



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL CASE NO. 23 OF 2015**

**ELIUD PAPOI PAPA (*Suing as the Legal Representative of the*  
*Estate of BRIAN AFWANDE PAPOI (DECEASED)*).....PLAINTIFF**

**-VERSUS-**

**JIGNESHKUMAR RAMESHBAI PATEL.....1<sup>ST</sup> DEFENDANT**

**SOLOMON AMBANI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. On 2<sup>nd</sup> June, 2017, this court entered judgment for the plaintiff against the defendant in the total sum of Shs 41,629,312/=. Aggrieved by the decision, the defendants have preferred an appeal before the Court of Appeal. Subsequently, the defendants filed a motion on 28/6/17 seeking to stay execution of the judgment and decree pending appeal.

2. The application is brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides as follows:-

**“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. Through the affidavit supporting the motion and further affidavit (described as a supplementary affidavit), the defendants contend that the decretal sum is colossal and if paid over, the plaintiff has no

known means of refunding such sums if the appeal were to succeed. The defendants contend that an order requiring the deposit of such a large sum would prejudice the financial status of the insurance company concerned. In both scenarios, the defendants express fear that they would suffer substantial loss. They pledged to give a bank guarantee as security for the performance of the decree.

4. Responding to the defendant's depositions, the plaintiff swore a replying affidavit wherein he asserts that he is a large scale farmer in Kitale. He attached copies of title documents in respect of eleven parcels of land he owns in Kitale and contends that their combined value is in excess of Ksh45m.

5. Earlier, the plaintiff had filed grounds of opposition emphasizing primarily, the welfare of the minor child of the deceased who stood to benefit from the decree. The plaintiff also asserted that the application does not rise up to the requisite threshold for the grant of the orders sought. In my opinion, some of the matters raised among the grounds are evidential in nature thus more suited to introduction through an affidavit.

6. The parties agreed to canvass the motion through written submissions. The applicants' arguments take cue from the affidavits sworn in support of the motion. With regard to the question of substantial loss, the applicant sought to rely on the decision of the Court of Appeal in **ABN Amro Bank N.N -Vs- Le Monde Foods Limited Civil Application No. WAI 15 of 2002**, as quoted in **Alhyder Trading Company Limited -Vs- Lucy Jepngetch Mibei [2016] eKLR**.

7. According to the applicants, there is no evidence to demonstrate the plaintiff's earnings from his farming activities or value of his stated assets. They therefore argue that the plaintiff will not be capable of refunding the decretal sum, if paid over, and that the applicants will thereby be exposed to substantial loss in the event that their appeal succeeds. The applicants reiterated their willingness to offer security by way of a bank guarantee.

8. The plaintiff's submissions restate much of the contents in the plaintiff's replying affidavit and grounds of opposition. In the plaintiff's view, the defendants have not demonstrated the likelihood of suffering substantial loss and he points to legal requirements under Section 30 and 31 of the Insurance Act for insurance companies to maintain a share capital of Ksh600 million.

9. The plaintiff also reiterates his ability to refund the decretal sum. Moreover, he urges the court to give priority to the interest and welfare of the minor beneficiary based on the provisions of Article 53(2) of the Constitution and Section 4(2) of the Children's Act. The court was further urged to order the release of half the decretal sum in that regard.

10. Concerning security, the plaintiff submitted that the decretal sum ought to be deposited into court or into a joint interest earning account to secure the interest of the plaintiff and minor beneficiary. Two authorities were relied on, including **Rose Mbithe -Vs- Kyalo Mbobu [2008] eKLR**.

11. The court has considered all the material canvassed in respect of this motion. To be successful an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

12. In this case, the applicant has approached the court timeously and also offered security. Has the applicant demonstrated that substantial loss will result if the orders sought are denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Limited -Vs- Kibiru & Another [1986] KLR 410**.

