REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 22 OF 2016

(Being an appeal from a Judgment of the CM'S Court Naivasha Civil Case No.399 of 2012)

PATRICK KALAVA KULAMBA….1ST APPELLANT/APPLICANT

TRISTAN K. LIMITED…….……2ND APPELLANT/APPLICANT

VERSUS

PHILIP KAMOSU and RODA NDANU PHILIP

(*Suing as the Legal Representative of the Estate of*

JACKLINE NDINDA PHILIP (Deceased)…….RESPONDENTS

R U L I N G

1. The Applicants herein were aggrieved with the Judgment of the lower court in Naivasha CMCC 399 of 2012. They filed an appeal on 14th April 2016. A subsequent application for stay pending appeal before the said court was granted with conditions. The Applicants did not comply with the conditions. Instead they filed before this court the application dated 7th July, 2016 seeking stay of execution pending appeal.

2. The grounds on the face of the application are that

> **"a) THAT the court delivered its judgment in favour of the Plaintiff against the 1st and 3rd Defendants on 15th day of March 2016 and the 30 day stay of execution granted having lapsed, the 1st and 3rd Defendants/Applicants herein are open to execution which has since ensued.**
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> **b) THAT the 1st and 3rd Defendants being aggrieved by the said judgment/decree have preferred an appeal in Naivasha HCCA No. 22 of 2016 against the entire judgment of the Honourable Court.**
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> **c) THAT notwithstanding the aforesaid the Plaintiff and/or his advocate on record and through the firm of CREATER VIEW AUCTIONEERS have already commenced execution by issuance of proclamation notice and attachment of movable properties for sale by way of public auction.**
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> **d) THAT the said appeal has overwhelming chances of success and continuance of the said execution of the judgment/decree of the Honourable court delivered on the 15th day of March**

2016 would render the appeal nugatory.

e) THAT the 1st and 3rd Defendants/Applicants herein shall be exposed to irreparable damage and loss if the said judgment/decree os fully executed in pendency of the appeal preferred herefrom.

f) THAT in the premise it is fair and just and within the practice of further execution of the subject judgment/decree herein pending the hearing and determination of this application *inter-partes* and the hearing and determination of Naivasha HCCA No. 22 of 2016.

g) THAT the 1st and 3rd Defendants/Applicants herein are amenable to furnishing security pending appeal as may be directed by the honourable court."

3. These grounds are further amplified in the supporting affidavit sworn by **Benson Koome** an officer of the 2nd Applicant. Interim stay orders were granted on condition pending *inter partes* hearing. The Respondents filed a fairly lengthy replying affidavit in opposition to the application. Therein, they restate the background to the present application and lament the fact that the Applicants rather than comply with conditions in the lower court, have filed the present application, which action they term an abuse of the court process.

4. The Respondents asserts that Benson Koome is a "busy body" without any authority to swear the Supporting affidavit and that no likelihood of suffering substantial loss has been demonstrated by the Applicants. That the Respondents have the means to refund the entire decretal sum should the appeal succeed.

5. Although the application was premised up on Order 42 Rule 6 (1) of the Civil Procedure Rules, the Applicant's written submissions touched upon three issues, namely the arguability of the appeal, the timeousness of the application, and whether the Applicants stand to suffer substantial loss. On the first issue the Applicants highlights the matters contained in the Memorandum of appeal and on the second asserts that the application was filed without delay.

6. Regarding the question of substantial losss the Applicants point to the fact that the Respondents are administrators of the estate of the deceased **Jackline Ndunda** and contend that if the damages are distributed among beneficiaries, it will be difficult to recover thereby exposing the Applicants to substantial loss. The case of **Sally Nyakio Thuo -Vs- Douglas Ojwang & Another NKU HCCC 457 of 1999** was relied on.

7. As regards the conditional stay granted in the lower court, the Applicants contend that the same was prejudicial because release of a sum of Shs 1 million to the Respondent as ordered by the court was not secured by any deposit in the event of this appeal succeeding. That the condition effectively denied stay.

