REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.654 OF 2016

WANANCHI GROUP (K) LIMITED……..…1ST APPELANT/APPLICANT

GABRIEL KYALO MULWA……..…..….2ND APPELANT/APPLICANT

VERSUS

METRINE NAMULISA MUSAMALI…….RESPONDENT/RESPONDENT

RULING

1. The appellant has moved this court by a notice of motion dated 27th October, 2016 seeking the following orders:

i. Stay of execution of the judgment delivered in CMCC No. 2063 of 2014 on 30th September, 2016 and any consequential decree made against the appellants pending hearing and determination of the appellants' appeal.

ii. Costs of this application.

2. The motion is supported by the grounds on the body of the application and the supporting affidavit of Caroline Kimeto who is the legal officer and compliance of British American Insurance Company (K) Limited, the insurer of the appellants. She stated that the 30 days stay of execution period expires on 30th October, 2016 and the respondent will be at liberty to execute on the basis of the judgment given on 30th September, 2016 against the appellants. That should the respondent proceed and execute the court's judgment, the appellants will suffer irreparable loss and damage and render the intended appeal nugatory. She stated that this motion was filed timeously in an effort to ensure that justice is not delayed on either party. She intimated that the appellants are willing to furnish security as the court may order pending the outcome of the appeal, therefore the respondent will not be prejudiced. She further contended that the orders sought are important in preservingthe substratum of this appeal and if not granted the appeal will be rendered nugatory. She stated that the Appellants stands to suffer substantial loss if the orders sought are not granted since the decretal sum of KShs. 1,155,450/= may not subsequently be recoverable from the Respondent in the event the appeal succeeds.

3. In response thereto the respondent swore a replying affidavit on 6th December ,2016. He contended that the appellant made an application dated 27th October, 2016 which application the appellants abandoned and refused to proceed with because they did not get any favourable orders and the application is still pending in court. The appellants have not shown that they are serious with the appeal as they have not attached a copy of the decree and certificate of costs hence making this application an abuse of court. He contended that the appellants have not offered any security or proposed which way they will provide

security as required by law. It was contended that the appellants did not raise any objection at the time of hearing of the matter hence the memorandum of appeal dated 27th October 2017 is a delaying tactic intended to delay this matter. He stated that he sustained serious injuries and he requires the decretal sum to enable him to go for treatment.

4. James Okao advocate in conduct of the matter on behalf of the respondent also swore a replying affidavit on 6th December, 2016 in response to the motion. He contended that the appellants have not offered security as required by law and without disclosing the kind of security, the total decretal amount of Kshs. 1,555,450/= should be deposited in court as a condition for security. That the memorandum of appeal does not have a *locus standi* since the Appellants advocate's wrote a letter dated 12th October, 2016 which letter itself is an admission of liability. That the applicant has not applied for the proceedings and has not attached the copy and letter requesting for the proceedings.

5. In their submissions the appellants stated that they have an arguable appeal therefore there is the need to maintain the status quo and allow the determination of the appeal on merits as any execution will render the appeal nugatory. On this point they cited **Butt v. Rent Restriction Tribunal (1982) KLR 418** where it was held that:

> ***"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory."***

And **Mombasa Civil Suit No. 85 of 2010;Florence Hare Mkaha v. PwaniTawakal Mini Coach & Another** where the court held that the burden of proving the ability to refund the decretal sum lay with the respondent.

It was submitted that this motion was brought timeously. That judgment was delivered on 30th September, 2016 and the appellant was granted 30 days stay of execution which was to expire on 30th October, 2016 but that the appellant filed an application for stay of execution on 26th October, 2016 however the orders of stay were not granted. That subsequently, the appellant filed this motion on 28th October, 2016. That in adherence with the provision for security under Order 42 rule 6 (2) (b), the appellant has expressed willingness to furnish security as may be ordered by this court.

