REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 576 OF 2012

WINFRED NYAWIRA MAINA……..PLAINTIFF

VERSUS

PETERSON ONYIEGO GICHANA ……DEFENDANT

RULING

Stay pending appeal

[1] This is an application for stay of execution pending appeal. It is made through a Motion dated 25th September, 2014 which is expressed to be made under Order 42 of the Civil Procedure Rules. The significant order sought is:

1. **THAT this Honourable Court be pleased to order a stay of execution of the Preliminary Decree dated 11th April 2013 pending the hearing and determination of Nairobi Court of Appeal Civil appeal No. 91 of 2013; Peterson Onyiego Gichana -vs- Winfred Nyawira Maina.**

[2] The Application is supported by the Supporting Affidavit of Peterson Onyiego Gichana sworn on 25th September, 2014.

The Applicant's gravamen

[3] The Applicant believes that he has sufficient grounds to for the grant of a stay of the execution of the Preliminary Decree given by this Honourable Court on 11th April, 2013. But he started by stating that the grounds which an applicant must satisfy in order to be granted a Stay of Execution of a decree *are set out in stone in statute law and in particular under Order 42 Rule 6 of the Civil Procedure Rules, 2010.* He set out the said order in extenso. These conditions are:-

i. There should be an appeal preferred against an order or decree sought to be stayed.
ii. There must be sufficient cause.
iii. The Court must be satisfied that substantial loss may result to the Applicant unless the order is made
iv. The application must have been made without unreasonable delay.

[5] The Applicant has filed **Civil Appeal No. 91 of 2013** seeking to reverse the Ruling of Mr.

Justice G.K. Kimondo given on 11th April 2013 by which Ruling the Judge entered judgment on admission in favour of the Respondent in the sum of Kshs. 5,600,000/= together with interest at Court rates from 30th August 2012 till payment in full. Therefore, he has fulfilled the first major prerequisite for the grant of stay pending appeal. The Court of Appeal is yet to invite the parties to fix a hearing date for the Appeal. Secondly, the said appeal is not frivolous. It is arguable as shown in the Memorandum of Appeal, for: i) the Honourable Mr. Justice Kimondo in disbelieving the Defendant's Defence and entering judgment against the Defendant relied on a purported bankers cheque dated 26th January 2012 for Kshs. 300,000/= in favour of the Plaintiff which cheque was not issued by the Defendant to the Plaintiff; ii) The Honourable Court entered judgment on admission against the Applicant based on the handwritten note dated 30th June, 2011 notwithstanding the fact that the said handwritten note was executed by the Applicant under duress; iii) The Court entered judgment on admission against the Applicant notwithstanding its findings to the effect that the alleged dishonoured cheques in purported part payment (save for the alleged bankers cheque dated 26th January, 2012) were not issued by the Defendant. For those reasons, the suit should have been let to proceed to trial and Judgment on admission should not have been given. He referred the court to the decision of Mary Kasango J in the case of **Shepard -vs- Seton** where the Hon. Lady Justice cited with approval the *ratio* of Nambuye J(as she then was) in **Kenya National Chambers of Commerce** –vs- **County Council of Machakos** where the Court had held thus;

> *"As regards the arguability or the success of the intended appeal this is a matter for the Court of Appeal."*

[6] The Applicant also submitted that he will suffer substantial loss unless the order of stay is made. In the event that the Appeal succeeds, the Respondent will not be in a position to refund the colossal decretal amount of over Kshs. 5,600,000/= because the Respondent has no tangible assets and property. The deposition was made in paragraph 25 (a) of the Supporting Affidavit of the Applicant. Therefore, according to the Applicant, that having so submitted, the Respondent must show that she has the resources to repay the decretal sum if the appeal succeeds. She must show that she owns or holds. She has failed to do so except making mere allegation at paragraph 14 of the Replying Affidavit that she has means and assets worth more than the decretal sum and hence able to refund any money which she may be required to reimburse to the Defendant/ Applicant if at all he succeeds. She has not shown whether she has any cash deposits in any bank. She has also not annexed any bank statements to prove this. The reasonable inference to be drawn from this is that the Respondent is not in a position to refund the decretal amount in the event of the appeal succeeding. By this, the Applicant has shown on a balance of probability that the Respondent will be unable to refund the decretal amount, thus, the evidential burden shifts to the Respondent to show what she owns or holds. In support of this submission the Applicant referred to the Court of Appeal's decision in the case of **ABN Amro Bank N.V vs. Le Monde Foods Limited** which decision was cited with approval by Mary Kasango J in the case of **Kenya Orient Insurance Co. Ltd-versus- Paul Mathenge Gichuki & Another**. In the **ABN Amro Bank N.V case** the Court of Appeal stated as follows:-

> **"We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank 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."**

Therefore, the Respondent has not discharged her evidential burden.

