REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CIVIL APPEAL NO. 107 OF 2015

MASISI MWITA…….....APPELLANT

VERSUS

DAMARIS WANJIKU NJERI.....RESPONDENT

RULING

By way of a notice of motion dated 3rd December 2015, the applicant moved this court under certificate of urgency seeking orders that *"pending the hearing and determination of the intended appeal, the Honourable Court be pleased to issue an order of stay of execution of the judgement delivered on the 5th November 2015 in Thilka CMCC No. 342 of 2010."* Even though the said prayer talks of *"intended appeal,"* I note that the appeal was actually filed the same day this application was filed. This is a Muranga High Court file, but at the time the application was filed, the Muranga High Court was not sitting, hence the reason why the application was forwarded to this Court. Prayers one and two of the application are already spent, hence I will only determine prayer **3** reproduced above.

The application is expressed under **Order 42** Rule **6, Order 51** of the Civil Procedure Rules 2010 & Section **3A** of the Civil Procedure Act.[1] The application is premised on the grounds enumerated on the face of the application and the annexed affidavit of the applicant sworn on 3rd day of December 2015.

Essentially, the grounds relied upon are as follows:-

*i. That the applicant is dissatisfied with the decision of the lower court and intends to appeal**

ii. That if the orders are not granted, the respondent will proceed with execution to the detriment of the applicant who will suffer irreparably and the appeal will be rendered nugatory.

iii. That there has been no delay in filing this application and that the appeal has merits.

iv. That the respondent will not suffer any prejudice if the application is allowed.

v. That it is in the wider interests of justice that this application be allowed.

The Respondent filed a replying affidavit on 11th December 2015 and averred *inter alia* that :-

i. That the application does not conform to the requirements of Oder 42 Rule 6 under which it is brought.

*ii. That the averments in paragraphs **4** & **5** of the affidavit ought to have been confirmed by the advocate by way of an affidavit.*

iii. That the Respondent is entitled to the fruits of the judgement.

iv. That there is no threat of execution.

v. That to qualify for the orders, the applicant must provide security which he has failed to provide

vi. That alternatively, she prays that half of the decretal amount be released to her.

At the hearing of this application counsel for the applicant adopted the supporting affidavit annexed to the application and the supplementary affidavit in which the applicant averred that he is ready, able and willing to furnish security as a price for the stay sought in the application and that the appeal has great chances of success and if the prayers are not granted the appeal will be rendered nugatory.

Counsel for the Respondent opposed the application and insisted that the applicant has not satisfied the requirements of Order 42 in that no substantial loss has been demonstrated nor has it been deposed. Further, counsel submitted that the applicant has not shown that the Respondent will not be in a position to refund the money if paid and cited the case of *Mutua Kilonzo vs Kioko David* [2] where the court dismissed a similar application holding that the applicant therein had not proved substantial loss. Counsel further urged the court in the event of allowing the application to consider ordering half of the decretal sum be released to Respondent arguing that in the lower court the applicant had actually proposed General Damages of Ksh. 20,000/=.

I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling.

As earlier mentioned, the application is expressed under Order **42** and Order **51** of the Civil Procedure Rules 2010 and Section **3A** of the Civil Procedure Act.[3]

Order **42** Rule **6 (1) & (2)** 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 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 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 of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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

The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal***[4] (Madan, Miller** and **Porter JJA)** whole considering an application of this nature had this to say:-

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his

opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

It is clear from the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[5]What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto***[6]** where it was held *inter alia* that:-

"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 CPR. This is so because execution is a lawful process.

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 vs. Chesoni****,**[7]* *……..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"*

In the present application, the applicant has not demonstrated that he would suffer substantial loss. It has not been shown that the Respondent is a person of straw and that he may not repay the said sum in the event of the appeal succeeding. In *Equity Bank Ltd vs Taiga Adams Company Ltd***,[8]** the court stated a follows:-

"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant."

In *Elena D.Korir vs Kenyatta University***[9]Justice Nzioki wa Makau** had this to say:-

*"the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd**[10]** where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:-* ***Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.***

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd**[11]** (2013) as follows:-*

"In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. ***These twin principles go hand in hand and failure to prove one dislodges the other".***

On whether or not the application was brought without undue delay, I am satisfied that there was no delay. The application was filed on 3rd December 2015. The Judgement was delivered on 5th November 2015. There was no unreasonable delay.

Apart from proof of substantial loss the applicant is enjoined to provide security.[12] The applicant states in a supplementary affidavit filed on 7th January 2016 that he is ready to provide security. There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[13] However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others.**[14]*

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd*[15]it was held that:-

> *"……of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought……let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay…"* which principle was also emphasized in ***Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.**[16]*

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)***[17]** where 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".*

I have carefully considered the application before me and the law, I a persuaded that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established as stated above. As was held in *Hassan Guyo Wakalo vs Straman EA Ltd**[18]*

> *"In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".*

I am fortified in my finding by the following excerpt from *Halsburys Laws of England**[19]* wherein the learned writers observe that:-

> *"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."*

In the case of *Global Tours and Travels Ltd***[20]** it was held that:-

> *".....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the*

> *interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously." (Underlining provided)*

It should also be noted that the judgement in question is a money decree. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd*[21] had this to say:-

> *"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."* ***(Emphasis added)***

As stated earlier, the applicant did not deem it fit to address the issue of whether or not if the decretal sum is paid, he may not recover it from the Respondent. I find thus substantial loss, being one of the requirements under the rules has not been proved in the present case. I therefore find no reason to deny the Respondent the fruits of her judgement especially bearing in mind that this is a money decree.

The upshot is that applying the above principles, I hereby disallow the application before me and dismiss it with costs to the Respondents.

Right of appeal 30 days

Dated at Nyeri this 18th day of February 2016

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

* In fact the appeal was filed the same day with the application.

[2] High Court Civil Appeal No. 62 of 2008

[3] Supra

[4]Civil App No. NAI 6 of 1979

[5] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[6] HC Misc No. 42 of 2012 OR {2012} eKLR

[7] {2002} 1 KLR 867

[8] {2006}eKLR

[9] {2012}eKLR

[10] {1993} KLR 365

[11] {2013}eKLR

[12] See judgement in Republic vs Commissioner for Investigations & Enforcement,Misc App no 51 of 2015 (NBI),

[13] Ibid

[14] Civil Appeal No. 291 of 1997

[15] Supra note 6

[16] Supra note 14

[17] {2002} KLR 63

[18] {2013}eKLR

[19] 4th Edition, Vol 37 pages 330-332

[20] WC No. 43 of 200 (UR)

[21] Civil Application number NAI 322 of 2006 (UR)