



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 278 OF 2015**

**PAUL MAKATU.....1<sup>ST</sup> APPELLANT**  
**VEKARIA CONSTRUCTION LIMITED.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**QUADRANT SERVICES ..... RESPONDENT**

**RULING**

Vide a notice of motion dated 11<sup>th</sup> June 2015 and filed on 11<sup>th</sup> June 2015 under certificate of urgency the appellant/applicant seeks from this court orders:

- a. Spent
- b. Spent
- c. That there be stay of execution of the judgment and decree in CMCC 8089 of 2002 at Nairobi Milimani pending hearing and determination of the appeal herein.
- d. That costs of this application do abide the outcome of the appeal.

The application was brought under the provisions of Section 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law.

The said application was predicated on the grounds that:

1. Judgment was given in favour of the Respondent in CMCC 8089/2002 Nairobi Milimani, wherein liability was apportioned at 5% against the respondent and special damages awarded were kshs 1,232,645 plus costs and interest.
2. That the applicants being dissatisfied with the said judgment have lodged an appeal as it is of the view that the court's finding on both liability and quantum was erroneous.
3. That the applicants is apprehensive that the respondent will commence the execution process and it is therefore necessary that this application be heard urgently to avoid adverse action to the applicant.

4. That unless the orders sought are granted the applicant will suffer substantial and irreparable loss as disclosed in the appellant's supporting affidavit.

The application is further supported by the affidavit sworn by Sarabjit Singh Sehmi the project manager of the 2<sup>nd</sup> appellant/applicant on 11<sup>th</sup> June 2015 wherein he deposes on the facts of the case giving rise to the cause of action in the trial courts while faulting the trial court for reaching a finding that she did and contending that the appellant's business would be crippled and grind to a halt if it were to pay the decretal sum which would be in excess of three(3,000,000) million since the Chinese Contractors have taken over construction projects from local contractors like the appellant.

That the stay will not prejudice the respondent in any way; the appeal is arguable and has overwhelming chances of success and that the appellant is ready to provide a bankers guarantee as security or in the alternative an insurance bond should the court insist on a security to be provided. They also propose in the alternative to settle 50% of the judgment sum.

The application by the appellant is opposed by the respondent who filed grounds of opposition dated 19<sup>th</sup> June 2015 and a replying affidavit sworn by Fred Ncruba Ojiambo Senior Counsel on 16<sup>th</sup> July 2015 and filed on the same day contending principally that the averments by the appellant are irrelevant as the appellant is only required to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, which they have not satisfied to warrant grant of the orders of stay of execution pending appeal. More specifically, it is contended by the respondent that it has not been shown that the appellants will suffer substantial loss if stay is not ordered; it has not been demonstrated that the respondent is incapable of reimbursing the decretal sum if paid out and the appeal succeeds; the proposal for bank guarantee and or insurance bond is unacceptable; the appellants in the lower court had sought a finding that liability be apportioned equally between the plaintiff and defendants in the trial court; the respondent is not aware of any counterclaim that is referred to in the affidavit by the applicant and that it is only aware of the defence filed on 19<sup>th</sup> September 2005. The respondent contends that it is amenable to payment of a substantial part of the decretal sum and deposit of the balance in a joint interest earning account.

The parties advocates agreed to canvas the application by way of written submissions. The applicants filed theirs on 5<sup>th</sup> October 2015 whereas the respondent filed theirs on 19<sup>th</sup> October 2015 which submissions mirror the depositions in the parties' rival affidavits.

Worth of mentioning is that the submissions by the applicant substantially focus on the merits of the appeal as filed, which though relevant, is not a key determining factor at this stage since the court will have occasion to hear the appeal on merits at the opportune time and therefore it would be prejudicial to the outcome of the main appeal if this court were to engage in a mini trial thereof without according parties equal opportunity to be heard on merit.

In considering whether or not to grant stay of execution of decree pending appeal, the court is called upon to consider whether:

a. The applicant shall suffer substantial loss if stay is denied; if the application was made timeously and whether security for due performance of decree is available and may in its discretion for sufficient cause shown under Order 42 Rule 6 grant such orders.

On the first requirement it is worth noting that the order for stay is intended to preserve and protect the subject matter of the dispute to avoid a situation where should the appeal be successful, it is rendered nugatory.

In **M.M. Butt V The Rent Restrictions Tribunal CA Civil Application Nairobi 6/79** Madan JA was categorical 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 an***

***execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as to not to prevent the appeal, if successful, from being nugatory .....per Brett L.J. in WILSON V Church No. 212 CH D [1879] 454.”***

Thus, what the applicant needs to establish on an application for stay in a money decree is that if the money is paid in execution of the decree then the intended appeal will be rendered nugatory.

