REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 22 OF 2017

FOCIN MOTORCYCLE CO. LIMITED...APPELLANT/APPLICANT

VERSUS

ANN WAMBUI WANGUI..1ST RESPONDENT

STEPHEN KINYUA MUGO..................................2ND RESPONDENT

RULING

1. The appellant **Focin Motor Cycle Company Limited** filed a Notice of Motion dated 20th July, 2017 under a certificate of urgency seeking orders that there be a stay of execution of the judgment issued in Baricho RMCC 25 of 2014 pending the hearing and determination of his appeal.

2. The application is based on the grounds that a ruling was delivered by the Hon. Magistrate Ms M. Kivuti dismissing the applicant's application for setting aside the *exparte* judgment, thus allowing the Respondents to execute the judgment. That if stay is not ordered substantial loss would result to the appellant as once the said money is paid to the 1st Respondent and the appeal succeeds it may not be recoverable. That the appeal has high chances of success and if stay is not ordered the appeal will be rendered nugatory. That the appeal is brought without delay. That the appellant is willing to abide by any conditions and terms as to security as the Court may deem fit to impose. That the Respondent is likely to execute the decree.

3. The application is supported by the affidavit of Mercyline Kobai sworn on 20th July, 2017 where in addition to the above grounds, she depones that the magistrate failed to consider the defence while deciding whether to set aside the judgment and the said judgment was littered with irregularities, errors in law and facts.

4. The Respondent Ann Wambui Wangui filed a replying affidavit sworn on 25th July, 2017 and she contends that the application is incompetent, misconceived, bad in law and ought to be struck out. That the application is brought in bad faith and aimed to delay her enjoyment of the fruits of successful litigation. The application is under wrong provisions of the law and does not meet the threshold for granting of stay of execution. The applicant has not explained the delay of two months in filing the application. It is further deponed that the applicant has not demonstrated the substantial loss he is likely to suffer and that an appeal cannot be rendered nugatory by a money decree being satisfied where substantial loss is not demonstrated. The applicant has not shown what prejudice he is likely to suffer whereas she will be prejudiced if stay is ordered.

5. The applicant filed a further affidavit and depones that the application is not brought in bad faith. That the Court should disregard technicalities as provided under **Article 159 (2)** of the **Constitution** and **Section 1A and 1B Civil Procedure Act** and decide the application on merits. That the Respondent is a man of straw and has not demonstrated that she will be in a position to refund the decretal sum if the appeal succeeds.

6. In response the Respondent filed a reply to the further affidavit in reply to the averments.

7. The parties filed written submissions which I have considered. The issue for determination is whether the Court should order stay of execution. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

> **"No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."**

Order 42, rule 6 states:

> **"No order for stay of execution shall be made under sub-rule (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."**

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

a. Substantial loss may result to the applicant unless the order is made.

b. The application has been made without unreasonable delay, and

c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

8. It is submitted for the Applicant that if stay of execution is not granted the applicant will suffer substantial loss as the 1st Respondent is a no person of straw who has not shown in any way that she is capable of refunding the said sum if the same was paid to her and the appeal succeeds. That the 1st Respondent has not shown her ability to repay the decretal sum if the decretal sum is paid to her. It is also submitted that the applicant had sold the motor cycle and did not own the motor cycle at the time of the accident as it had sold to the 2nd Respondent and ordering him to satisfy the decree would be prejudicial and unfair. He relies on **Stanley Karanja Wainaina & Another -V- Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015** where it was stated:

> **"It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005 stated:-**
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> > **This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."**

9. The Respondent bears the evidential burden to prove that he is not a man of straw as alleged. The 1st Respondent Anne Wambui Wangui has not made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that she is not able to refund. He cannot be expected to dig deep into the financial standing of the respondent, that is for the respondent to produce and prove.

10. The Applicant says "this is what I know" and it is for the respondent to say with confidence and certainty that "you are wrong, this is how I will get the money when called upon to refund." There must be evidence to prove. The respondent has not attempted to discharge the burden, paragraph 10 in her affidavit she states:

> **"…….the mere fact that the applicant does not know my financial capability does not give rise to the presumption that I will be unable to repay the sum, there must be other factors that lead to that presumption. Further it is not a burden placed upon the decree holders to prove that they can refund the decretal sum. It is the appellant who alleges that the decree holder is not a man of straw to demonstrate that fact".**

My view is that this averment is wrong. The applicant can allege with little knowledge but it is the respondent who has the true knowledge of his financial ability. The law is that as stated by the Court of Appeal in **National Industrial Credit Bank Limited** (**supra**), the evidential burden is on the respondent to prove that he is able to refund. I am of the view that the Respondent has not discharged the burden to prove that she has resources to pay back the decretal sum.

