



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 127 OF 2018

POLYTANKS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

EVERLYNE WANZA MUSAU AND MARY MUTHEU SILA (Suing as the legal

representatives of the Estate of the JOSEPH MUSAU KIVELANGE)...1ST RESPONDENT

MBUTHIA CHARLES.....2ND RESPONDENT

PHILIP MUYUNGI.....3RD RESPONDENT

(Being an Appeal from a judgement of the Hon. M. Opanga, SRM delivered on 18th September, 2018 in Kangundo SPMCC No. 14 of 2016)

RULING

1. By a Motion on Notice dated 30th October, 2018, the applicant herein seeks that there be a stay of execution of the judgement of the trial court delivered on 18th September, 2018 in Kangundo SPMCC No. 14 of 2016 pending the hearing and determination of this appeal.
2. The said application was supported by an affidavit sworn by **Emma Mwangi**, the legal manager-claims at Mayfair Insurance Company. According to the deponent, the trial court delivered its judgement on 18th September, 2018 and being dissatisfied with the said judgement on quantum and liability, they instructed their advocates to file this appeal which in the deponent's view raises serious issue which ought to be heard on merits and that the same has very high chances of success.
3. It was therefore deposed that it is only just and fair and in the interest of justice that the court grants the orders of stay sought herein as the application is made timeously and in good faith. It was deposed that unless the application is granted and the decree is executed, the applicant would be subjected to irreparable loss and damage thus the appeal would be rendered nugatory. It was disclosed that the applicant is ready and willing to furnish security for due performance.
4. It was averred that according to the evidence which was tendered in court, the plaintiff is a person of straw and in case the decretal sum is paid to her, she will not be able to refund the same in the event that the appeal is successful.
5. In response to the application, the 1st Respondents who were the plaintiffs in the lower court averred that the deceased left behind a wife and children who do not have anyone to support them or anything to survive on as they were waiting for the outcome of the judgement and the deceased was the sole breadwinner of the family. After the accident, the family had to borrow cash to cater for funeral expenses which amounts they have not refunded and are under pressure as they had promised to do so upon the finalisation of the claim.
6. It was averred that the applicant was only ordered to shoulder half of the decretal sum hence its appeal can only proceed to the extent of its liability. However, without prejudice, it was averred that the court should order the applicant to pay half of Kshs 1,689,917/= which is half of the decretal amount which amounts to Kshs 844,958.50 and deposit the balance of similar amount in a joint account.

7. In the submissions it was disclosed by the applicant that the trial court awarded the plaintiff a total of Kshs 3,143,010/- against the defendants and liability was apportioned at 50:50 as between the 1st and 3rd defendants hence the applicant is liable to the tune of Kshs 1,571,505/- plus costs. In the applicant's view, the amount that it is required to pay is, by no means a small amount taking into account that the applicant is in the insurance business and has a raft of litigation requiring finances to defend various claims hence will suffer substantial loss if it were to pay the decretal sum yet the plaintiffs have not demonstrated that if paid the same, they are capable of refunding the same.

8. According to the applicant the denial of the stay sought will cause great hardship on the applicant whose operations may ground to a halt.

Determination

9. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions filed as well as the authorities relied upon.

10. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

No order for stay of execution shall be made under subrule (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.

11. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

12. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

13. The same position was adopted by **Kimaru, J** in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgement 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 Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

14. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance

or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

15. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“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. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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”.

16. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

17. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

18. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held 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 sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

19. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

20. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

21. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success.

22. In this case, the applicants have deposed that from the evidence adduced before the trial court, the plaintiffs are people of straw hence in the event that the appeal succeeds and the decretal sum is paid, the success of the appeal will be rendered nugatory. I must however say that lack of means per se is not necessarily a ground for granting stay. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the plaintiffs, at this moment, are the successful parties and to deny them the fruits of their success, it is upon the applicant to prove that they are unlikely to make good whatever sum they may have received in the meantime.

23. In this application, I must state that the applicant, with due respect, presented a rather clumsy application. Apart from the general averment that the evidence presented before the trial court revealed that the plaintiffs were people of straw there was no evidence presented that that was actually the case. One would have expected the applicant to exhibit a copy of the proceedings to support that allegation or at least to reproduce part of that evidence in the affidavit in support of this application. Apart from that the affidavit in support did not bring out the facts leading to the judgement and even the nature of the judgement itself. In fact were it not for the replying affidavit, this court would have been left at a loss as to the nature of the judgement appealed against. The applicant instead in its submissions, quite inappropriately in my view, made some factual averments which ought to have been in the affidavit. That is a very unusual way of presenting evidence before the court.

24. However, a holistic consideration of both the applicant and the respondent's case (the plaintiffs) that the sum was awarded in respect of fatal accident and the beneficiary of the judgement is the estate of the deceased.

25. In this case however, the decree holder is an estate of the deceased. The plaintiffs have disclosed in the replying affidavit that the grant of the orders of stay will leave the estate of the deceased in a precarious situation as the same comprise the wife and the children of the deceased who were all dependent on the deceased and that the estate requires funds in question not only for its upkeep but also to settle the debts incurred as a result of the deceased's death. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondents have not disclosed the estate's source of income, if any.

26. As regards to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** it was held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the latter case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

27. In this case, the applicants themselves seem to suggest that they are likely to be financially embarrassed were they to be compelled to pay out the decretal sum. Accordingly, in order not to place the plaintiff's in a situation where they may lose out should the appeal fail, both parties ought to be secured.

28. In the premises, there will be a stay of execution of the decree as regards the liability of the applicant to settle the decretal sum pending this appeal on condition that the Applicant remit to the Respondents half of the decretal sum that it is liable to pay which according to the plaintiff is Kshs 844,958.50 and deposit the other half amounting to a similar sum in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the applicant herein and the 1st respondents/plaintiffs within 30 days from the date hereof. In default, this application shall be deemed to have been dismissed with costs. For avoidance of doubt the execution of the other part of the decree has not been stayed.

29. There will be no order as to costs since none of the parties complied with the directions of this court with respect to furnishing of soft copies of pleadings and submission. costs of this application are awarded to the Respondent in any event.

30. It is so ordered.

Read, signed and delivered in open court at Machakos this 25th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munywoki for Mr Mutiso for the Respondent

Miss Mbuvi for Mr Juma for the Applicant

CA Geoffrey