[7] The Applicant cited more cases, to wit; **Ann Wanjiru Waigwa & Another –vs- Joseph Kiragu Kibarua,** where Makhandia J. (as he then was) stated that *it is the paramount duty of the Court to which an application for stay of execution pending an appeal is made to see that the Appeal, if successful, is not rendered nugatory*. On substantial loss the Learned Judge stated thus;

> **"Nonetheless the applicants' difficulties in recouping their money is only one consideration. The other consideration is whether the loss, if any, arising from those difficulties would be substantial**. As correctly observed by Ogola J in Tropical commodity suppliers Ltd (Supra) "……..**Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal……."**

[8] Flowing from the above decision, the Applicant believes the failure by the Respondent to prove she has the ability to refund the decretal amount will occasion him substantial loss in the event of the appeal succeeds. Stay of execution of the decree is therefore merited. The amount concerned is quite substantial. It is impossible to expect the Applicant to know in detail the resources owned by the Respondent or lack of them. Therefore once an Applicant expresses a reasonable apprehension that the Respondent will be unable to pay back the decretal sum the evidential burden must shift to the Respondent to show what resources she has since those are matters peculiarly within her knowledge. The Applicant was categorical that by the ruling in **Ann Wanjiru Waigwa & Another –vs- Joseph Kiragu Kibarua,** Makhandia J(as he then was) introduces another ground to be considered by a Court when deciding whether to grant a stay of execution of a decree pending appeal; *whether an appeal would be rendered nugatory if a stay of execution is not granted*. This ground has been subject of discussion in the Court of Appeal in a number of decisions including; **Reliance Bank Limited (In liquidation) –vs- Norlake investments Limited Civil case Nai No. 93 of 2002** (unreported) where the Court of Appeal held that in considering whether an appeal would be rendered nugatory if a stay is not granted the Court is bound to consider the conflicting claims of both sides. The Court also held that the issue of balance of convenience or the claims of both sides is one of elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if a stay of execution is not granted. After examining its decisions in the cases of **Oraro & Rachier Advocates –vs- Co-operative Bank of Kenya Limited** and **The Attorney General –vs- Equip Agencies,** the Court of Appeal in the **Reliance Bank Limited case(supra)** held thus at page 8 thereof;

> **"The point which clearly emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term "Nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling….."**

[9] Therefore, the Applicant submitted that the court should find that the amount involved is very large and the Applicant will suffer more hardship and suffering than the Respondent might suffer if he is forced to pay out the said sum. On the other hand if the Respondent is kept out of the said sum she would not be affected. If the Applicant's land is sold in execution of the Decree and his appeal is allowed then it would be impossible for him to recover his property from the

purchaser. The balance of convenience thus favours the Applicant. He cited the case of **Kalondu Mbusya** –vs- **Martin Kimwele Kokoi & 10 others** where the Court of Appeal in dealing with a situation where the Appellant's land was at the risk of being sold if stay of execution was not granted stated at page 4;

> **"We do agree with the learned Judge in her observation that if this application is not granted, the results of the intended appeal, if successful, will be rendered nugatory as by the time the appeal is determined, the subject land might be put beyond the applicant's reach and if she is evicted and the suit land, which, we understand, is already in the name of the 1st respondent, is sold by the 1st respondent, then, even if her intended appeal succeeds, the resultant success would be no more than a pyrrhic victory.''**

