



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 54 OF 2016**

*(BEING AN APPEAL FROM NAIVASHA CMCC NO. 585 OF 2013)*

**ERIC NYARANGI ONDORA.....1<sup>ST</sup> APPELLANT**

**UNILEVER KENYA LTD.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**JULIUS MBAJA OMBEVA.....RESPONDENT**

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 55 OF 2016**

*(BEING AN APPEAL FROM NAIVASHA CMCC NO. 172 OF 2014)*

**ERIC NYARANGI ONDORA.....1<sup>ST</sup> APPELLANT**

**UNILEVER KENYA LTD.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**JULIUS MBAJA OMBEVA AND JACKLINE NASWA MISIKHU**

**(BOTH SUING AS ADMINISTRATORS ADLITEM OF THE ESTATE OFHOPE ESENDI  
MBAJA.....RESPONDENTS**

**AND**

**CIVIL APPEAL NO. 56 OF 2016**

*(BEING AN APPEAL FROM NAIVASHA CMCC NO. 588 OF 2013)*

**ERIC NYARANGI ONDORA.....1<sup>ST</sup> APPELLANT**

**UNILEVER KENYA LTD.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**JACKLINE NASWA MISIKHU.....RESPONDENTS**

## CONSOLIDATED RULING

1. The Applicants (Appellants) in all the three matters herein are Erick Nyarangi Ondora and Unilever Kenya Limited. They were Defendants in Naivasha **CMCC 585 of 2013**, **CMCC 588 of 2013** and **CMCC 172 of 2014** wherein the Plaintiffs were **Julius Mbaja Ombeva, Jackline Naswa Misikhu** and **Julius Mbaja Ombeva** with **Jackline Naswa Misikhu** the joint administrators of the estate of **Hope Esendi Mbaja**, respectively.
2. In all the lower court cases, the court found for the Plaintiffs. The current applications, responses and submissions in all the matters being similar, this court heard the same simultaneously through written submissions, hence the consolidated ruling.
3. Filed under certificate of urgency and on the same date i.e. 14<sup>th</sup> September, 2016 the applications by the Appellants seek stay of execution pending appeal. The applications are expressed to be brought under several provisions of the law but I do not see an invocation therein of Order 42 Rule 6 of the Civil Procedure Rules. The key ground cited on the face of the applications and supporting affidavits is the Applicant's apprehension that execution is imminent and that the appeals will be rendered nugatory, to their detriment if the orders sought are denied.
4. The Respondents filed Replying affidavits asserting *inter alia* their ability to refund the decretal sum, being pensionable employees of the National Social Security Fund. In particular, **Julius Mbaja Ombeva** swears that he personally met the costs of his treatment amounting to Shs 2,152,414/=. The Respondents aver that a stay in respect of the entire award will be unjust, noting that there was a consent recorded on liability at 85:15% in their favour and on special damages.
5. By their written submissions, the Applicants reiterate the grounds set out through affidavit evidence, and assert that they will suffer substantial loss if the stay is not granted, because the Respondents have no means of repaying the decretal sum in the event the appeal succeeds. Pointing to the Respondent's affidavit, the Applicants argue that no tangible proof of income and or employment with National Social Security Fund has been produced.
6. Thus, the Applicants contend that the Respondents have not controverted the Applicants' assertion, that the Applicants cannot repay the decretal sum if the appeal succeeds. On this score, reliance was placed on the Court of Appeal decision in **CA No. NAI 238 of 2005 (UR) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another** as cited by Kasango J in **Swapan Sadha Bose -Vs- Ketan S. Somaia & 3 Others [2004] eKLR**. Finally, referring to Order 42 Rule 6 (2) of the Civil Procedure Rules the Applicants submit that the Applicants approached the court without delay and are willing to deposit security into court.
7. The Respondents based their reply on the well known decision in **Kenya Shell Limited -Vs- Benjamin Karuga Kibiru & Another [1986] KLR 410** stating that the burden lies with the Applicants to demonstrate the likelihood that they stand to suffer substantial loss. That no deposition has been made to the effect that the Respondents have no means. That notwithstanding, the Respondents argue that they have disclosed that they have means at their disposal. In the Respondents' view therefore, substantial loss has not been asserted or proved and the application ought to be dismissed.
8. I have considered all the material canvassed in respect of the applications before me. There is no doubt in spite of the Applicants' omission to invoke the provision, that the Applicants have brought their application under Order 42 Rule 6 of the Civil Procedure Rules. While the invocation of specific provisions in an application is essential, I do not consider a failure to do so to be fatal to the applications.
9. In this case, the grounds, affidavits and submissions of the Applicants clearly reflect the intent and nature of the applications. Indeed the Respondents' responses and submissions indicate that they too understand the nature of applications and the provisions under which they are brought.
10. Order 42 Rule 6 (2) of the Civil Procedure Rules is in the following terms:

