support of the second Application, Mr. Harrison Kinyanjui essentially reiterated the grounds enumerated on the face of the application and the Replying Affidavit and urged the court to allow the application.

45. Mr. Kirimi, the *ex parte* applicant's counsel in opposition to the application argued that there is no appeal pending. He cited *Wangui Kathryn Kimani v Disciplinary Tribunal of Law Society of Kenya & Another*[25]for the proposition that to 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 the sound exercise of a judicial discretion. He also cited *Masisi Mwita v Damaris Wanjiku Njeri*[26] in support of the proposition that there must be an appeal filed before the court can address itself to a question of stay of proceedings.

46. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. In this regard, the Court of Appeal decision in the case of *Butt vs Rent Restriction Tribunal*[27] is worth quoting in which the court stated:-

> *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.*

47. From the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

48. *First,* the history of this case leaves me with no doubt that the instant application was filed after a long inordinate delay.

49. *Second,* the corner stone of the jurisdiction of the court under the Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[28]What constitutes substantial loss was broadly discussed in *James Wangalwa & Another vs Agnes Naliaka Cheseto*[29] as follows:-

> *"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... 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 appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of* ***Silverstein vs. Chesoni***,[30] *...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"*

50. It is important to emphasize that in an application of this nature, an applicant is required to place before the court sufficient evidential support, establishing substantial losses. The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Rules expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to and different from that.[31] This position was reiterated in *Bansidhar vs Pribhu Dayal*[32] where it was held that substantial loss should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances.

51. The other twin principle is whether the appeal will be rendered nugatory. It has been argued that no appeal has been filed and what is before the court is an application for leave to appeal out of time. This being the case, the question of a yet to be filed appeal being rendered nugatory cannot arise in this case because it's not clear whether the leave sought will be allowed.

52. Further, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the *prima facie* merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time, and whether the application has been brought timeously.[33]

53. Judicial discretion must be exercised upon reason. "Discretion" is defined as the power of a judge, to make decisions on various matters based on his opinion within general legal guidelines. Therefore, discretion is regarded as the power of choice.[34] Discretion must be founded on the law. Without the law, a court of law can will nothing.

54. Mr. Harrison Kinyanjui, if I understood him correctly impugned the manner his predecessors handled this case and generally the manner in which the entire proceedings were conducted and cited the possibility of loss of public funds. This argument is highly attractive. However, I am conscious of the fact that I am not sitting on an appeal or review so I cannot impugn the decision nor can I venture into the merits.

55. It is settled that mere preferring of an appeal does not operate as stay of a decree or order appealed against. The power to grant stay is discretionary. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms

the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

56. From the above authorities, the facts and the history of this case, I derive the following five principles in relation to the application before me. *First,* the court must take into account all the circumstances of the case. *Second,* a stay is the exception rather than the general rule. *Third*, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. *Fourth*, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. *Fifth*, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.[35]

57. The proper approach must be to make that order which best accords with the interest of justice.[36] If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.[37] Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.[38] This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.[39]

58. The grant of the order of stay pending appeal is not as a matter of course, though a discretionary remedy[40] which must be exercised both judiciously and judicially.[41] The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.[42]

59. The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances, which render it inequitable for him to enjoy the benefit of his victory.[43] The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances, which have received judicial approval, are when execution would: -[44] ***(a).*** *Destroy the subject matter of the proceedings.* ***(b).*** *Foist upon the court a situation of complete helplessness.* ***(c).*** *Render nugatory any order or orders of the appeal Court.* ***(d).*** *Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal.* ***(e).*** *Provide a situation in which even if the appellant succeed in his appeal there could be no return to the status quo.*

60. Guided by the legal principles discussed herein above and applying them to the circumstances of this case, it appears to me that the refusal of the grant of a stay of execution pending appeal is the order that would most accord with the interests of justice.

Disposition

61. In view of my analysis and conclusions enumerated herein above, I find that the *first* application is legally frail and therefore incompetent while the *second* application does not meet the test for granting stay. The common denominator between the two applications is that both lack merit.

62. The upshot is that the Notice of Motion dated 22nd May 2018 filed by the *ex parte* applicant (the *first* application) and the Notice of Motion dated 6th December 2018 filed by the Respondents (the *second* Application) are hereby dismissed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 25th day of June 2019

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya.

[2] Act No. 4 of 2015.

[3] Act No 46 of 2016.

[4] Cap 40, Laws of Kenya.

[5] Act No. 12 of 2012.

[6] Cap 40, Laws of Kenya.

[7] Act No. 12 of 2012.

[8] {2016} e KLR.

[9] {2013} e KLR.

[10] Cap 40, Laws of Kenya.

[11] Cap 40, Laws of Kenya.

[12] Ibid.

[13] Ibid.

[14] Cap 21, Laws of Kenya.

[15] Douglas Harper *Online Etymology Dictionary* (2014).

[16] https://dictionary.cambridge.org/dictionary/english/sequestration

[17] *Encyclopædia Britannica* (11th ed.). 1911.

[18] Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

[19] {2016} e KLR.

[20] Ibid.

[21] Ibid.

[22]{1952} 2 All ER 567

[23] CA No. 304 of 2006 (171/2006 UR):

[24]{1952} P 285

[25] {2017} e KLR.

[26] {2016} e KLR.

[27]Civil App No. NAI 6 of 1979.

[28] See Gikonyo J in HCC NO. 28 of 2014, *Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement*.

[29] HC Misc No. 42 of 2012 OR {2012} eKLR

[30] {2002} 1 KLR 867

[31]Learned Judge Vivian Bose A. J. C in the case *Anandi Prashad v. Govinda Bapu*, AIR 1934 Nag 160 (D)

[32] AIR 1954 Raj 1, Learned Judge Dave.

[33]*Global Tours and Travels Ltd*, WC No. 43 of 200 (UR).

[34] Gerald and Kathleen Hill *Legal Dictionary* Farlex com (2005).

[35]{2011} EWHC 3544 (Fam)

[36]Philips LJ in *Linotype-Hell Finance Limited v* Baker [1992] 4 All ER 887, at page 3

[37] Ibid

[38] Ibid

[39] Ibid

[40] *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

[41] *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd*. (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Olunloyo v Adeniran* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129.

[42]*Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

[43] *Fawehinmi vs. Akilu* (1990) 1 NWLR (Pt. 127) 450 @ 460.

[44] *UNIPORT vs. Kraus Thompson Organization Ltd.* (1999) 11 NWLR.