[11] The Applicant also submitted that he has brought the application for stay without unreasonable delay. The preliminary decree was issued on 11th April, 2013 and he filed an appeal promptly. As the Court had ordered that the balance of the claim should proceed to trial, the Applicant did n not see the necessity to apply for immediate stay of execution of the Preliminary Decree pending the hearing and determination of the Appeal as the Court had not given leave under Section 94 of the Civil Procedure Act. On 11th July, 2013 the Respondent filed an Application before this Honourable Court seeking a prohibitory order to issue against the Applicant's property known as Land Reference Number 209/10947 situate within Nairobi County and fixed the application for *inter partes* hearing on 16th September 2013. The said Application was however not listed on the Cause List of that day and subsequently thereafter the Court file disappeared from the Court's Registry. On 31st October 2013 the Plaintiff filed an application for the reconstruction of the Court file and fixed the same for *inter partes* hearing on 11th November 2013. The Plaintiff's application dated 30th October 2013 was heard on 20th November 2013 and granted as prayed. Upon the reconstruction of the Court File the parties fixed the Application dated 25th June, 2013 on 4th December, 2013 for *inter partes* hearing on 4th February, 2014. When the Application came for hearing on the said date the Plaintiff withdrew it. On 14th February 2014 the Respondent filed another Application dated 6th February, 2014 seeking leave to execute the decree and fixed it for inter partes hearing on 28th February, 2014. On 28th February 2014 the Plaintiff's aforesaid application was taken out of the Cause list and parties were directed to take another hearing date in the Court Registry. The said Application was heard by the Hon. Mr. Justice Kimondo on 28th March, 2014 and granted as prayed. On 4th April, 2014, the Respondent filed yet another application this time seeking a prohibitory order to issue against the Defendant's property known as Land Reference No. 209/10947 situate within Nairobi City County and fixed it for *inter partes* hearing on 30th April, 2014. The said application was listed for hearing before the Hon. Mr. Justice Kimondo on 30th April 2014 who directed that the application be heard by the Deputy Registrar on 2nd May 2014. The Application was heard by the Deputy Registrar on 2nd May, 2014 as directed and a Ruling delivered on 10th September, 2014. In the Ruling, the Court allowed the Application with costs to the Respondent. The Applicant was not notified of the date of delivery of the Ruling and only came to learn about it when he was served with a letter dated 10th September, 2014 by the Respondent's Advocates. The said letter is at page 9 and 10 of the Application. The net effect of all the Respondent's actions as enumerated hereinabove is that the Applicant was prevented from filing his Application for stay as the Respondent was pursuing several active Applications and the file was unavailable or had disappeared from the Court which made the Applicant's efforts to apply for stay fruitless. Having filed a multiplicity of applications in Court it is unfair for the Respondent to now turn around and accuse the Applicant of being guilty of unreasonable delay in filing this Application for Stay. There is no unreasonable delay in filing this Application.

[12] Without prejudice to the foregoing, the Applicant recognizes that the power to grant stay of execution is a discretionary one. Even if there may be delay in filing an Application for stay the court should consider the fact that the Applicant will suffer substantial loss if his land is sold and

put beyond the reach by the time the Appeal is determined. It should grant stay of execution. In support of this submission, the Applicat relied on the decision by Wendo J. In the case of **Kalondu Mbusya vs. Martin Kimwele Kikoi & 10 Others**, that:-

> **"The applicant claims to have been on the land for over 20 years and it is my view that if stay is not granted the applicant will suffer substantial loss as she may be evicted from the land and it might be put beyond her reach by the time the appeal is determined. If the applicant is evicted and the suit land put beyond her reach would (sic) then render the appeal nugatory. The applicant urged that they were ready to offer whatever security the court ordered. Stay is a discretionary remedy and this being a land matter that touches the heart of the Kenyan considering the history of the land and the admitted fact that the applicant has been on the land for long and despite the delay in filing this application, this court will exercise its discretion and grant a stay of execution on condition that the applicants (sic) deposit a sum of Ksh.150,000 as security for the due performance of the decree. The said sum be deposited in court within 21 days of today's date in default the order of stay vacates. To avoid any further delays, it is also ordered that the appeal be filed within the said 21 days or the order of stay vacates."**

[13] The Applicant deposed at paragraph 24 of the Supporting Affidavit that he is ready and willing to put Land Reference Number 209/10947 at the disposal of the Court or to furnish any other form of security this Court pending the hearing and final determination of the Appeal. It is also not in dispute that the Plaintiff is in possession of the Applicant's original title and she will therefore not suffer any prejudice at all if the Orders sought herein are granted. As the application has also been brought under the provisions of the new Section 1A and 1B of the Civil Procedure Act, the Court should take into consideration the overriding objective in interpreting the law by acting justly in every situation; have regard to the principle of proportionality and create a level playing ground for all the parties coming before the court in line with the principle of equality of arms. See the decision of the Court of Appeal in **E Muriu Kamau & Another vs. National Bank of Kenya limited.** In sum, the Applicant submitted that he is entitled to stay of execution.