**“(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.”**

11. The applications before me were admittedly filed in a timeous manner. In all the matters the Applicants’ have complied with the order of this court granting conditional stay by depositing the prescribed portion of the decretal sum. Therefore the Applicants’ submitted willingness to deposit security for the performance of the decree may well be vindicated.

12. The sticking point in this application is whether the Applicants have demonstrated that they will suffer substantial if the orders sought are denied. There is no dispute that the damage awards or quantum in the lower court is at the core of the Applicant s’ appeal herein. Thus, whether a decree has issued or not, the Respondents have awards in their favour. I do not regard as serious, the argument by the Respondents, in the circumstances, that the applications were filed prematurely before the extraction of the decree. To demand the demonstration of an extracted decree in my view harks back to a period in the past where this technicality was used to defeat applications for stay pending appeal. I do not think such an approach would pass muster the requirement under Article 159 (2) d) of the Constitution that *“justice shall be administered without undue regard to procedural technicalities.”*

13. The provisions of Order 42 Rule (1) and 6 (6) of the Civil Procedure Rules empower the court to grant a stay or an injunction provided the procedure for instituting an appeal from the subordinate court has been complied with. The Appellants had filed Memorandum of appeal in all the matters prior to bringing the present applications.

14. I do however agree with the Respondents that the drafting of the applications before me and affidavits is far from satisfactory. Ditto for the written submissions, which could do with some revising. On substance however, and without giving undue regard to semantics, it is apparent from the grounds, affidavits and submissions of the Applicants that the gravamen of their application is that they are apprehensive that: a) execution is imminent; b) that the denial of the orders sought will be the detrimental to their interests and c) why? Because the Respondents will be unable to refund the decretal sum thereby rendering their appeal, if successful nugatory and an “academic exercise.”

15. The above is disclosed in ground 2 on the face of the applications to the effect:

**“THAT the Applicants/Appellants are apprehensive that execution may issue in the Lower Court matter if stay of execution pending the hearing of the application and appeal herein is not granted by this Honourable Court to the detriment of the Applicants/Appellants as the Appeal herein will be rendered nugatory and an academic exercise.” (sic)**

16. Further paragraph 3 of the supporting affidavit states:

**“THAT the Applicants/Appellants are apprehensive that execution may issue in the Lower Court matter if stay of execution pending the hearing of the application and appeal herein is not granted by this Honourable Court to the detriment of the Applicant/Appellant as the appeal herein will be rendered nugatory and academic exercise.” (sic)**

17. Notwithstanding the wanting style of the drafter, these paragraphs communicate the essentials. The court’s decision in the **Kenya Shell** case relied on by the Respondents brings out the relationship between substantial loss and nugatoriness of the appeal. In the passage cited by the Respondent the court state *inter alia* that

**“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 all its forms is the cornerstone of both jurisdictions for granting stay. That is what must be prevented.....”**

