REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 411 OF 2014

BAKE 'N' BITE (NRB)LIMITED…. APPELLANT/APPLICANT

VERSUS

DANIEL MUTISYA MWALONZI…RESPONDENT/DEFENDANT

RULING

By a Notice of Motion dated 25th September 2014 , the appellant Bake N Bite Limited brought an application seeking from this court orders:-

a. That there be temporary stay of execution pending the hearing and determination of the application.
b. That there be stay of execution of enforcing the whole judgment entered on 29th August 2014 in civil Case NO. 1622 of 2013 pending the hearing and determination of this appeal.

The application is brought under the provisions of Oder 42 Rule 6 (1), (2), (3), Oder 51 Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law.

The application is predicated on the grounds that :-

I. The appellant had lodged an appeal against the judgment of the Honourable court delivered on 29th August, 2014 and had indeed filed memorandum of appeal to wit, Nairobi HCCA No. 411 of 2014.
II. The trial court on 29th August 2014 categorically ordered that any further application for stay shall not be entertained which was contrary to the Civil Procedure Rules 2010 and Principle of Natural Justice which order in itself amounted to condemning a party unheard.
III. That the appellant/applicant was likely to commence execution of the judgment at any time.
IV. If the execution proceedings commence the appellant will suffer substantial irreparable loss and damage.
V. The appellant/applicant is ready and willing to deposit the entire judgment sum of kshs 60,000/- plus the special damages of kshs 3,000 and doctor's charges of kshs 5,000 aggregating to kshs 68,000 in court as security.
VI. This application has been brought without any undue delay before the same court.

The application is further supported by the affidavit of Seif Mohammed and other grounds as contained in the parties written submissions.

In his supporting affidavit, the deponent Mr Seif Mohammed Seif deposes that he is the Managing director of the appellant/applicant company and that the company challenges the judgment of the Chief Magistrate at Milimani Commercial Courts In C.C. No. 1626/2013 delivered on 29th August 2014.

Further, that the court did reject any attempt by the applicant to get a stay of execution in the lower court pending the filing of this appeal and that being dissatisfied with the said judgment wherein the respondent Daniel Mutisya Mwalonzi was awarded kshs 68,000 special and general damages, he has appealed and also applied for copies of proceedings and judgment in the said court. He avers that the appellant has serious triable issues to raise and be canvassed on appeal which appeal has high chances of success particularly with regard to ground No. 1 of the Memorandum of Appeal which challenges judgment for non- compliance with Section 35 of the Evidence Act.

That the execution of decree in the lower court was imminent and that unless stay is granted, the appeal shall be rendered nugatory and that it is the appellant's right to appeal. Further, that the appellant is willing to deposit in court as security for the entire judgment of shs 68,000.

The respondent Daniel Mutisya Mwalonzi opposed the application by the appellant and swore an affidavit on 21st October 2014.

He contends that the appeal does not raise any triable issues hence it has no chances of success. He also supports the judgment of the trial court which awarded shs 68,000/- which was not an excessive estimate and that the application seeks to deny him his lawfully obtained judgment. He maintains that the application is mischievous, misconceived, frivolous, vexatious and merely intended to buy time and frustrate the plaintiff's right to enjoy the fruits of his judgment. He urged the court to deposit the decretal sum in a joint interest account in the name of both advocates pending the hearing and determination of the application. He prays that the application be disallowed.

When parties advocates appeared before me on 23rd October 2014 they agreed to dispose of the application by way of written submissions.

The appellant filed-their submissions on 4th November 2014 whereas the respondent filed his on 2nd December 2014.

The submissions by both parties' advocates mirror the depositions in the rival affidavits with each relying on past decisions and law as enacted. The appellant/applicant relies on Order 42 Rule 6 (2) of the Civil Procedure Rules and the principles set out in the said provisions which he outlined as:-

1. If 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
2. Such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In their view, the grounds for stay of execution are now settled law as was held in the Court of Appeal decision of **Equity Bank Ltd vs West Link MBO Ltd (2013) e KLR** that an appeal does not operate as a bar to execution of judgment hence a party seeking stay of execution pending appeal must therefore demonstrate that they are not using the appeal to delay justice. They must not only show that they have an arguable appeal but also that they have come to court without undue delay.

They also relied on **Tarbo Transporters Ltd vs Absalom Dora Lumbani (2012) e KLR** wherein justice Gikinyi J held that stay of execution pending appeal is granted at the discretion of the court upon demonstration by the applicant that the application has been brought without unreasonable delay.

They referred to **Elena Dondoladoya Korir vs Kenyatta University (2012) e KLR** where justice Nzioki Wa makau set out the criteria used to determine grant of stay of execution pending appeal

" the application must meet a criteria set out in precedent and the criteria is best captured in the case of Halal & another vs Thornton & Turpin (193) Ltd KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag JA that:

"The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions.

1. ***Sufficient cause.***
2. ***Substantial loss would ensue from a refusal to grant stay.***
3. ***The applicant must furnish security***
4. ***The application must be made without unreasonable delay.***

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

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

Counsel for the appellant submits that the application was filed only seven days after the delivery of judgment in the lower court hence it was filed timeously.