The Respondent returned a fiery fire

[14] The Respondent opposed the application for stay of execution. She filed grounds of opposition dated 3rd October 2014 and a Replying Affidavit sworn on 3rd October 2014. First and foremost, the Respondent stated that the application before court was filed after a period of one (1) year and five (5) months after the passing of the preliminary decree. The said decree was made on 11th April 2013. The first hurdle the Applicant has is to give an account as to why he has taken a period of one (1) year and five (5) months before filing the present application. The Applicant in his supporting affidavit had deposed in paragraph 8 as follows:-

> **"That in the foregoing circumstances it was not necessary to apply for immediate stay of execution of the preliminary decree pending the hearing and determination of my appeal as the court had not given leave under Section 94 of the Civil Procedure"**

It is apparent that the Applicant deliberately failed, refused and/or neglected to file his application because he was waiting for the Respondent to move before he would utilize his statutory right. He is an indolent party who should be treated as such and does not deserve any mercy from the Honourable court.

[15] According to the Respondent, under Order 42 Rule 6(2)(a), the part who seeks stay of execution pending appeal is required to file his/her application promptly without unreasonable delay. In the present application, the delay is unreasonable and inordinate. It is plain and clear under the said Order 42 Rule 6(2) (a) of the Civil Procedure Rules, 2010 that a party will not have to wait until his/her opponent moves the court before the application for stay is filed. Whereas it is true that the court file went missing at the registry between 16th September 2013 to 20th

November 2013, on the latter date when the order for reconstruction of a skeleton court file was made, presented an opportunity for the Applicant to apply for stay of execution immediately without having to wait for the determination of the Plaintiff's/Respondent's application. Therefore, the Applicant went into slumber and has woken up to give lame excuses which are not backed by any provision under the Civil Procedure Rules. The question which keeps on surfacing is as to why the Applicant failed to make the appropriate application for stay of execution immediately judgment on admission was entered against him. In the view of the Respondent, the conduct and inaction of the applicant clearly depicts a reluctant party to pay the decretal sum and yet interest keeps on accruing. His aim is to continue enjoying the monies which he received from the plaintiff; he is unwilling to settle his just debts even after the court entered judgment against him.

[16] The Respondent posits that the Applicant has not satisfied the second condition for stay of execution under Order 42 Rule 6(2) (a), i.e. on substantial loss. The decree which was passed on 11th April 2013 is a monetary decree and there is no substantial loss which will result at all. The Applicant at paragraph 25 of the Supporting Affidavit has attempted to single out that he stand to lose his property and yet he surrendered the original title to the Respondent as security for the advancement he initially received. The Applicant was aware of the consequence of surrendering his title as security and he is estopped now from alleging he stand to suffer substantial loss if at all stay of execution is refused.

[17] The Respondent did not stop there. She continued to submit that execution process is wide and optional to the decree-holder and the Applicant is only seeking stay of execution to save his property which property he had surrendered long time ago before the present suit was filed. He has not said that he does not have any other properties which may also be a subject of attachment. The Applicant in the same paragraph 25 has also alleged that the Respondent has no known tangible assets and property and yet he forgot that the Respondent is a person of substance as she was able to advance to him substantial sums of monies. It is laughable and untenable when the Applicant turns round and alleges that the Respondent has no known tangible assets and property.

[18] The Respondent cited judicial authorities to support her stand on the matters herein. She relied on the case of **Kenya Shell Limited Vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)l KAR 1018** where the Court of Appeal considered order 41 Rule 4(1) of the former Civil Procedure Rules (currently Order 42 Rule 6(2)(a) and held inter alia:-

> **There was no evidence on the record to justify a finding that the respondents were not likely to repay the decretal sum if the appeal was successful.**

The Respondent in paragraph 14 has deposed as follows:-

> **"That I am the one who advanced part of the decretal sum to the Applicant/Defendant and to allege that I will not be able to reimburse back the decretal sum if at all he succeed in his appeal is baseless and has no basis at all, as I have means and assets worth more than the decretal sum and hence I am able to refund any amount which I may be required to re-imburse to the Defendant/applicant if at all he succeeds"**

