**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO 202 OF 2018**

**MEA LIMITED.....1ST APPELLANT**

**NITRON GROUP LIMITED.....2ND APPELLANT**

**VERSUS**

**MULTISHIP INTERNATIONAL LIMITED.....RESPONDENT**

***(Being an Appeal from part of the Judgment and decree of the Honourable J. M. Nang'ea,***

***Chief Magistrate's court at Mombasa delivered on 10th September, 2018 in Civil Case No 523 of 2017)***

**RULING**

1. The appellants being the Defendants in Mombasa Chief Magistrate's court civil Suit No. 523 of 2017 instituted this suit praying for judgment against the Defendant (Respondent) herein. Judgment was entered in favour of the Respondent herein and court ordered that the 1st Appellant/Applicant to pay the sum of USD 39,498.50 to the Respondent within 30 days and dismissed the Appellants/applicants counterclaim with costs to the Respondnet.th Appellants/Applicants being dissatisfied with eh judgment filed an appeal in this court.

2. The Appellants/Applicant pursuant to filing the Appeal also filed a Notice of Motion application dated 15th October, 2018 seeking the following orders;

**(a) spent;**

**( b) spent;**

**(c) That pending hearing and determination of the applicant's appeal, there be stay of execution of the decree issued by the magistrate court in its judgment delivered on 10th September, 2018 in CMC No. 523 of 2017.**

**(d) That this Honourable court grants such other appropriate relief as the justice of the circumstances herein may dictate;**

**(e) That the costs of this application be in the appeal.**

3. The application is based on the ground on its face and reiterated in the supporting affidavit as follows;

**(i) The learned magistrate erred in law and in fact in finding that the 1st appellant breached the bagging contract.**

**(ii) The learned magistrate erred in law and fact in refusing or failing to find that the respondent breached the express terms of the bagging contract.**

**(iii) The learned magistrate erred in law and fact in refusing or failing to find that the Respondent was responsible for the delay in discharging the vessel within the prescribed lay time and was therefore liable to pay the consequential demurrage.**

**(iv) The learned magistrate erred in law and in fact in finding that the Respondent had proved its case on a balance for probability against the 1st Appellant.**

**(v) The learned magistrate erred in law and misdirected himself by refusing or failing to allow the Appellant's counterclaim against the Respondent.**

4. In response, the Respondent filed a Replying Affidavit dated 24th October, 2018 stating a follows;

**(a) That the application is made in bad faith and an attempt to deprive the Respondent herein the fruit of their judgment.**

**(b) That on the date that judgment was issued, the appellants herein were well present with an advocate, thus the contents of the judgment were well within their knowledge.**

**(c )That vide an email dated 13th September 2018, my advocates on record forwarded a copy of the judgment to the appellants' advocates. Annexed herewith and marked 'NR-1' is a copy of the said email.**

**(d) That vide an email dated 13th September, 2018, the Appellants advocates confirmed receipt of my advocates email, which had been forwarded to their Head of Department. Annexed herewith and marked 'NR-2' is a cop of the said email.**

**(e) That in light of the aforesaid, the appellants'/applicants' herein had a duty to be vigilant and file the application well within the period of 30 days , which the Appellant'/Applicants' have failed to.**

**(f) That the application, which is filed at the last minute is intended to defeat the Respondent's right to execute for the decretal amount, which course of action is duly within the rights of the Respondent' annexed herewith and marked 'NR-3' and 'NR-4' is a copy of the decree and warrants of sale of property issued in the matter.**

**(g) That the appellant/applicant has failed and/or neglected to address itself to the payment of the decretal sum, which we humbly implore this Honourable court to have secured pending the hearing and determination of the application and appeal.**

**(h) That the Appellants/Applicants have failed to deposit into court the decretal amount, thus, have failed to meet the legal threshold to warrant the orders sought therein, thus the application is defective in law.**

