# REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 13 OF 2018**

**ANDREW OKOKO.....APPELLANT/APPLICANT**

**VERSUS**

**JOHNIS WAWERU NGATIA.....1ST RESPONDENT**

**PETER MBEERE.....2ND RESPONDENT**

**RULING**

1. The applicant herein, **Andrew Okoko**, by his Notice of Motion dated 13th February, 2018, seeks a raft of orders. However for the purposes of this ruling, he is seeking that pending the hearing and determination of his intended appeal there be a stay of judgement, decree (if any) and any other consequential orders issued on 26th January, 2018 in Mavoko PMCC No. 246 of 2016.

2. According to the applicant, the trial court in PMCC No. 246 of 2016 delivered a judgement on 26th January, 2018 in favour of the 1st Respondent in which the Respondent was awarded Kshs 1,307,408.00 and being aggrieved by the same on issues of fact and law, he intends to appeal against the said judgement. He was however apprehensive that if the application is not allowed the 1st Respondent would proceed with the execution thereof, thereby exposing him to substantial loss in view of the fact that he has been unemployed since August, 2016 and currently has no source of income.

3. Based on legal advice, the applicant deposed that the intended appeal was arguable and had high chances of succeeding.

4. In his response the 1st Respondent opposed the application based on the following grounds of opposition:

**(1) The Appellant has no sufficient and cogent reasons entitling him to the orders sought.**

**(2) The application is an abuse of the Court process, misconceived and lacking merit.**

**(3) The application I baseless, fatally defective and does not meet the legal threshold required for grant of such applications.**

5. It was submitted by the applicant that the application has been brought without undue delay since the trial court's judgement was delivered on 26th January, 2018 and a stay of 21 days granted which was lapsing on 16th February, 2018 and this application was filed on 14t February, 2018 before the lapse of the stay granted.

6. As regards substantial loss, it was submitted that the Respondent is a motor cycle rider and the applicant will be ruined in relation to the appeal if it pays over the decretal sum to the Respondent with no prospects of recovering his money should the appeal succeed. In this respect the applicant relied on **Corporate Insurance Company Limited vs. Emmy Cheptoo Letting & Another [2015] eKLR** where it was held that:

**"In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like in the case here, substantial loss in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the respondent cannot pay back."**

7. The applicant also relied on **Carter & Sons Ltd vs. Deposit Protection Fund Board & 2 Others – Civil Appeal No. 291 of 1997**.

8. On behalf of the Respondent, it was submitted that the applicant is merely using these proceedings to forestall efforts by the 1st Respondent to enjoy the fruits of his judgement. The Respondent disclosed that at the hearing in the lower court, the appellant despite being

granted a chance to file submissions did not comply. Moreover all the supporting documents were produced by consent of the parties. According to the Respondent, the applicant has not established any substantial loss that he will incur if the stay orders are not granted since to the Respondent the fact that the applicant is nolonger in employment cannot be a substantial loss warranting the grant of the said orders. In support of his submissions the Respondent relied on **James Wangalwa & Another vs. Agnes Naliaka Cheseto**, **Masisi Mwita vs. Damaris Wanjiku Njeri [2016] eKLR** and **Equity Bank Ltd vs. Taiga Adams Company Ltd**. Based on **Hssan Guyo Wakalo vs. Straman EA Ltd [2013] eKLR**, the Respondent submitted that the applicant has also failed to demonstrate that the appeal would be rendered nugatory.

**Determination**

9. 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.***

10. 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 nolonger 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 Act or in the interpretation of any of its provisions. According to section 1A(2) "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.

11. 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.** 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."**

12. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil**

**Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

> **"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."**

13. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

14. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

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. As to whether the fact that the Respondent is in dire need of money can be used to support the contention that he would not be in position to refund the decretal sum, **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 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 the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. 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 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. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account.

22. Therefore with respect 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** 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 said 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.

23. However, 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. 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.

24. In this case the judgement in question was entered on 26th January, 2018. Section 79G of the ***Civil Procedure Act*** provides that:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time***

25. On the face of it the time for filing an appeal has lapsed. The applicant has not disclosed the reasons why the appeal has not been lodged or whether he has applied for enlargement of time to do so. The decision whether or not to grant stay is no doubt an exercise of discretion and a party seeking favourable exercise of discretion must disclose all material facts to enable the Court do so. Where an appeal has not been filed and the applicant seeking a stay pending the filing of the appeal, the applicant must disclose the steps being taken to file the appeal so that the Court does not grant the stay in vacuum.

26. In this case, the applicant has not informed me of what steps he intends to take in pursuit of the intended appeal once the stay is granted. Accordingly, I cannot grant a stay which may well be abused. Consequently, this application fails and is dismissed but as none of the parties complied with the direction to furnish the Court with soft copies of their pleadings and submissions as at the time of writing this ruling, there will be no order as to costs.

27. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 31st day of July, 2018.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Kinge for Mr Miencha for the applicant**

**CA Geoffrey**