[19] The Respondent argues therefore that she has demonstrated through her affidavit that she is capable and able to refund the decretal sum if at all the Applicant succeed in his appeal. The Applicant deposed to empty and/or bare statements without any credible evidence at all that he has no knowledge of the assets and/or property owned by the Respondent. The said allegation cannot be of any help at all as he has failed to tender any tangible evidence to support his bare statement. In the Kenya Shell Case, the court further observed at page 1022 paragraph 4 from top as follows:-

"It is usually a good rule to see if Order 41 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 jurisdiction for granting stay"

The court of Appeal further held in Kenya Shell case:-

Per Platt Ag JA:

''It is not normal in money decrees for the appeal to be rendered nugatory if payment is made".

[20] Like in the Kenya Shell case, the Respondent insisted that the present application seeks stay of execution of a money decree and the Respondent humbly submits that the Applicant will not suffer any substantial loss at all if stay of execution is refused. She contrasted this case with that of: 1) **Kalondu Mbusya vs. Amrtty Kimwele Kikoi & Others Civil Application Nai No.35 of 2005 (Unreported)** in which the subject matter was land unlike and not a money decree. The authority is therefore distinguishable and further the court of appeal was considering stay under its own Rule 5(2)(b) but not under Order 41 Rule 4 of the old Civil Procedure Rules: 2) **Kenya Orient Insurance Co. Ltd vs Pal Mathenge Gichuki & Another Civil Appeal NO. 40 of 2014 (Unreported**) which was made under its own Rule 5(2)(b) and was made without delay. In the present case, the application was made after one year and five months since the file was reconstructed. The court however considered Order 42 Rule 6(1) (2) of the Civil Procedure Rules and at pages 4/5 paragraph 12 the court of Appeal had this to say:-

"I am satisfied that the Appellant's application for stay of execution was filed without unreasonable delay as required under Order 42 Rule 6(2) and in any case the Respondent did not allege any such delay".

The delay has been raised and is already an issue in this matter. On this basis, the case of Kenya Orient Insurance Co. Ltd is easily distinguishable: 3) **Baryn Walter Shepard vs. Michael Vladimir Nicholas Seton Civil Case NO.1039 of 2001** is merely persuasive. But substantial loss had been proved and so the Honourable court granted conditional stay: 4) **Ann Wanjiru Waigwa & Another vs. Joseph Kiragu Kibarua Hcc No.92 of 2009** the High Court remarked:-

"As regards the criterion of delay, I am satisfied that the applicants have been timeous in filing and prosecuting the application……"

The Respondent was of the view that the fact that the present application was filed after a period of one (1) year and five (5) months cannot be said to be timeous. On this ground alone the authority is in favour of the Respondent but not the Applicant. The delay in the present application is unreasonable and inordinate: 4) **E. Muriu Kamau, Njoroge Nani Mungai T/A Muriu Njoroge & Company Advocates vs. National Bank of Kenya Limited Civil Appeal No. 258 of 2009** was considered under the Court of Appeal Rules, i.e. rule 5(2)(b) and not under the former Civil Procedure Rules.

[21] In conclusion, the Respondent humbly urged the court to dismiss the application.

THE DETERMINATION

The test

[22] If I understood the submission by counsel for the Applicant, it is way far off the correct position of the law to fathom that the prescriptions under Order 42 rule 6 of the Civil Procedure Rules on grant of stay of execution pending appeal are ''cast in stone'' and no other element should be added to it. Such submission has been made before other eminent judges and all have

stated with indisputable authority that:

> **The law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. See the case of Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was).**

Our jurisprudence has had new developments in law: the enactment of the Constitution of Kenya 2010; and the introduction of the principle of Overriding Objective in our body of law on civil procedure. The Constitution has established a new scheme in the adjudication of case by casting certain principles of justice in black and white, which should guide the court in administration of justice, and insists on, *inter alia* dispensing of substantive justice as opposed to technicalities; dispensing justice without delay; and to all parties. The Overriding Objective as a component of the principles of justice stresses that courts should take a much broader approach in applying and interpreting any prerequisite conditions prescribed in any law. It also emphasizes on just, proportionate, affordable and expeditious disposal of cases. See the case of **E. Muiru Kamau & Another vs. National Bank of Kenya Ltd (2009) eKLR** from which the court quoted the following;

> **"The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objectives include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by enduring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on an equal footing."**

Therefore, in applying the grounds set out in Order 42 Rule 6 of the Civil Procedure Rules, the court should follow the dictates of the Constitution and the new scheme in the administration of justice I have enunciated above. I will be so guided by this test which is driven mostly by the circumstances of each case, the law applicable and the demands of the justice of the case.