**(i) That the Appellants/Applicants has failed to demonstrate the loss they are likely to suffer, and merely stating that they are likely to incur loss is not sufficient to warrant the orders sought therein.**

**(j) That the Appellants/Applicants have not demonstrate any loss that shall be occasioned if the decretal amount is to be paid despite admitting that the applicant is a reputable company thus capable of paying the decretal amount.**

**(k) That in the interest of balancing the scales of justice, the Respondent is willing to have the decretal amounts be paid into and interest earning account in the name of both advocates pending the hearing and determination of the appeal.**

5. On 3.11.2018, the counsel for parties were directed to canvass the application dated 15th October, 2018 by way of written submissions. Each counsel filed their written submissions and list of authorities on 28.11.2018 and 11.12.2018 respectively.

**APPELLANT'S SUBMISSIONS**

6. The Appellants/Applicants filed their submissions on 28th November, 2018. In their submissions the Appellants/applicants submitt that the threshold for the grant of an order for stay of execution pending appeal is;

(a) Whether the Applicant has an arguable appeal;

(b) Whether the Applicant will suffer substantial loss if a stay of execution is not granted; and

(c) Whether the application has been brought without unreasonable delay.

7. The Appellants/Applicants submitted that their appeal raises triable issues of fact and law that should be rightly heard and justly determined. That the learned magistrate erred in law and in fact in finding that the 1st Applicant breached the bagging contract and failing to find that the Respondent was responsible for the delay in discharging the vessel within the prescribed lay time.

8 The Appellants/Applicants further submitted that when considering an application for stay, it is trite law that court must address its collective mind to the question of whether to refuse it would occasion substantial loss to the applicant and in turn, render the appeal nugatory.

9. Further the Appellants /Applicants submitted that there has been no unreasonable delay by the Applicants and that their application for stay was within time. That the Appellants/Applicants would be ready to comply with any other conditions that maybe imposed by this court with regard to security and that the respondent will not be prejudiced in any way if the orders sought herein are granted. Lastly, they have submitted that the application dated 12th October, 2018 was made without undue delay. To invoke this court's discretion in granting the prayer, the Applicants have cited **Kenya Airports Authority vrs Mitu –Bell Welfare Society & Another (2014) e KLR**, John Mwangi Ndiritu vrs Joseph Nderitu Wamathai (2016).

**RESPONDENT'S SUBMISSIONS.**

10. The Respondents filed their submissions opposing the application on 11th December, 2018. They summited that the issues for determination would be whether the Appellant/Applicant has met the threshold in law to have the orders of stay of execution as sought and whether the Appellants/Applicants is entitled to costs.

11. The Respondent submitted that the decision cited by the Appellants/Applicants are distinguishable and misleading in the instant application. That the court should in exercise of its jurisdiction as relates to the instant application, consider Order 42 Rule 6 and not the principles submitted by the Appellants/Applicants. That the Appellants/Applicants will in no way suffer substantial loss and that it is not for the Appellants/Applicants to merely state that they are likely to suffer substantial loss but should demonstrate that the Respondent lacks the means to repay the decretal amount should this court find that the appeal has merit.

12. The Respondent also submitted that the application was filed after the lapse of 30 days and on commencement of execution by them. Further, it is submitted by the Respondent that the Appellants/Applicants have not provided any security to this court which is a necessary requirement for the prayers sought herein.

Lastly, the Respondents submitted that the application herein be dismissed and costs awarded to them.

**ANALYSIS AND DETERMINATION.**

13. I have considered the application by the Applicants/ Appellants dated 15th October, 2018, the grounds on its face and the supporting affidavit, the replying affidavit by the Respondents, the rival submissions by counsel for both parties, together with the applicable law and cited authorities.