18. As stated by the Court of Appeal in **Nation Newspapers Limited –Vs- Peter Barasa Rabando [2007] eKLR:**

**“In the circumstances, we need to consider and balance the interests of the parties, and their respective positions, and safeguard the same. The applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent has a decree in his favour, and he should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree.**

**In those circumstances, we are minded to grant a conditional stay. We grant a stay conditional on the applicant depositing in an interest bearing account in the joint names of counsel on record for the parties, the whole of the decretal sum. The deposit shall be made within 15 days of the date hereof, in a reputable commercial bank to be agreed upon between counsel. Upon satisfaction of that condition, execution of the decree in *Nakuru High Court Civil Case No. 505 of 1998* shall be stayed pending the determination of the intended appeal or further order of this Court. Costs of this motion shall be in the appeal.”**

19. Thus in my view, what the Applicants have communicated through their affidavits is that if execution is allowed to proceed, their appeals will be rendered nugatory and they will suffer what they refer to as “detriment” or “substantial irreparable loss” per their submissions. The Respondents evidently understood the gist of the Applicants’ apprehension. Hence their Replying affidavits asserting the ability by the Respondents to repay the decretal sum. Their counsel submitted that they have disclosed their means despite their not being called upon to do so.

20. Certainly, the above submission does not carry much weight. The mere assertion that one has means, without attaching a single document in support thereof cannot be said to be a disclosure of means. Secondly this submission to my mind is an afterthought because, if the Respondents truly believed that they had no duty to prove means, they should have had no compulsion in deponing therefor, or at all.

21. In my considered view, the totality of the Applicants’ otherwise inelegant applications and affidavits, while not using the well known phraseology of “substantial loss”, in the circumstances of this case, is sufficient to shift the burden up on the Respondents. The amounts awarded in the lower court are by no means insubstantial. If the appeal were to succeed, would the Respondents be able to refund these sums? It must be noted that the claim in CMCC 172 of 2014 was brought on behalf of the estate of the deceased. Thus, under the law distribution among the dependants and beneficiaries may well render it difficult if not impossible to recover the respective portions of the appeals were to succeed.

22. In the case of **National Industrial Credit Bank Limited – Vs- Aquinas Francis Wasike & Ano. Civil Appl. No. NAI 238 of 2005 (UR)** the Court of Appeal stated:

***“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”***

23. The Respondents by the material contained in their affidavits understood that the Applicants were expressing an apprehension concerning their ability to refund the decretal sum should the appeal succeed. However, while asserting to be persons with means and pensionable employees of the National Social

Security Fund, the Respondents did not find it necessary to attach evidence of such employment or earnings. A copy of proper payslip or settled medical bill could have sufficed. The Respondents' means after all are matters peculiarly within their knowledge.

24. In my considered view the Respondents have not discharged the burden cast upon them to show that they have the necessary resources. It matters not that perhaps only a portion of the quantum awarded will be in contest on appeal. It is difficult to quantify the exact portion, and for that, the Respondent's argument is speculative. Undoubtedly the 2<sup>nd</sup> Applicant is an established company and has indicated ability and willingness to deposit security for the performance of the decree.

25. For all the foregoing reasons I am persuaded that the applications before me are merited. I will grant stay pending appeal. The sums deposited into court in respect of the order of 19/9/2016 in all the matters will be treated as security for the performance of the decree. These sums are to be deposited into an interest earning account in the joint names of the parties' advocates within 30 days of today's date. The costs of application will abide the outcome of the appeal.

26. In order to expedite the appeals, and for prudent time management, I direct that the three matters be consolidated for the purpose of hearing of the appeals. The leading file will be **HCCA No. 54 of 2016**.

Delivered and signed at Naivasha this **20<sup>th</sup>** day of **December, 2016**

In the presence of:

Mr. Obino holding brief for Mr. Ngeresa for the Appellant/Applicant

N/A for the Respondent

C/C : Barasa

**C. W. MEOLI**

**JUDGE**