[23] Order 42 Rule 6 (1), (2) & (4) of the Civil Procedure Rules 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 , to consider such application and to make such order thereon as may 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) For the purposes of this rule the Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

[24] It is not in doubt that the relief of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules is discretionary; except, the discretion of the court should be

exercised judicially. See **Shah vs. Mbogo.** I see the Order uses the phraseology, i.e. '***may for sufficient cause order stay of execution of such decree or order''*** which is quite wide in scope; I believe the wide scope allows the court to follow after the constitutional prescription under Article 159 and the Overriding Objective in the administration of justice in matters falling under Order 42 Rule 6 of the Civil Procedure Rules. But as the court takes the preferred wider approach on the application for stay pending appeal, the same law goes ahead to set out certain major considerations in making the decision on whether or not to order a stay; I repeat, this is all to ensure the ever cardinal adage that exercise of discretion of court must be upon defined principles of law; not capriciously; not whimsically. Some of the major prerequisites to ordering a stay of execution are that:-

a. **The Applicant has filed an appeal;**
b. **The court is satisfied that substantial loss may result to the Applicant unless the order is made and**
c. **that the application has been made without unreasonable delay; and**
d. **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.**

On unreasonable delay in filing the application

[25] The Applicant has filed appeal herein. That is not in doubt. I will proceed to examine the other grounds and I propose to start with the ground whether this application was made without undue delay for obvious reasons. For good order, the ground sets the tempo for the decision and it is not normally difficult to tackle although what amounts to unreasonable delay is not something which can be measured in any mathematical precision or defined methodology or dictionary definition. It varies from case to case and depends on the circumstances of each case. The Applicant stated that he did not find it necessary to apply for stay of execution after filing the appeal because there seemed not to be any danger of execution for the Respondent had not applied for leave to execute under section 94 of the Civil Procedure Act. . He gave yet another reason; that he was prevented from filing this application in good times as the file went missing for a period of time from 16th September 2013 to 20th November 2013. The third reason he gave for the delay was that the Respondent filed several applications including the one for execution and attachment of the Applicant's immovable property. The Respondent responded to these claims and stated that the Applicant need not have waited for the Respondent to move the court for execution before he could apply for stay pending appeal. Again, she submitted even if the file has went missing for some time, but on 20th November 2013 when a skeleton file was reconstructed presented a golden opportunity for the Applicant to apply for stay. But he waited for over 1 year and 5 months to apply. Such is an indolent litigant who should not be assisted by the court.

[26] I have considered the above arguments by both parties, the entire circumstance of the case as well as the law applicable hereto. I admit that the Applicant needed not to have waited for the Respondent's applications to be disposed of before applying for stay of execution pending appeal. Ordinarily, stay of execution pending appeal is not pegged on execution having been applied for or levied for it can even be applied for informally immediately following the delivery of judgment or ruling. See rule 6(5) of order 42 of the Civil Procedure Rules. Although, however, the court will not ignore the fact that execution has been applied for or levied but that is not per se the sole basis for ordering a stay. The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal. Indeed, going by his arguments, a prudent and diligent suitor should have been awakened by the applications by the Respondent to levy execution on his immovable property and apply without delay to have the execution stayed. But the Applicant waited for the Respondent to go through all the motions of execution until a

prohibitory order on the immovable property was issued in execution. It should be noted that filing of an appeal alone will never operate as a stay of execution and order 42 Rule 6 of the Civil Procedure Rules is as clear. And therefore, with all due respect, the explanations offered by the Applicant for not applying in a timeous manner do not hold firm or at all. From the conduct of the Applicant in allowing the Respondent to go through time-consuming and costly rigours of the process of applying for execution renders credence to the Respondent's assertion that the Applicant deliberately allowed too much time to pass-by as aa gimmick by the Applicant to obstruct and delay the course of justice in this matter. Surely, the Applicant did not bring this application timeously and is the indolent litigant whose conduct compromises his equity and may not excite any love from a court of equity. Except, I realize that notwithstanding, the fact that his equity is tinctured with lashes, will need to be coupled with other grounds for the Court to state with absolute sanctification that the Applicant has not shown any sufficient for a stay to be ordered. This course ensures that the Applicant is not disentitled of a remedy in limine. That is why the court must go ahead and examine the other grounds under order 42 Rule 6 of the Civil Procedure Rules and take the overall impression of the entire circumstances of the case to see whether any sufficient cause has been shown as to order a stay of execution. I will, therefore, proceed on that basis and examine the other ground on whether substantial loss would occur unless stay is ordered.

