



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 39 OF 2014

AUTO SELECTION (K) LTD.....1ST APPELLANT/APPLICANT

LYSBETH GATIRA MBAE.....2ND APPELLANT/APPLICANT

JUSPER GITONGA

KIUBUTHI.....3RD APPELLANT/APPLICANT

-VERSUS-

JOHN NAMASAKA FAMBA.....RESPONDENT

RULING

By a notice of motion dated 30th June, 2014 filed in court on the same date, the applicants have principally sought for a stay of execution of the decree arising out of a judgment delivered by the Nyeri Chief Magistrates' Court on 29th May, 2014 pending the hearing and determination of the appeal they have lodged against that judgment.

The motion is based on the grounds that the appellants have been decreed to pay a monetary sum of Kshs. 2,736,061.30 plus costs and interest at court rates. The appellants are apprehensive that they are likely to suffer substantial loss if the execution proceeds and these sums are paid because if their appeal eventually succeeds they may not recover these monies from the respondent; their appeal, in their view, will thereby be rendered nugatory.

The motion is supported by the affidavit of Erastus Mwaniki who has described himself as a legal officer with Directline Assurance Company Limited, an insurance company which at the time material to the suit in the subordinate court covered motor vehicle registration number **KAS 078P**.

I gather from Mwaniki's affidavit that motor vehicle registration number **KAS 078P** was involved in a road traffic accident as a result of which the respondent was injured; the decretal sum is the quantum of damages the subordinate court assessed to be payable to the respondent in compensation for the loss and damage that he must have suffered.

The appellants are dissatisfied with the decision of the subordinate court because, in their view, the award was excessive and in any event contrary to the statutory provisions and judicial decisions on award of damages.

The appellants are ready and willing, and indeed at the time of hearing of the application, they had deposited the entire decretal sum in a joint interest earning account in the parties' advocates' names as

security in the event their appeal fails.

By a replying affidavit sworn on 11th September, 2014, the respondent's counsel opposed the application mainly arguing that the application is only intended to delay the respondent from enjoying the fruits of his judgment. The respondent's counsel has argued that although the appellants are appealing against the quantum of damages payable to the respondent, they never submitted on these damages in the magistrates' court. It is the counsel's view that the appellant's appeal is not merited and thus stay of execution of the subordinate court's decree is not warranted.

Counsel also swore that the respondent was disabled as a result of the accident and that he needs urgent medical attention; he proposed that the applicants be ordered to pay half of the decretal sum while the other half should be held in a joint interest earning bank account pending the hearing and determination of the appeal.

Parties' representatives sought to have the application disposed of by way of written submissions which they eventually filed and exchanged; I have understood these submissions to reiterate what the parties have deposed in their respective affidavits.

The grant of the order of stay under **Order 42 Rule 6(1)** of the Civil Procedure Rules is always discretionary; this discretion is, however, subject to **Order 42 Rule 6(2)** of the same Rules which stipulates when that discretion **will not** be exercised in favour of the Applicant. The rule spells out the circumstances when the grant of stay of execution will be declined notwithstanding the latitude given to court to exercise its discretion under **Rule 6(1)**. The sub rule provides as follows:

(2)

"No order for stay of execution 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 that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant."

My understanding of this Rule is to the effect that, over and above the discretion which the court enjoys to grant or refuse to grant a stay of execution order, it must be certain, whenever it deems it necessary to grant the order, that firstly, the Appellant has satisfied the court that he will suffer substantial loss if the order for stay is not made, secondly, he has demonstrated that his application has been made without unreasonable delay and thirdly, he has given security for satisfaction or performance of the decree in the event his appeal fails.

The satisfaction of these conditions does not necessarily guarantee an applicant to an order for stay of execution; the court may very well reject an application for the order of stay despite the applicant having satisfied these conditions if in its discretion the order for stay of execution is not warranted. It has been held elsewhere as will be shown in due course, for instance, that it is not normal in money decrees for the appeal to be rendered nugatory, if payment is made; in such cases a stay would not ordinarily be granted notwithstanding that the applicant has satisfied the foregoing conditions.

What influences the court's discretion, one way or the other, is whether the proposed appeal will be rendered nugatory. In **Kenya Shell Ltd versus Kibiru & Another (1986) KLR 410** the Court of Appeal was of the view that:-

It is also true to say that, in consideration of an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory.

The Court cited with approval the speech of Cotton LJ in **Wilson versus Church (No. 2) (1879) 12Ch D 454**, where the learned judge said:-

“I will state my opinion that when a party is appealing, exercising undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

The Court (Hancox J.A. as he then was) concluded that:-

“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruit of a judgment in his favour without a just cause.”

Again in **Butt versus Rent Restriction Tribunal (1982) KLR 418 Madan JA** (as he then was) spoke of the exercise of discretion and the question of the appeal being rendered nugatory in the following words:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory.”(See pages 419-420).

Looking at the applicants’ application from this perspective the simple question is whether their appeal would be rendered nugatory if a stay is not granted; in answering this question I am of the humble view that the decretal sum of **Kshs. 2,736,061.30**, is not, in the circumstances of this case an insubstantial sum; it is certainly a considerable sum.

The applicants’ counsel doubted the respondent’s ability to refund this sum if the appeal against him succeeded. The respondent did not make any response on this question; it has not been demonstrated that he has the means or he is capable of refunding the decretal sum if the appellants’ appeal is allowed.

The demonstration that the respondent is capable of refunding the decretal sum is an important consideration in determining whether a stay will be granted or not; this is important more so because as was stated by Platt Ag JA (as he then was) in the **Kenya Shell Ltd case**(supra);

“ It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made.”(See page 416).

Thus the question that matters in considering whether a stay of execution should be granted against monetary decrees would appear to me to be whether the decree holder has the necessary means to refund the decretal sum should it become necessary.

In the **Kenya Shell Ltd case** the Court of Appeal rejected the application for stay because it found as a fact (as per Gachuhi JA at page 417) that the respondent was a man of means who held an executive position that, in the court’s view, attracted a good pension. There was no evidence, according to the court, to show that the respondent was not a man of means. The court, in my humble opinion, was saying that the respondent was capable of refunding the decretal sum awarded to him if the appeal failed. The contrary is true, if the court was to find that the respondent was a man of limited financial capacity or if he could not demonstrate that he is capable of refunding the money, an order of stay would probably have been granted.

The respondent’s deafening silence on the question raised about his financial clout or to be more direct, whether he has the capacity to refund the decretal sum would invite an inference that he does not have such a capacity. This then implies that should execution be allowed to proceed and the decretal sum is paid, the applicants will certainly suffer substantial loss and their appeal will thereby be rendered nugatory. For this reason I would allow the application and grant the order for stay. In exercising my discretion in favour of the applicants, I have noted that the entire decretal sum has been deposited in a

joint interest earning account as security for the performance for the decree should the appeal fail and the application for stay was, in any event, timeously filed.

Even as I allow the application I am bound to bear in mind the words of Hancox JA in the **Kenya Shell Ltd case** quoted hereinbefore that much as it is important to grant a stay if the appeal is to be rendered nugatory, it is also important that, a litigant if successful should not be unduly deprived of the fruits of a judgment in his favour. For this reason I make an additional order that the appellants will take appropriate steps pursuant to the relevant provisions of the law and set down the appeal for hearing within six months of the date hereof failure of which the order for stay will lapse automatically. It is so ordered.

Signed, dated and delivered in open court this 24th day of April, 2015

Ngaah Jairus

JUDGE