In their submissions paragraph 7, it is stated that the respondent worked as a casual employee and therefore is unlikely to repay back the decretal sum once paid out to him, which in effect will occasion substantial loss to the applicant should execution of decree proceed pending the appeal.

He maintained that the appeal herein has overwhelming chances of success as shown by the grounds contained in the Memorandum of Appeal .

Further, that the respondent's replying affidavit is a mere denial and does not raise substantial objections to the application for stay.

In his brief submissions the respondent through his counsel Onguti and Company Advocates equally avers that Order 42 Rule 6(2) of the Civil Procedure Rules must be satisfied and that unfortunately the applicant in this appeal has not satisfied the court on the condition that it shall suffer substantial loss if the amount of shs 68,000 is paid out to the respondent.

On the submissions that the respondent if paid the decretal sum shall not be in a position to repay the same should the appeal succeed, it is contended by the respondent that in **Sofinac Co. Ltd vs Nelphaat Kimotho Mutuu (2013) e KLR** Odunga J held inter alia

" The appellant's belief that the respondent will be unable to repay the same is solely based on the appellant's lack of knowledge as to the respondents' financial capability and does not give rise to the presumption that the respondent will be unable to repay the sum. There must be factors that led to that presumption. The law of evidence places the onus of proof on the party making the allegation and a mere averment that due to the respondents' social and economic status she is unlikely to be able to refund the money is not tenable in Law".

The respondent also relied on **Stephen Wanjohi vs Central Glass Industries Ltd HCC 6726/91 Nairobi** where the court held that;-

" Financial inability of a decree holder is not a reason or allowing a stay……".

That the applicant had not demonstrated any peculiar circumstances that necessitate withholding of the decretal sum from the respondent decree holder.

That the applicant had merely stated that they will suffer substantial loss but not demonstrated what loss as was held in the Kenya Shell case that proof of loss is the corner stone of granting of an application for stay:

"***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 corner stone of both jurisdiction for granting stay. That is what has to be prevented. Therefore without this evidence,it is difficult to see why the respondents should be kept out of their money"***

The respondent submits that the appeal does not raise triable issues worth of determining by the court and that they have not fulfilled the condition of furnishing security for the due performance of decree. He cited **Republic vs Attorney General & 2 others exparte (COFEK) & Stephen Mutoro that "…….**one of the conditions for the grant of an order for stay is that an applicant should provide security" and **Equity Bank Ltd vs Taiga Adams Company Ltd (2006) e KLR that:**

"……of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought…….let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay……" which principle was also emphasized in **Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others CA Nairobi 291/1997.**

He submitted that it is the respondent who will be greatly prejudiced by a stay as he will be kept away from his fruits of a lawful judgment that it is in the interest of justice that stay sought be refused with costs as the application is an abuse of the court process.

Determination:

The conditions for the granting of a stay of execution pending appeal are now settled. An order of stay of execution is a discretionary one. However that discretion is fettered by the conditions or pre-requisites encapsulated in Order 42 Rule 6(2) of the Civil Procedure Rules. These condition are that:

The application must be made without undue delay;

The applicant must demonstrate that they will suffer substantial loss unless the order sought staying execution is granted; and

That the applicant should provide such security as may be ordered by the court.

On the first condition and whether the appellant/applicant herein has filed this application without undue delay, It should be noted that the judgment in CM CC 1626 was delivered on 29th August 2014. The appeal was filed on 4th September 2014 and the application filed on 25th September 2014.

In my view, the application was filed within reasonable time within 30 days of the date of judgment, which is also statutory period under Section 79G of the Civil Procedure Act, within which an appeal from the subordinate court should be filed to the High court as a matter of right. I am therefore satisfied that the application was filed timeously.

Regarding the second condition of substantial loss that is likely *to* be suffered by the applicant if stay is not granted, the applicant has submitted that the respondent being a casual worker, it is unlikely that he will be in a position to refund the decretal sum of shs 68,000/- should the appeal succeed, which will in effect render the appeal nugatory. The respondent rubbishes that submission as a mere allegation and that it has not been proved that he is not in a position to refund the money if paid and the appeal succeeds.

This court noted that the applicant did not state on oath in any of the depositions that the respondent is a person of no means and that he will be incapable of refunding the shs 68,000/- if he is paid and the appeal succeeds. The applicant's advocate only raised the issue of incapacity to reimburse the money in

his submissions. This court finds that submissions of counsel on factual issues are not evidence and the counsel for a party cannot be allowed to introduce factual evidence in his submissions, which facts were not deposed by his client. To do so would be allowing advocates to adduce evidence on behalf of their clients. And for reasons that the fact of the respondent's impecunity was only raised in the submissions, he could not have been expected to react to it in his replying affidavit.

The applicant has maintained in their application and supporting affidavit that they will suffer substantial loss if the money as decreed by the lower court is paid out to the respondent and the appeal succeeds. They did not indicate or specify what kind of loss they will suffer if the amount of shs 68,000/- is paid before the appeal is heard and determined.