On Substantial loss Occurring

[27] The fact that substantial loss would occur unless stay is ordered is the cornerstone of the jurisdiction of the High Court under Order 42 Rule 6 of The Civil Procedure Rules. There is an ample judicial authority on this issue but I need not multiply them except to cite the case of **Kenya Shell** (supra). However, I note that the Applicant, in a bid to show substantial loss will occur embarked on a journey which led him to argue the appeal to show it is arguable. That is the threshold applied in the Court of Appeal under rule 5(2)(b) of the Court of Appeal Rules and not under Order 42 rule 6 of the Civil Procedure Rules. In the High Court, what a party is supposed to show on the required standard is that substantial loss will occur unless stay is granted and I will discuss that concept in greater detail later. See also a work of this court in **Jason Ngumba** [2014] eKLR that:

> **''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.**

The only concept, however, which is used in the Court of Appeal but technically resonates on substantial loss occurring is that the appeal will be rendered nugatory unless stay is granted and that explains why the Court of Appeal in the Kenya Shell case stated that:

> **"It is usually a good rule to see if Order 41 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 jurisdiction for granting stay"**

[28] The above recapitulation brings me to yet another important issue; what amounts to substantial loss? Much judicial ink has been spilt on this matter and there is no dearth of judicial decisions thereof. I am content to cite a work of Ogola J in **Tropical Commodity Suppliers Ltd** (Supra) that:-

> "…**Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"**
>
> I will add what the court said in the case of **Bungoma Hc Misc Application No 42 of**

2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto that*:*

> **‘’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...’’**

[29] Why the above approach when the right to appeal is a constitutional right of the Applicant? The rationale for the position taken by the law is because the Respondent has a right to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so. Under Order 42 Rule 6 of the CPR sufficient cause is one which would result into substantial loss occurring to the Applicant unless a stay of execution is ordered. That decision is, however, made after a delicate and novel balancing of the rights of parties; of appeal and to judgment held by the Applicant and the Respondent respectively. And, I am of the persuasion that none of the rights is greater or the lesser than the other and so the court should not prefer one over and or not the other. That is why, even where the court finds there is sufficient reason to grant stay of execution, any restriction to or postponement of the Respondent’s right to the fruits of his judgment must be on just terms and secured by provision of security which is sufficient to guarantee performance of the decree which might ultimately be binding on the Applicant. On this postulation, see what the Court of Appeal said in the Kenya Shell case that

> **‘’…By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”**

See also what this court said in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** that:

> ***‘’*The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination’’.**

[30] The substantial loss under order 42 rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the Applicant intends the court to believe. Or by making comparisons as was submitted by the Applicant *that since the amount is huge-at least according to the Applicant-the court should find that the Applicant will suffer more hardship and suffering than the Respondent might suffer if he is forced to pay out the said sum; whilst on the other hand if the Respondent is kept out of the decretal sum she would not be affected.* This kind of submission is not defensible in light of what I have stated that none of the rights held by the parties is greater or the lesser than the other as to entitle a court of law to prefer one over and or not the other.

[31] I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the

time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY'S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden if to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of **Raila Odinga vs. IEEBC & 3 Others [2013] eKLR** that:-

> **''…a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden''.**

[32] Has the Applicant established to the required standards that the Respondent cannot refund the decretal sum if he succeeds? And has he laid before court such prima facie evidence as to cause a shift of evidential burden to the Respondent? The Applicant has just averred that the decretal sum of Kshs. 5,600,000 is a huge amount and the Respondent cannot refund the decretal sum herein should the appeal succeed. He has stated that he has honestly made those statements and so the evidential burden is shifted to the Respondent to state her assets and ability to refund the decretal sum herein in case the appeal succeeds. The Applicant relied heavily on the case of **ABN Amro Bank N.V. (supra)** but missed an important detail in the judgment of the Court of Appeal when it stated that:-