13. Holdings 2,3 and 4 therein are particularly relevant for the case. These are that:

**“1. ....**

**2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**

**3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**

**4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.**

**5. ....”**

14. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The Ag JA (as he then was) stated inter alia that:

**“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) 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 would be unable to repay the decretal sum plus costs in two courts...”**

The learned Judge continued to observe that:-

**“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 cornerstone of both jurisdictions for granting 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.” (emphasis added)**

15. Earlier on, **Hancox JA** in his ruling observed that:

**“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the questions of whether to refuse it would,..... render the appeal nugatory.**

**This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”**

**As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”**

16. In the instant case, the applicants have by their further affidavit expressed apprehension that they

will suffer substantial loss if they pay over the decretal sum to the plaintiff, whom they believe is not capable of refunding the sum if the appeal succeeds. Not merely that, as argued by the respondents, the insurance company may be crippled by such a payment. Thus the invocation of provisions of the Insurance Act as to the statutory liquidity level of insurance companies has no relevance to the matter of substantial loss, in my opinion.

17. Regarding substantial loss, the applicants' fear is predicated upon the inability by the plaintiff to refund the payment if the appeal succeeds, not the applicants' inability to pay the decretal sum and continue its operations. As stated in ABN Amro Bank N.V. each party bears a specific burden regarding proof of substantial loss in a case such as before us. The Court of Appeal stated therein that:-

**“.....So all an Applicant in the position of the bank (Appellant) 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 were paid over to him and the pending appeal was to succeed. 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 if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”**

18. There can be no dispute that the decretal sum herein is quite substantial. The plaintiff has sworn an affidavit in a bid to discharge the evidential burden of proving his ability to refund the decretal sum in the event the appeal succeeds. I must however state that while I do not think that the plaintiff is a pauper from the material he has placed before the court, it is difficult, without the benefit of a valuation report to assess the value of his declared assets. Equally, his income from farming has not been disclosed.

19. For a decree of this nature, I think the court ought to feel assured that the applicants will be able, without undue difficulty or delay, to recover the sums paid over, in the event their appeal succeeds. Were the decree for minimal sums, the court would perhaps have considered the plaintiffs' response adequate. A tension is created by two rival but equally important propositions in cases of this nature: the court's duty to ensure that an intended appeal is not rendered nugatory through likely substantial loss on one hand and concern that a successful litigant should not be deprived of the fruits of his judgment without just cause on the other.

20. It is my considered view in this case, that the applicant might suffer substantial loss if the stay order is denied and therefore there is a just cause in the court staying execution. However, the plaintiffs' interests (including those of the minor beneficiary) must also be considered through an examination of the form of security suitable for the circumstances of this case.

21. Considering the material presented on this aspect, I take the following view. The decretal sum is no doubt substantial and I agree with the Applicants that it would be onerous to order the entire sum deposited by the applicants. That notwithstanding, the applicants have not offered to pay any amount of cash as security. And while their offer to furnish a bank guarantee seems attractive, the defendants have not stated the specific sum of such guarantee. In the circumstances of this case, it is my view that the bank guarantee ought to be substantial though not necessary equal to the decretal sum.

22. Thus, in light of the foregoing, I will allow the motion filed on 28/6/17 in terms of prayer 3 subject to the following conditions:

- a) That the defendants do deposit a sum of Kshs 3 million (three million) into an interest earning account in the joint names of the parties' respective advocates.
- b) That the defendants do furnish a bank guarantee issued by a reputable bank for the sum of Kshs 5,000,000 (five million).
- c) That a period of 30 days is allowed to the defendants to comply with conditions (a) and (b)

above, during which period, for the avoidance of doubt, the stay order will be in force.

The defendants will bear the costs of the application.

**Delivered and Signed at Naivasha this 29<sup>th</sup> day of November, 2017.**

In the presence of:

No appearance for the Plaintiff

Mr. Terer for the Defendants

Court clerk - Barasa

.....

**C. MEOLI**

**JUDGE**