REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 229 OF 2010

SAMWEL KIMUTAI KORIR (*Suing as personal and Legal Representative*

***of Estate) of* CHELANGAT SILEVIA.....PLAINTIFF**

VERSUS

NYANCHWA ADVENTIST SECONDARY SCHOOL)

NYANCHWA ADVENTIST COLLEGE.....DEFENDANTS

RULING

1. Before the court for determination is the defendant/applicant's Notice of Motion application dated 28th November 2016 brought under **Order 42 Rule 6 (1), (2)** and **(4)** and **Order 51 of the Civil Procedure Rules, Articles 48 and 159 of the Constitution,** and **Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act**.

2. The main prayer sought in the application is for stay of execution of the judgment and decree of this court pending the hearing and determination of the defendant's intended appeal to the Court of Appeal. The applicant also prays that the costs of this application abides the outcome of the intended appeal.

3. The application is premised on the grounds that the execution of the decree against applicant is imminent following the lapse of the 30 days stay of execution period granted by the Deputy Registrar of the court and that in the event of such execution, the applicant's intended appeal to the Court of Appeal would be rendered nugatory considering that the respondent is a person of straw who may not be able to refund the decretal sum should the intended appeal succeed.

4. The applicant maintains that it stands to suffer substantial loss if the respondent executes the decree which is in the tune of Kshs. 2,211,417/=

5. The application is supported by the affidavit sworn by C.W. Sabillah, an advocate of the High Court of Kenya and the Legal Services Manager of the respondent's insurer M/s Kenindia Assurance Company Limited who deposes that M/s Kenindia Assurance Company is obligated, under the Insurance (Motor Vehicle Third Party Risks) Act. Cap. 405 Laws of Kenya, to satisfy the judgment and decree issued by this court.

6. He repeats the grounds already stated in the body of the application and contends that the instant application has been filed without unreasonable delay and that the applicant is ready and willing to furnish security for the due performance or satisfaction of this court's decree.

7. The respondent filed a statement of grounds of opposition to the application in which he states that the

application is premature, misconceived, incompetent and otherwise legally untenable.

8. The respondent also states that the affidavit in support of the application has been sworn by a stranger to the suit and is therefore, not only invalid but is also legally untenable. He adds that the application does not meet the threshold set by the provisions of Order 42 Rule 6 of the Civil Procedure Rules and more so because there is no valid Notice of Appeal on which the stay of execution orders can be anchored.

9. He further states that the application has not been mounted within reasonable time since the 8 months delay from the date of the delivery of the judgment to the date of filing the application has not been explained. It is the respondent's position that the application is intended to delay, obstruct and or defeat the due process of the court.

10. The application was canvassed by way of written submissions the summary of which I will highlight in this ruling as follows:

11. M/s Okongo Wandago Advocates for the applicant submitted that there is sufficient cause for granting the relief sought in view of the fact that the applicant had appealed from this court's decree thereby invoking the jurisdiction of the Court of Appeal by filing and serving a Notice of Appeal as required under the Court of Appeal Rules, 2010. He argued that unless the order of stay of execution pending the appeal sought is granted, the applicant would suffer substantial loss and that the application had been filed without undue delay.

12. The applicant maintained that the Notice of Appeal filed and served upon the respondents is valid and regular despite the respondents' attempt to discredit it on the basis that it was filed outside the period stipulated by the Court of Appeal Rules. On this point, the applicant contended that this court lacks jurisdiction to pronounce itself on the validity of the applicant's Notice of Appeal which jurisdiction is the sole preserve of the full bench of the Court of Appeal itself pursuant to Rule 53 of the Court of Appeal Rules, 2010. The applicant cited the decisions in the cases of **David Simiyu Wanyonyi vs John Silakwa & Another**, **Civil Application No. 3 of 2016 [2016] eKLR**, and **South Nyanza Sugar Company Ltd vs Riewa Onyango Genga, Kisii HCCA No. 118 of 2006 [2013] eKLR** wherein the decision in **Centre for Rights Education and Awareness (CREAW) and 5 others vs Attorney General & Another [2012] eKLR was cited**.

13. On substantial loss to be suffered by the applicant should the orders of stay of execution sought by the applicant not be granted, the applicant submitted that the respondent was a person of straw as was discernable from the evidence tendered during the trial and that the applicant was apprehensive that he would therefore not be capable of refunding the decretal sum to the tune of Kshs. 2,211,417/= should be intended appeal succeed. The applicant faulted the respondent for failing to swear an affidavit to show his financial status and material possessions in opposition to this application as a way of assuaging the applicant's reasonable apprehensions on his financial standing and capability to refund the decretal sum.

14. On the issue of the applicant's deponent's capacity to swear the affidavit in support of the application, the applicant submitted that it is a well known fact that Insurance Companies, who underwrite Motor Vehicle risks under Insurance (Motor Vehicle Third Party Risks) Act are always familiar with every aspect pertaining to the underwritten risk and that once an insured is sued, the entire court proceedings including the settlement of the courts decree, if any, is always the responsibility of the insurer.