8. The Respondents' submission starts where the Applicants' stop. They argue that the Applicants not having complied with the conditions for stay in the lower court have not come to court with clean hands. Citing the case of **Timsales Limited -Vs- Hiram Gichohi Mwangi [2013] eKLR** they argue that the mere fact that execution has commenced is not proof of substantial loss, which an Applicant must prove. The Respondents cast doubt on the Applicant's ability to deposit a security for the eventual performance of the decree citing default in respect of the lower court order.

9. The Respondents cite the High Court decision in **Kinoti Marete –Vs- Moses Njane & Anor [2016] eKLR** to support the proposition that since stay was not denied in the lower court, the filing of a further application upon failure to comply with earlier condition, amounts to an abuse of the process of the court. That the Applicant ought to have appealed the lower court's decision. The appeal, according to the Respondents is a sham with no chance of success and is partial, challenging quantum only.

10. I have considered the material canvassed in respect of the application. Before answering the question whether the Applicants have brought their application within the provisions Order 42 Rule 6 (1) and (2)

of the Civil Procedure Rules, the court must determine whether the Applicants are properly before the court. The Respondents by their Replying affidavit have emphasised the Applicants' supposed default in respect of the lower court to pay a sum of Shs 1 million to them as a condition for stay granted therein. To their mind the Applicants ought not to be entertained by this court.

11. For their part, the Respondents asserted by affidavit that the conditions did not consider security for future refund and were effectively a negation of the order for stay. Order 42 Rule 6 (1) of the Civil Procedure Rules is in the following terms:-

> **"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 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."**

12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "**shall be at liberty …….to consider**" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof.

13. The Court of Appeal has delivered itself on the application of Order 42 Rule 6 (1) of the Civil Procedure Rules in both original and appellate jurisdictions in several decisions, while considering its own Rule 5(2) b which is essentially at *pari materia* with order 42 Rule 6 (1) of the Civil Procedure Rules.

14. In **Equity Bank Ltd –Vs- West Link MBO Ltd [2013] eKLR Civil Applicaton No. 78 of 2011, Githinji J A** had this to say in his judgment:

> **"[13] It is trite law that in dealing with (Rule 5 (2) (b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction (Githunguri –Versus- Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838.**

15. In his judgment Musinga J A observed on the same question that:

> **"The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra)."**

16. Kiage J A in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –Vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court's reflection in its dictum in the **Githunguri** case as follows:-

> **"In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction.**

……But because of the existence of Rule 5 2 (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds *denovo* or it is not an appeal from the learned Judge's discretion to ours."

17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the **Githunguri Case** concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. . The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established.

22. From the foregoing, I do not think that much turns on the Respondents' objections regarding the matter under consideration. As to whether the Applicants stand to suffer substantial loss I note that the Applicants' submissions carried more evidential material on the matter than the affidavit. I do not see an explicit statement regarding the likelihood of substantial loss beyond the complaint that the requirement by the lower court for the payment of the sum of Shs 1 million directly to the Respondents was not accompanied by any requirement of a security and that it negated the stay order granted.

23. At paragraph 10 of the Affidavit it is stated:

"10. THAT the Appellant made initial application for stay in the trial court which on the 28th June 2016 allowed the same albeit on terms that I believe were defeatist of stay and amount to partial satisfaction of the judgment and will still render this appeal nugatory if it succeed entirely.

11. THAT the trial court in the said ruling ordered that the Appellant pays to the Respondent a sum of Kshs 1,000,000/= without any security to its recovery and further that the Appellants deposit the balance of the decretal sum into court." (sic)

24. In their submissions, the Applicants also raise a legal point regarding the possibility that the payments if made might be distributed as required in a case of an estate to the beneficiaries thereof. These matters should also have been stated in the affidavit notwithstanding the obvious fact that the Respondents were suing on behalf of the estate of a deceased person.

25. Ordinarily, in an application of this nature the court does not consider the merits of the appeal. However, because of the orders that I propose to make, the question is relevant. This court is empowered under Order 42 Rule 6 (6) to grant an interim injunction pending appeal in lieu of stay. The rule states as follows:

> **"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."**

26. In **Madhupaper International Limited –Vs- Kerr [1985] KLR 840** the Court of Appeal stated that:

> **"The Court of Appeal's jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid. In this case, to grant an injunction pending appeal would be wrong as it would probably inflict greater hardship than it would avoid."** (Emphasis added).

