



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**MISC. CAUSE NO. 394 OF 2008**  
**In the Matter of the Advocates Act, Cap 16 of the Laws of Kenya**  
**AND**  
**In the Matter of Taxation of Costs between Advocate and Client**  
**KAGWIMI KANG'ETHE & CO. ADVOCATES.....APPLICANT**  
**Versus**  
**PENELOPE COMBOS.....1<sup>ST</sup> RESPONDENT**  
**ANTHONY COMBOS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

[1] There are two applications. One is made by the Applicant and the other by the Respondents. Both applications are dated 15<sup>th</sup> October 2014. The application by the Applicant is essentially for prohibitory order whereas that by the Respondents is for leave to appeal and stay of execution. I will set out the arguments for both applications as advanced by each party but I will determine each of applications separately.

**Application for Prohibitory Order**

[2] The Applicant has applied through a Notice of Motion dated 15<sup>th</sup> October for the following orders:-

- 1. A Prohibitory Order stopping the registration or any further dealings in respect of all that property known as Land Reference Number 7741/412 (Original No. 7741/71/4) situated in the City of Nairobi and registered in the joint names of the Respondents herein pending further orders of this honourable court.**
- 2. The subject property namely Land Reference Number 7741/412 (Original No. 7741/71/4) to be advertised and sold by public auction to recover the total outstanding decretal sum of Kshs. 1,583,884.12/- together with further accrued interest thereon until payment in full.**

**3. The Respondents be ordered to grant free and un-limited access to the subject property for the purpose of inspection and valuation.**

**4. The court to allocate a convenient date before the Deputy Registrar for the settlement of the terms and conditions of sale of the property.**

**5. Costs of valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.**

**6. Costs of this application be borne by the Respondents.**

[3] The application is expressed to be brought under Order 22 Rule 6 and Rule 18(2) (3) of the Civil Procedure Rules and Section 52 of the Advocates Act Cap 16 and Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. It is based on the grounds that:-

**a. On 19<sup>th</sup> June 2014, judgment was entered against the Respondents for the principal sum of Kshs. 947,485.42/- together with interest thereon at court rates from 27<sup>th</sup> January 2009 until payment in full being Advocates taxed costs due to the Applicant and a decree was issued on 8<sup>th</sup> July 2014.**

**b. The Respondents have failed to pay the said principal sum of Kshs. 947,485.42 together with accrued interest thereon such that the total outstanding decretal sum due and owing from the Respondents was Kshs. 1,583,884.12 as at 31<sup>st</sup> August 2014.**

**c. The judgment debtors are the joint registered owners of the subject property.**

**d. The Applicant is apprehensive that the subject property may be transferred or alienated in order to frustrate the execution of the decree and this application will be rendered nugatory in such event.**

**e. The Applicant is entitled to attach and sell the subject property under the supervision and directions of this honourable court in order to recover the outstanding decretal sum together with accrued interest thereon.**

**f. It will suit the interests of justice to grant the prayers sought herein.**

[4] The application is supported by the Affidavit of **GEORGE KANG'ETHE** sworn on 15<sup>th</sup> October 2014 who is the proprietor of the Applicant firm. The Applicant reinforced the above grounds in his affidavit. The Applicant also relied on the cases cited in the Applicant's List of Authorities filed herein on 29<sup>th</sup> October 2014. The applicant has provided a copy of the Decree as exhibit "**GK1**" in the Supporting Affidavit. He averred that to-date the judgment debtors have not paid a penny towards settlement of the said decree and are thereby indebted to the Applicant in the total sum of Kshs. 1,583,884.12/- as at 31<sup>st</sup> August 2014 together with further accrued interest thereon. The Respondent has not shown it has paid anything on the decree and has not even contested that fact.