15. He added that in the event the instant motion is allowed, it would be the insurer furnishing the security required in satisfaction of the decree and in that regard the applicant's deponent cannot be said to be a stranger to the instant proceedings. To bolster its argument on this point, the applicant relied on the decision of Kamau J in **Akamba Public road Services vs Abdikadir Adan Galgalo Voi HCCA No. 21 of 2015 [2016] eKLR** wherein it was held:

> ***"An insurer institutes or defends a claim in its insured's name because it cannot prosecute or defend such claim in its name. It provides legal representation to its insured and pays the legal costs for such legal representation. On its part, the insured is contractually obligated to fully co-***

operate with counsel who has been appointed on his behalf to assist the insured in recovering any sums paid to such third party.

In this respect, it is not uncommon in insurance practice for an insurer to appoint legal counsel for its insured once its insured is served with Summons to Enter Appearance so as to control the process from inception and mitigate its losses especially where its insured is a defendant, this benefit does not, however, accrue to an insured whose claim has been repudiated by an insurer...

In view of the interest of an insurer in insurance matters, there is nothing in the law that prohibits it from having an interest in a case involving its insured. If indeed the Appellant's insurer is the one that paid legal representation for the appellant in the Trial Court, nothing prevented its insured form taking an active role in the background to safeguard its interests in appeal."

16. On the aspect for the timelines for the application, the applicant submitted that since costs of the trial court's case were taxed on 31st October 2017 (sic) and the instant application filed 28th November 2016, there was no inordinate delay in bringing the application to court since no execution proceedings were imminent prior to the taxation of the costs and that in any event, the applicant only became aware of the extent of the pecuniary loss that it would suffer after the assessment of the costs.

17. On the issue of security to be furnished for the due performance of the decree, the applicant maintained that it was ready and willing to provide security for the due performance of the decree should the appeal fail.

18. M/s Oguttu Mboya & Co. Advocates for the respondents, on their part, submitted that since the applicant's Notice of Appeal signifying their intention to pursue an appeal to the court of Appeal was not lodged within the statutory timelines provided pursuant to the provisions of **Rules 74 and 75 of the Court of Appeal Rules 2010**, there was technically no valid appeal on which a stay of execution order could be anchored.

19. The respondent added that even assuming that the Notice of Appeal was valid, which was not the case, the mere filing of an appeal does not *ipso facto* connote that a stay of execution order should issue as such issuance will be at the unfettered discretion of the court which must be satisfied that the applicant has established sufficient cause for such an order, has furnished security and has established that it will suffer substantial loss if the orders sought are not granted.

20. The respondent argued that the applicant had not proved that it would suffer any loss if the orders sought are not granted and that on the flipside, it was the respondent on the losing side should the orders sought be granted as he would be kept away from enjoying the fruits of the judgment rendered by a competent court.

21. On whether the instant application was filed within reasonable time, the respondent submitted that the period of 8 months, after delivery of the judgment appealed against, taken by the applicant was grossly inordinate and unreasonable thereby making the applicant an unworthy recipient of the court's discretionary orders sought in line with the doctrine of equity that abhors indolence by espousing the maxim that delay defeats equity.

22. I have carefully considered the applicant's application, the grounds of opposition filed by the respondent and the parties' respective submissions. The main issue for determination is whether the application meets the threshold of the conditions for grant of orders of stay of execution pending appeal as envisaged by the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**.

23. The said provision stipulates as follows:

"[Order 42, rule 6.] Stay in case of appeal.

6. (1) 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.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

24. From the above provision, it is clear that the first stop in determining this application will be a determination of whether or not the applicant has filed an appeal before the Court of Appeal on which a stay of execution can be anchored. On existence of an appeal, while the respondent argued that the Notice of Appeal filed before this court was not valid in view of the fact that it was filed outside the stipulated period of 14 days pursuant to the provisions of **Rules 74 and 75 of the Court of Appeal Rules 2010**, the applicant maintained that the Notice of Appeal was as good as an appeal as long as it had been filed and that under **Rule 53 of the Court of Appeal Rules**, only the full bench of the Court of Appeal had jurisdiction to determine the question of its validity.

25. **Rules 53, 74** and **75 of the Court of Appeal Rules** stipulate as follows:

53. (1) Every application, other than an application included in sub-rule (2), shall be heard by a single judge:

Provided that any such application may be adjourned by the judge for determination by the Court.

(2) This rule shall not apply to—

(*a*) an application for leave to appeal;

(*b*) an application for a stay of execution, injunction, or stay of further proceedings;

(c) an application to strike out a notice of appeal or an appeal;

or

(*d*) an application made as ancillary to an application under paragraph (*a*) or (*b*) or made informally in the course of a hearing.

"74. This Part shall apply only to appeals from superior courts acting in original and appellate jurisdiction in civil cases and the matters relating thereto."

"75. (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant."

26. In the instant case, it is not in dispute that the judgment of this court, which is the subject of the intended appeal, was delivered on 18th April 2016 and the Notice of Appeal filed in this court 22 days later on 10th May 2016 which was a period way beyond the 14 days stipulated by **Rule 74 of the Court of Appeal Rules**.