> **"…The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. <u>They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns''</u>. [Underlining mine]**

Following the case of **Amro Bank** (supra) and what the Court of Appeal said in the case of **Kenya Shell**, the Applicant should place cogent evidence before the court which show that the Respondent cannot refund the money, and it is in face of such limitation that the Respondent should discharge the evidential burden that she is of sufficient means to make a refund of the decretal sum. If it were to be otherwise, what Applicants will do, is to merely state that the Respondent is not able to refund the decretal sum in the event the appeal succeeds. And that would be shifting of the legal burden from the Applicant to the Respondent, which I have already stated never shifts from the Applicant for as long as it is him who is asserting the particular fact. The law never intended to be and will never go that way. Note that the Applicant in the case of **Amro Bank** which has been heavily relied by the Applicant herein, searched the returns filed in the Companies Registry and found that there was no asset which was registered to the name of the Respondent; and those are the reasonable grounds upon which the Applicant in that case swore and the court held that evidential burden had shifted to the Respondent to show it has means to repay the decretal sum. See the carefully chosen words used by the Court of Appeal in that case:-

> **'' <u>They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns''</u>…So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, <u>upon reasonable grounds</u>, 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''.[underlining mine]**

[33] The Applicant provided no evidence at all to show any financial limitation on the part of the Respondent. The Respondent on the other hand gave some useful information which is borne out of the pleadings, documents and the affidavit before court that she advanced the Applicant money which now forms part of the decretal sum herein. One wonders whether it is reasonable ground for the Applicant to state that such is a person of straw. Indeed, the Applicant admits in the submissions that the title to the property which has been attached is with the Respondent. The Respondent has explained how the title deed came to her possession. Therefore I will say just like

what the Court of Appeal stated in the case of **Kenya Shell Limited vs. Kibiru (1986) 1 KAR 1018** that:

> **"It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be?''**

[34] Before I close on this ground, the Applicant seems to mix matters of land and money decree. The subject matter of the suit is money and this is a money decree and not land. In light thereof, I hold that the Applicant did not bring this application timeously as a diligent suitor would. Looking at the explanations offered and the apparent conduct of the Applicant emerging therefrom, it is not unfair to infer a litigant who has deliberately delayed the cause of justice to his benefit. Such a person does not excite any tenderness from the eye of equity. He has not also established to the satisfaction of the court that the Respondent will not be able to refund the decretal sum herein, and therefore, he has not shown that substantial loss would occur unless the stay is ordered. The Respondent has averred she is of means and she advanced the decretal sum to the Applicant. I note, and I said this earlier, unlike the Applicant's submission, the Respondent has rights to the fruits of her judgment just as much as the Applicant has right to his appeal including the prospects that it will not be rendered useless. In the absence of evidence to the contrary, the court cannot doubt the Respondent's ability to refund the decretal sum herein if it becomes necessary-in which case there will be no substantial loss that the Applicant will suffer. Now, therefore, in such situation and the circumstances of this case, there is absolutely no reason why the Respondent should be kept away from the fruits of her judgment. The law dictates that I act justly; keep to the principle of proportionality, maintain equality of parties before the court. It is clear the direction the court is taking. But I should complete by deciding whether offering of security as the applicant has stated would tilt ground in favour of the Applicant?

Security of performance

[35] The Applicant has offered to give the attached property as security for the performance of such decree as may ultimately be binding on him. He says the security is sufficient to cover the decretal sum and indeed the title to the property is in the custody of the Respondent. The offer is a good gesture but it may not tilt the ground in favour of the Applicant since I have found that he will not suffer any substantial loss, and he can get a refund of whatever he pays. His redemption lies in the Respondent's ability to the refund the decretal sum herein. The reality of the law in this case is that the property is under attachment in execution of a decree which is governed by Order 22 of the Civil Procedure Rules, and attachment of such property is automatically lifted once he has paid over the decretal sum; the property is immediately redeemed. This should not be confused with a clog on chargor's equity of redemption under a mortgage scheme. That is why I stated that this is a money decree and not land case.

The Upshot

[36] The upshot of the above analysis of the court is that I dismiss the application dated 25th September, 2014 with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at Nairobi this 29th day of January 2015

F. GIKONYO

JUDGE