11. The contention by the 1st respondent that the applicant has not shown that he will suffer substantial loss cannot stand. The applicant has deponed that the decree is for Ksh.1,414,493/= which the 1st respondent has not shown will be able to refund. If the decree is executed the appeal will be rendered nugatory as he is not likely to recover the said amount. I am of the view that the applicant has proved that he is likely to suffer substantial loss and the appeal may be rendered nugatory. The authority of **Kenya Shell Limited -V- Kariga 1982-88 1 KAR** where the Court of Appeal held that, *"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 cornerstone of both jurisdictions for granting stay"*, is not in favour of the 1st respondent. A sum of Ksh.1,414,493/= is no doubt a substantial amount. It is the loss which the applicant will incur. The applicant need not go further after establishing that he is likely to suffer that substantial loss. It has been stated that substantial loss lies in the inability of the 1st respondent to refund the decretal sum. I have stated that the 1st respondent has failed to prove that she is in a position to refund. This was held in **Lucy Nyamu Kimani -V- Lawrence Mburu Muthiga (2006) eKLR –**

"An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant."

This was also held on **Antoine Ndiage -V- African Virtual University (2015) eKLR**.

12. The case of **Socfinac Company Limited -V- Nelphat Kimotho Muturi (2013)eKLR, and Van Den Berg (K) Limited -V- Charles Osewe Osodo (2015) eKLR** which stated that it is the applicant who has the burden to prove that the decree holder is a man of straw are persuasive decisions. Once the applicant alleges that the respondent is a man of no straw who cannot refund the decretal sum, the evidential burden shifts to the respondent as stated by the Court of Appeal in the case of **National Industrial Credit Bank Limited -V- Aquinas Francis Wasike & Another** – **supra.** The applicant has discharged the burden of proof that he is likely to suffer substantial loss. This is what has to be prevented by the Court by ordering stay of execution. It is the corner stone which determines whether the Court should exercise discretion to order stay. I am of the view that there is need to order stay so that the appeal is not rendered nugatory.

13. The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under **Order 42 rule 6 Civil Procedure Rules** **(supra).** The law does not require this Court to determine the application based on the merits or otherwise of the appeal.

14. The second consideration is security. The applicant has deponed that he is ready to provide security. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree. It is therefore sufficient to depose that he is ready to provide security. The applicant has submitted that he has ability to provide security as will be ordered by the Court as it is a company with substantial investments in the County and once called upon by the Court will avail such security. In **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocate**s Justice Gikonyo the Court stated that:

"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 due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.

15. The other consideration is whether there was undue delay. The judgment was delivered on 18th May, 2017 and the Memorandum of Appeal was filed on 30th May, 2017. The appeal was filed timeously during the same month. There is no doubt that the appeal was filed without undue delay. The application for stay was filed after two months. This was after the Applicant realized the execution of the decree was imminent. The Court has to consider whether the delay was unreasonable. The Applicant has tried to explain that the delay was due to the fact that proceedings were supplied towards the end of June, after which they filed the application. It is submitted by the Respondent that the Memorandum of Appeal was filed without proceedings. My view is that having filed the appeal within the stipulated time and in view of the explanation offered, a delay of two months cannot be said to be unreasonable. The applicant cannot be shut out, he is seeking the discretion of the Court. My view is that he should be given an opportunity to ventilate the appeal.

16. The Respondent submits that wrong provisions of law were cited. I have considered the case of **Patricia Cherotich Sawe -V- Independent Electoral & Boundaries Commission (IEBC) and 4 Others** where it was stated that,

"Not all procedural deficiencies can be remedied by Article 159, and such is clearly the case where the procedural step in question is a jurisdictional prerequisite."

The applicant quoted provisions like Section 3A Civil Procedure Act and Order XL1 rule 4 Civil Procedure Rules and others. Failure to quote the correct provisions was not fatal as **Order 51 rule 10 (1)** provides that no application shall be refused by reason of failure to quote the order, rule or other statutory without quoting the provisions. The rule is mandatory. The omission to quote the correct provisions is a technicality which is excusable and which can be cured under **Article 159 (2) (d)** of the **Constitution** which provides that:-

"justice shall be administered without undue regard to procedural technicalities."

Section 1A and **1B Civil Procedure Act** urges the Court to strife for substantial justice other than relying on procedural technicalities. My view is that the defects are curable under **Article 159** of the **Constitution** and **Section 1A** and **1B Civil Procedure Act**.

17. Conclusion

The application has met the threshold for granting the order of stay. I will therefore allow the application and order that there be stay of execution pending the hearing and determination of the appeal. The appellant will provide security by depositing the decretal sum in an interest earning account in the joint names of the counsels on record for appellant and the respondent. The amount be deposited within twenty one days from the date hereof. Costs shall be in the cause.

Dated and delivered at Kerugoya this 21st day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Timba for appellant, Respondent absent, court assistant Naomi Murage this 21st day of February, 2018.

L. W. GITARI

JUDGE

21.02.2018