27. From the pleadings placed before me and the submissions of both counsel, the issue for determination is whether this court has jurisdiction to determine the validity of Notice of Appeal pursuant to **Rule 74 (2) of the Court of Appeal Rules**.

28. The preamble of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya states as follows:

"An Act of Parliament to confer to the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto."

299. Under Section 2 of the same Act, "The Court of Appeal means the Court of Appeal established by **Section 64 (1) of the Constitution**.

30. Under Rule 2 of the Court of Appeal Rules "court means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone. "Notice of Appeal" under Rule 2 means a notice lodged in accordance with rule 74.

31. In the instant case, the Notice of Appeal complained of is a creation of the Court of Appeal Rules embodied in the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya and therefore I find that this court lacks jurisdiction to determine the validity of a Notice of Appeal issued pursuant to the provisions of the

Appellate Jurisdiction Act. A similar position was taken by Murgor JA in the case of **David Simiyu Wanyonyi vs John Silakwa & Another [2016] eKLR** when she observed that Rule 53 of the Court of Appeal Rules stipulates that the validity of a Notice of Appeal are a preserve of the full bench of the court.

32. Having found that the validity of the Notice of Appeal is a matter that can only be determined by the Court of Appeal, I will now proceed to determine the other issue for determination which is whether the application meets the threshold of the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**.

33. On whether the application has been filed within reasonable time, I find that there was a time lapse of over 8 months from the date of the delivery of the judgment appealed against to the time to filing the instant application.

34. Courts have on many instances held that the determination of whether or not a delay in taking certain action is inordinate or not depends on the circumstances of each case. (**See Selestic Ltd vs Gold Rock Development Ltd [2015] eKLR**).

35. In the instant case, the applicant had as at 10th May 2016 when it filed a Notice of Appeal, already decided to file an appeal in which case, I find that it beats all logic why it took another 5 months for the applicant to file the instant application for stay pending appeal. I find that the applicant has not given any reasonable explanation for its long delay in filing the instant application and its claim that it only became aware of the extent of the judgment against it after the taxation of the respondents bill of costs before the trial court does not hold any water.

36. The applicant sat pretty after belatedly filing the Notice of Appeal until after the assessment of the respondent's bill of costs before asking for a stay of execution for 30 days, which stay was rightly construed by the respondent to have been intended to give them time to call for funds for settlement of the decretal only for the applicant to spring a surprise application for stay of execution pending an intended appeal. It is my observation that the conduct of the applicant during the period that preceded the filing of the instant application was that of an indolent litigant not worthy of the courts discretionary orders of stay of execution that it now seeks.

37. Turning to the issue of substantial loss, the applicant argued that the respondent was a man of straw, as was evident from the proceedings before the trial court, who lacked the financial capability to refund the decretal sum should the same be paid to him only for the intended appeal to be determined in favour of the applicant.

38. In view of the applicant's apprehension over the respondent's financial muscle, the respondent was under a duty to dispel this fear by filing his affidavit of means so as to clear the air on his capability to refund the decretal sum should he lose at the appeal. Quite unfortunately, the respondent did not file any affidavit of means or at all thereby leaving this court with nothing to look at in determining whether or not he is a man of straw. I find that the applicant's apprehension on the respondent's financial capability was well founded considering that the respondent went mute on the issue of his financial standing.

39. The same position was taken in the case of **National Industrial Credit Bank Ltd vs Aquinans Francis Wasike Court of Appeal Civil Application No. 238 of 2005**, wherein the Court of Appeal held:-

> ***"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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 a respondent or the lack of them. Once an applicant expresses a reasonable fear 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."***

40. The above decision notwithstanding, I find that, poverty per se, cannot be a basis for keeping a party away from enjoying the fruits of his decree as the court needs to look at all the aspects of the case and balance the interests of the respondent visa vis the applicant who under Article 48 of the Constitution, is guaranteed right to access to justice and right to fair hearing under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the Constitution.

41. Having regard to my above findings and to ensure that from this point forward none of the parties to these proceedings is prejudiced by an order of stay of execution pending the hearing and determination of the intended appeal, this court is minded to strike a middle ground and balance the competing interests of both parties.

42. In the case of **M/s Port Reitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** the court observed that the power to grant an application for stay of execution pending appeal is discretionary in that the court when granting a stay needs to balance the interest of the appellant with those of the respondent.

43. Consequently, I allow the applicant's prayer for stay of execution, but on condition that it pays to the respondent one half (1/2) of the decretal sum awarded by the trial court while the other half (1/2) of the decretal sum shall be deposited in an interest earning account with a reputable bank to be opened and held by advocates for both parties hereto pending the hearing and determination of the appeal or until such a time that the court will give further orders on application by either party.

44. The said monies shall be disbursed as ordered within 30 days from the date hereof and in default thereof, the stay orders granted shall lapse unless they are otherwise enlarged by the court. The respondent shall have the costs of this application.

Dated, signed and delivered in open court this 24th day of October, 2017

HON. W. A.OKWANY

JUDGE

In the presence of:

N/A for the Plaintiff

Miss Kibungu for the Defendants

Omwoyo court clerk