14. The principles that guide the grant of stay of execution as enshrined under Order 42 rule 6 (1) stipulate as follows;

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside".**

15. In the case of **BUTT V RESNT RETRICION TRIBUNAL ( 1982)** KLR 417, the applicable principles in deciding whether or not to grant a stay of execution pending appeal and how a court should exercise tis discretion were captured in the court of appeal's holding that;

"1. 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"

2 The general principle 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.

3. A judge should not refuse a stay of 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.

4. The court in exercising its discretion whether to grant (or ) refuse an application for stay will consider the special circumstances for the case and the unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under order XLI Rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

16. And in the case of **ANTOINE NDIAYE VRS AFRICAN VIRTUAL UNIVERSITY ( 2015) e KLR , HIGH COURT AT NAIROBI, CIVIL SUIT NO. 422 OF 2006,** the learned Judge Gikonyo, held inter alia that;

> **"Stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court shall be guided by the prerequisites provided under Order 42 rule 6 of the Civil procedure Rules."**

17. A perusal of the decisions of both the High Court and Court of Appeal clearly show that the principles to be applied when considering an application for stay of execution pending an appeal are the same.

18. It is the Respondent's submissions that judgment in the lower court was delivered on the 10th September, 2018 and the appellant/applicant proceeded to file the present application on 12th October,2018, which was after the lapse of the 30 days and on commencement of execution by the respondent. The issue for consideration from this disposition is whether there was undue delay I find that the judgment having been delivered on 10th September, 2018, and the application having been filed on 5th October, 2018, which is about a

month after the said judgment had been delivered, the period cannot be said to be unreasonable or undue delay on the part of the Appellants/Applicants.

19. The next issue for determination is whether the Appellants/Applicants is bound to suffer substantial loss unless the order sought is made.

20. What is the substantial loss an applicant will suffer if stay of enforcement of that order of the subordinate court is not made in its favour. In the instant case, the applicant has submitted that the Respondent may execute decree or the amount involved (USD 39,498.50) and render the Appellants/Applicants a mere speculator to the appeal. The question to execute is therefore what amounts to substantial loss?

21. In the case of **ANTOINE ADIAYE VRS AFRICAN VITRUAL UNIVERSITY (2015) e KLR,** Supra, the learned Judge Gikonyo J, cited the holding in the case of SEWANKAMBO DICKSON VRS ZIWA ABBY HCT –OO-CC MA 0178 of 2005 where it held that:

> " Substantive loss is a qualitative concept. It refers to any loss, real or small, that is real worth or value, as distinguished from a less without value or loss that is merely norminal….insistence instance on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a commercial court, such as orders, where the underlying transactions typically tend to lead to colossal decretal amounts".

22. In the case of **KENYA SHELL LIMITED VRS KIBIRU (1986)** KLR 410, Platt Ag JA ( as he then was ) at page 416 expressed himself as follows;

> " It is usually a good rule to a seeing 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 form is the corner- stone of both jurisdiction for grabbing a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondent should be kept out of their money"

23. And the party of GACHUHI Ag (as he then was) at page 417;

> " It is not sufficient by merely stating the sum of Kshs 20,380 is a loss 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 application 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 judgment. What assurance can there be if appeal succeeding. On the other hand, granting the stay would be denying a successful ! litigant of the fruits of his judgment".

24. In the case of **ANN NJERI MWANGI VRS MUZAFFER MUSAFEE ESSAJEE & ANOTHER (2014) e KLR,** HC at Nairobi (Milimani), CIVIL CASE NO 49 of 2011, the learned Judge Havelock, J delivered himself as follows;

> " As regards determination of what amounts to substantial loss, Musinga J. ( as he then was ) in the case of **DANIEL CHEBUTUL ROTICH& 2 OTHERS VRS EMIRATE AIRLINES, CIVIL CASE NO. 368 of 200** held that;
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> " **….**.substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum".

27. Again in the **KENYA SHELL** case ( Supra) PLATT Ag J.A gave his observations as to the meaning of "substantial loss' when he detailed

> **" The application for the stay made before the High court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. 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 to be unable to repay the decretal sum plus costs in two courts".**

The learned judge went onto say;

"It is usually a good rule to see if order LXI 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 form, 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".