6. On the other hand, the respondent submitted that this motion is res judicata for the reason that the appellant made an application dated 27th October, 2016 which application the appellants abandoned because they did not get any favourable orders and the application is still pending in court. On this issue the respondent cited **MburuKinyua v. GichiniTuti [1978] KLR 69** where the court held that filing of a similar application over the same subject matter seeking similar relief is an abuse of court process. That where such application has been determined is barred by the principle of res judicata. It was further stated that the appellants are not serious with this appeal since they have not requested for proceedings and a copy of the decree. That a decree is a vital document in the record of appeal hence failure to annex a letter requesting for proceedings and receipt for payment of further court fees indicates that the appeal has no locus standi. That the appellants advocates wrote a letter confirming that the appellants were satisfied with the judgment. That the said letter confirms that this appeal has no chances of success. On this aspect, the respondent cited **Order 13 rule 2 of the Civil Procedure Rules** and **Choitram v. Nazari (1984) KLR 327** and **Cassam v. Sachania (1982) KLR 191** which states as follows respectively:

> Order 13 rule 2
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> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."***

"For the purpose of Order XII Rule 6, admissions can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in the judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."

"The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."

It was further submitted that while dealing with such an application, the court must balance the interest of the appellant and the respondent. The respondent then cited cases where the court ordered that half the decretal amount be deposited in court thus **Court of Appeal in Nairobi Application No. 252 of 2000, Mohan Meakin (K) Limited v. Mutunga Kiundi (UR)**. The respondent emphasized by vast majority the principle of stare decisis and intimated that this court was therefore bound by the decision of Meakin (supra).

7. Stay of execution pending appeal is governed by Order 42 Rule 6 (2) of the Civil Procedure Rules. It is a discretionary relief that must be exercised judiciously and upon defined principles of law. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 (2) of the Civil Procedure Rules, thus:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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.

8. On the first issue, there is no doubt that this motion was brought timeously considering the fact that the application was filed before the lapse of the thirty (30) days period within which an application for stay ought to be filed. This motion was filed on 28th October, 2016 while the thirty days were to lapse on 30th October, 2016.

9. On the issue of substantial loss, I am guided by the authority of **Kenya Shell Limited v. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)l KAR 1018** where the Court of Appeal stated that:

"It is usually a good rule to see if Order 42 Rule 6 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 cornerstone of both jurisdictions for granting stay"

10. In the case of ***Machira t/a Machira& Co. Advocates v. East African Standard (No 2) (2002) KLR 63*** the court was of the view that;

"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars… where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."

11. The appellants contended in the affidavit that if the orders sought are not granted, the respondent might execute and this appeal shall therefore be rendered nugatory. In **James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] eKLR** it was held:-

> **"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 under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.**
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> **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 V. Chesoni, ...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"**

It follows therefore that the allegation that execution is likely to commence in the event the orders sought are not granted is not satisfactory as an indication of substantial loss.

The respondent contended that the appellants have not intimated the kind of security they are willing to give. I however hold the opinion that such failure is not fatal since Order 42 rule 6 (2)(b) of the Civil Procedure Rules provides that it is for the court to order the kind of security the applicant should give.

Despite my finding on substantial loss, I bear in mind the fact that the court has to balance the interests of the decree holder and that of the appellant see **Jason Ngumba Kagu& 2 others v. Intra Africa Assurance Co. Limited [2014] eKLR**where it was stated that:

> **"...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."**

And **Absalom Dova v. Tarbo Transporters [2013] eKLR** that:

> **"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination''. (emphasis mine).**

Applying the above test, I am of the view that they are deserving of the orders sought considering that they are ready and willing to furnish security.

I therefore allow the application dated the 17th October, 2016 on condition that the decretal sum is deposited in a joint account in the names of both advocates. The said sum to be so deposited within 30 days from today failing which the stay order shall lapse.

Dated, signed and delivered at Nairobi this 30th day of March, 2017.

……..

L NJUGUNA

JUDGE

In the presence of

……. …..*For the Appellant/Applicant*

…… *For the Respondent/Respondent*