In the case of **Kenya Shell V Karuga [1982-1988]1 KAR 1022** Platt J.A stated that:

***“.....it is unusually a good rule to see if Order 41 Rule 4 (now 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.”*** The Learned Judge of appeal emphasized that substantial loss in its various forms is the corner stone of the jurisdiction under Order 41 Rule 4 (now Order 42 Rule 6) of the Civil Procedure Rules.

The appellants/applicants herein have stressed on the merits of the appeal and deposed that their business will be grounded if the decretal sum which is substantial, in excess of 3 million is paid out to the respondent company, they will suffer substantial loss. The appellants have not stated that if the appeal is successful, the respondent would not be in a position to refund the decretal sum if paid out to them. The appellants are however willing to either give a bank guarantee or insurance bond and in the alternative, to settle half of the judgment sum and the balance to be secured in the interest earning account to be held by both parties advocates. The question that emerges is where is the loss anticipated? There is no suggestion that the appellants are on the verge of collapse and therefore cannot raise the decretal sum and if they are not in the position to pay the decretal sum ,what a contradiction that they would be willing to settle half and the rest to be deposited in an interest earning account.

The type of argument raised that the sum of about shs 3 million is so much was rejected in the SHELL case (supra) wherein Gachuhi JA stated:

***“ it is not sufficient by merely stating that the sum of shs 201,380 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 s it would suffer if the order for stay is not granted. What assurance can there be of an appeal succeeding. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”***

This court fully associates itself with the pronouncements of the Learned Judges of Appeal in the Shell (supra) case. I do not find any evidence to show that once the money is paid to the decree holder/respondent herein then it will be beyond the reach and control of the applicant.

The persuasive cases cited by the applicant **Kenya Orient Insurance Company Limited V Paul Mathenge Gichuki & Another [2014] e KLR HCC Petition 322/211 –Crywan Enterprises Ltd V Kenya Revenue Authority** are not binding on this court and I am not inclined to rely on them even on the issue of deposit of security. The other decision relied on go the merits of the appeal.

Furthermore, I do not think that refusal to grant stay in this case would be tantamount to doing an injustice to the appellant as the circumstances do not reveal any injustice capable of being suffered by the appellant if stay is rejected hence the case of **S.M. Mwenesi V Shirley Luckhurst and Another [2000] e KLR** is irrelevant .

In the end, I find that the applicants have not demonstrated that they will suffer any loss let alone substantial loss if stay is not granted.

On the requirement for filing of the application without inordinate or undue delay, the motion was lodged in 11th June 2015 within 30 days of the delivery of judgment in the lower court on 15<sup>th</sup> May

2015. In my view, the application was filed timeously.

On the requirement for security for the due performance of decree, the appellants have deposed and submitted that in view of the very meritorious appeal they should be allowed to give bank guarantee or insurance bond or in the alternative that they settle half of the judgment sum and the rest to be deposited in an interest earning account to be held by both parties' advocates. In other words, the applicant does not resist depositing security for the due performance of decree.

The respondent however rejects any other form of security other than the decretal sum and urges that a substantial sum be paid to them and the balance be deposited in an interest earning account as sought by the appellants.

Having considered the rival positions and the requirements under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, and noting the willingness of the parties to have the decretal sum secured pending appeal, albeit the appellant has not demonstrated substantial loss, I would in my discretion order as follows:

1. That there shall be stay of execution of decree in Nairobi CMCC 8089 of 2002 pending hearing and determination of this appeal conditional upon the appellant paying to the respondent half of the decretal sum inclusive of costs to be determined in accordance with an approved sealed decree of the court. Such payment shall be effected with 21 days from the date of delivery of this ruling. The balance of the decretal sum shall be deposited in a joint interest earning bank account to be opened and operated by both counsels for the parties hereto within 21 days from the date hereof. The subject bank shall be a Commercial Bank of good repute.

2. In default thereof, and unless such time as fixed is enlarged by this court on an application the orders of stay granted herein shall lapse and execution shall issue.

The costs of this application shall be in the appeal.

Dated, signed and delivered in open court at Nairobi this 27<sup>th</sup> day of January 2016.

**R.E. ABURILI**

**JUDGE**

27/1/2016

Coram R.E. Aburili J.

C.A. Adline

Mr Muturi for appellant

Mr Wambua for respondent

**Court** – Ruling read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

**Mr Muturi** – I humbly pray for 45 days to comply instead of 21 days for purposes of depositing the half in a joint interest earning account.

**Mr Wambua** - The applicant can pay half in 21 days and deposit security within 30 days.

**R.E. ABURILI**

**JUDGE**

**COURT-** The applicant seeks for enlargement of time to deposit half security. The request is not opposed save for the period sought of 45 days which the respondent concedes 30 days. Balancing the interest of both parties, I would exercise my discretion and enlarge the period for depositing of half decretal sum to 40 days instead of 21 days from the date hereof. I note the applicant has taken the earliest opportunity to seek for review/ variation o the courts order. I so order.

**R.E. ABURILI**

**JUDGE**

27/1/2016