29. Applying the foregoing to the instant case the subject matter of the suit is the decretal sum which is payable to the Respondents in the amount of USD 39,498.50. According to the Appellants/Applicants, if the order being sought herein is not granted, and the Respondents proceeds to execute the decree, then the appeal succeeds, the Appellants/Applicants will stand to suffer substantial loss. In my view, the explanation does not meet the threshold for establishing substantial loss.

29. However, I have considered the biter in the BUTT case in laying the guidance on how a court should exercise discretion and applies the applicable principles of deciding whether or not to grant a stay of execution pending appeal.

30. I find that in their submissions, the applicants/Appellants have indicated that they are ready and willing to offer security for and abide by

any condition that may be set by the court pending the hearing and determination of this appeal. It is trite law that a litigant must enjoy the fruits of his/her judgment.

31. In the case of **MACHIRA T/A MACHIRA & CO. ADVOCATES VRS EAST AFRICAN STANDARD** (No. 2) 2002) KLR 63, it was held as follows that ;

> "…to be observed with the protection of an appellant or intended appellant in total disregard or flirting 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 judgment or if any decision of the court giving him success at any stage. That is trite knowledge and is one 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 court, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

32. In view of the above cited decision, it is worth noting that a litigant that has lost a case has a right of appeal against the findings of the court. It therefore follows that a matter is deemed concluded after going through its due course all the way to the apex court, if need be. But it must also be understood that until and unless the judgment/decree has been set aside by the superior court, it remains in force and capable of being executed. The courts must therefore balance the two competing interests of the decree holder and that of the judgment debtor, the applicant. (See case of **KIPLAGAT KOTUT VRS ROSE JEBOL KIPNG'OOK** (2015 e KLR)

34. In the case of **ANNE NJERI MWANGI VRS MUZAFFER MUSAFEE ESSAJEE & ANOTEHR** (Supra) the learned Judge HAVELOCK J. rendered himself as follows;

> " ….As regards rule 6 (2) (b) in relation to security for costs , the court in KENYA TANZANIA UGANDA LEASING CO . LTD VRS MUKENYA NDUNDA (2013) e KLR ,Mabanga, J held as follows;
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> **" As I stated in the case of KENYA COMMERCIAL BANK LIMITED VRS SUN CITY PROPERTIES LIMITED & 5 OTHERS ( 2012) e KLR**
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> **" In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant exercising his undoubted right of appeal should be safeguarded from her appeal being rendered nugatory. These two competing interests should always be balanced. ……..…In a bind to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal. I do not see why the same should not be applicable in this case".**

35. In the case of **ARUN C. SHARMA VRS ASHANA RAIKAUNDALIA T/A RAIRUNDALIA & CO. ADVOCATES**, justice Gikonyo had this to say;

> **"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor…civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants I presume that security must be one which can serve that purpose".**

36. In the instant case the Applicants/Appellants has indicated its readiness to furnish security. Therefore in my view, depositing of security is a show of good faith and serves fairly to the interest of both parties since the Respondent is not kept away from the fruits of his /her judgment.

37. Furthermore, the Appellants/Applicants are assured that they will stand not to lose the amount deposited if the appeal succeeds.

38. In the circumstances, I proceed to allow the application dated 10th October 2018 for the reasons stated herein above and proceed to order that;

> (a) there be a stay of execution of the order/decree of the lower court issued on 10th September,2018 pending he hearing and determination of this appeal on condition that;
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> > (i) the Applicants /Appellants do deposit the security for the decretal amount USD 39,498.50 in and interest earning account in the joint names of the counsel on record for the thirty (30) days of this ruling.
> >
> > (ii) the costs of the application shall abide the outcome of the appeal.

It is so ordered.

**This Ruling is delivered, signed and dated this 2nd day of August, 2019.**