Indeed, demonstrating what substantial loss is likely to be suffered, is the core to granting a Stay of execution of decree pending appeal.

In this case, the applicant has not complained that the amount of shs 68,000/- is so substantial that if paid out, its operations will be crippled and or completely grounded. Neither has it proved that the respondent who was a casual worker is so impecunious that if paid the said money, he would not be in a position to reimburse it if the appeal succeeds or that such reimbursement would be with difficulties.

From the evidence in the lower court, the appellant company deals in bakery business and has several branches in the country. How would payment of shs 68,000/- to a casual worker (then as we are not told what the respondent does currently or what assets he has or does not have) would ground a company like the appellant.

In **Daniel Cheptulu Rotich & 2 others vs Emirates Airline Civil Case No. 368/2001**, Musinga J held, and I agree that:-

" It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur……" substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum".

In **James Wangalwa & another vs Agnes Naliaka Cheseto (2012) e KLR** the court held that the applicant " ***must establish other factors which show that 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"***

In **Jeny Luesby vs Standard Group Ltd (2014) e KLR** it was held that ***granting of stay pending appeal is at the discretion of the court on sufficient cause being established by the applicant . The incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant ".***

*……**sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that the substantial loss may result to the applicant unless the order is made, and therefore the court may direct for the deposit of such security for the due performance of the decree or order as may ultimately be binding on the applicant where an applicant has been able to satisfy the court that the application has been made without unreasonable delay. ……The fact that execution process is in motion or the attached properties have been sold does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil procedure Rules".***

I reiterate that the applicant has failed to demonstrate that it will be totally ruined in relation to the appeal if it pays over the decretal sum to the respondent, and that it will be reduced into a mere explorer in the justice process if it does what the decree commands it to do without any prospects of recovering the money should the appeal succeed. In a money decree, substantial loss lies in the inability of the

respondent to refund the decretal sum should the appeal succeed. Yet as I have stated above, there was no such averment on oath and it only emerged in written submissions which as I have alluded to above , is not evidence.

It is trite law that he who alleges must prove (see Sections 107,108, 109 of the Evidence Act). Real and cogent evidence must be tendered by way of affidavit not by way of submissions by counsel for the applicant that the respondent is not possessed of any sufficient means to refund the shs 68,000/- should the appeal succeed.

The appellant also alleges that it has an appeal which raised triable issues with high chances of success especially on ground one of the Memorandum of Appeal.

This court has pronounced itself in several decisions that under Order 42 Rule 6 (2) of the Civil Procedure Rules, the applicant in seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. This is exemplified in several decisions including **Nakuru HCC 211/98- Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others** and the appellant's own authorities cited in support of this application namely, **Equity Bank Ltd vs West Link Mbo Ltd** (supra).

In this case, the applicant has not discharged its legal burden of proving that the respondent is not possessed of means to refund the money. Therefore, the respondent cannot be burdened to discharge the evidence that indeed he has means to refund the money if the same is paid to him and the appeal succeeds. Had the applicant discharged that burden, then the respondent would have been required, conversely, to provide an affidavit of means and in default, the court would be right in concluding that indeed, he would not be in a position to refund the decretal sum.

In my view, based on the above expositions, the respondent should only be restricted to accessing the fruits of his lawfully obtained judgment for sufficient cause, which has not been shown to the satisfaction of this court. As I have stated, the prospects of success of the appeal alone cannot be used to deny the respondent the execution of decree as reliance on that would be tantamount to summarily urging the appeal and determining it at the interlocutory stage without giving both parties, an opportunity to ventilate on its merits and demerits . In **Jason Ngumba case (2014) e KLR** the court held 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".

Nonetheless, what was stated in the case of **Absalom Dora vs Tarbo Transporters (2013) e KLR** is relevant as well 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."***

This court has many options of balancing out the parties rights in this case. Where it decides to grant stay it can do so on terms. Noting that the applicant has offered to deposit security for due performance of decree in order to insulate the respondent/decree holder from any loss should the appeal be rendered in his favour, I order that the decretal sum of shs 68,000/- plus all party and party costs of the suit in the court below to be agreed upon if not to be assessed and deposited in this court within 21 days from the date hereof, as a condition precedent to stay of execution of decree in CMCC 1626/2013 pending

hearing and determination of the appeal, upon which the said monies shall be held as security for performance of decree which may ultimately be binding upon the appellant. In default, the orders of stay herein granted lapses and the respondent shall be at liberty to execute decree. I further order that upon depositing of such decretal sum in court, the appellant shall take all the necessary steps to complete the process of readying this appeal for hearing and disposal within the next 90 days from the date of such deposit and in default, the orders of stay shall automatically lapse after 90 days from the date of deposit and the respondent may apply for release of the deposited funds.

Dated, Signed and Delivered at Nairobi this 21st day of April, 2015.

R.E. ABURILI

JUDGE

21.4. 2015

21/4/15

Coram: Aburili J

Court Clerk Kavata

Mr Kaburu holding brief for Abuga for the appellant

No appearance for respondent (date given in court)

Court – Ruling read and delivered in open court as scheduled.

R.E. ABURILI

JUDGE

21/4/2015