27. In the case of **Ruben & 9 Others –Vs- Nderito & Anor [1989) KLR 460** the Court of Appeal granted injunctive orders pending appeal to the Appellant after observing that:

> **"On the material before us, we are satisfied that the intended appeal raises a serious question for submissions to this court on appeal. Secondly, in this case there is a very real possibility of the appeal being rendered nugatory if the reliefs sought by the Plaintiffs are not granted."**

28. From several decisions of the High Court's exercise of its jurisdiction under Order 42 Rule 6 (6) of the Civil Procedure Rules, the test applied is that laid down by the Court of Appeal in the exercise of its discretion in regard to applications for injunction pending appeal (**See Muriithi J in Julius Musili Kyunga -Vs- KCB Ltd & Anor [2012] eKLR**).

29. **Visram J** (as he then was), in my humble view distilled the applicable principles in **Patricia Njeri & 3 Others -Vs- National Museum of Kenya [2004] eKLR**. The learned Judge stated:

> **"The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?**
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> **In the Venture Capital case (Venture Capital and Credit Ltd –Vs- Consolidated Bank of Kenya Ltd Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be "exercised judicially and not in a whimsical or arbitrary fashion." This discretion is guided by certain principles some of which are as follows:**
>
> > **a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited –Vs- Kerr [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries –Vs-KCB 1982 – 88) KLR 1088 (also cited in Venture Capital.**
> >
> > **b) The discretion should be refused where it would inflict greater hardship that it would**

avoid (See Madhupaper supra).

c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt –Vs- Rent Restriction Tribunal [1982] KLR 417 (cited also in Venture Capital).

d) The Court should also be guided by the principles in Giella –Vs- Cassman Brown & Company Ltd [1973] EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital)." See also Mukoma –Vs-Abuoga [1988] KLR 645.

30. Starting with the well known principles of **Giella -Vs- Cassman Brown & Co. Limited [1973] EA 358** the Applicants herein have established a *prima facie* case. A *prima facie* case was described in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated:-

"The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence…….

So what is a prima facie case? I would say in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

31. In so far as the Memorandum of appeal herein is concerned, it is not frivolous. It raises serious legal and factual issues affecting liability and quantum. The award in the lower court is substantial and the challenge is no surprise.

32. The Applicants' argument is that the distribution of the award among beneficiaries of the deceased would dissipate the same, rendering it in recoverable if the appeal succeeds. That to my mind is reasonable prediction based on the law of succession. Should the appeal succeed, it will be rendered nugatory if recovery of monies paid out is not possible or is difficult. Hence under the principles enunciated in **Giella -Vs- Cassman Brown & Co. Limited [1973] EA 358** regarding a *prima facie* case, in this case appeal; irreparable damage, in this instance the risk that the appeal if successful could be rendered nugatory are satisfied.

33. Will the Responder be subjected to undue and greater hardship? I do not believe so. In this case as the Applicants have reiterated the undertaking to deposit the entire decretal sum into an interest earning account pending the appeal. Thus as the Court of Appeal found in **Reuben & 9 Others**, I am satisfied that the appeal herein raises serious questions for agitation and determination on appeal and secondly, that there is a real possibility that if released to the Respondents the decretal sum may be dissipated without hope of recovery. Thus the appeal if successful will become a pyrrhic victory.

34. In the circumstances of this case, I would grant an interim injunction restraining the Respondents from recovering the sums awarded to them, in respect of the lower court suit, pending the hearing of the appeal. This order is made on condition that the entire decretal sum is to be deposited into an interest earning account in the joint names of the parties' respective advocates within 21 days of today's date. The costs of application will abide the outcome of the appeal

Delivered and signed at Naivasha on this **20th** day of **December**, **2016**.

In the presence of:-

N/A for the Applicant

Mr. Obino holding brief for Mr. Njuguna for the Respondents :

C/C : Barasa

C. MEOLI

JUDGE