[5] Of importance, at paragraphs 4 and 5 of the Supporting Affidavit, the Applicant deposes that to the best of his knowledge, the Respondents/Judgment debtors do not own any other valuable moveable assets which can be attached and sold to satisfy the outstanding decretal sum due and owing. He has conducted a search at the Nairobi Lands Registry and established that the judgement debtors are the joint registered owners of the subject property. A copy of the Certificate of official search dated 29<sup>th</sup> August 2014 is attached in the Affidavit as exhibit "**GK 2**" as proof of ownership of the said property. Further at paragraph 6 and 7 of the Supporting Affidavit, the Applicant has averred that he is apprehensive that the subject property may be transferred or alienated by the Respondents in order to frustrate the execution of the decree against them and the Applicant will be prejudiced substantially and the outcome of the application herein will also be rendered nugatory. The Applicant further stated that the Respondents are

not Kenyan Citizens and they may sell and/or transfer the property and thereafter leave the jurisdiction of this honourable court anytime and without notice.

[6] The Applicant further deposed that he has established from the searches conducted at the Lands Registry that the Respondents have already sub-divided the original land namely; **LR No. 7741/71, Nairobi** into several portions which they intend to alienate to third parties. The Applicant deposed that it will be substantially prejudiced in such eventuality since there will be nothing to attach and sell to recover the outstanding decretal sum. He stated that he is entitled to attach and sell the subject property under the supervision and directions of this honourable court in order to recover the outstanding decretal sum together with interest thereon all amounting to Kshs. 1,583,884.12/- as at 31<sup>st</sup> August 2014. Therefore, it will be in the interests of justice to grant the prayers sought herein to facilitate the recovery of the taxed costs which have been outstanding for a period of almost six (6) years to-date.

[7] On 15<sup>th</sup> October 2014, the court granted interim orders prohibiting any further dealings on the property pending further orders of the Court. The said order was presented at the Lands Registry and registered against the property on 16<sup>th</sup> October 2014 (Please refer to Exhibit “**GKK1 & GKK2**” annexed at paragraph 8 of the Replying Affidavit of George Kagwimi Kang’ethe filed on 29<sup>th</sup> October 2014 in opposition to Respondents Notice of Motion seeking leave to appeal out of time). The Court issued the interim Order on the basis of **Order 22 Rule 18(2) of the Civil Procedure Rules** which grants the court the power to grant any execution order without notice to the other party in order to avoid defeat of the ends of justice. **Order 22 Rule 6** of the Civil Procedure Rules further states that:-

**“When the holder of a decree desires to execute it, he shall apply to the court which passed the decree.....”.**

[8] The Applicant cited more law and stated that the Applicant has sufficiently demonstrated that he has a valid decree issued by this honourable court which has not been satisfied by the Respondents and that he is entitled to reap the fruits of his judgment by executing the decree through any of the various legal means allowed by the law. This honourable court has the power and duty to enforce execution of the decree under Section 38 of the Civil Procedure Act Cap 21 of the Laws of Kenya. Section 38(b) reads as follows:-

**“Subject to such conditions and limitations as may be prescribed, the court may on the application of the decree holder, order execution of the decree:-**

a. ....

**b. By attachment and sale or by sale without attachment, of any property”**

Therefore a decree holder is entitled to attach and sell “**any property**” of the judgment debtor including land.

[9] They also relied on **Section 44 (1) of the Civil Procedure Act Cap 21** of the Laws of Kenya which states as follows:-

**“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf shall be liable to attachment and sale in execution of a decree”**

The Applicant therefore acted properly and in accordance with the law when he applied for attachment of the Respondents property (**LR No. 7741/412 (original No. 7741/71/14)** Nairobi. In any event, **Section 52** of the Advocates Act Cap 16 of the Laws of Kenya States that:-

**“ Any Court in which an Advocate has been employed to prosecute or defend any suit or**

**matter may at any time declare the Advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat that charge shall except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the Advocate.”**

[10] On those reasons, the Applicant is convinced that he is entitled to seek a charging order and/or an attachment order against the subject property and auction it to recover his costs. The Applicant refuted claims in the affidavit by **JAMES SINGH GITAU** in paragraph 8 and 9 thereof. The Applicant submitted that this application is not made in bad faith or on extraneous considerations. He challenged the said deponent to provide the specific nature of the bad faith or extraneous considerations which he alleges against the Applicant. With a decree which has not been satisfied the Applicant is entitled to attach and sell ANY of the property of the Respondents pursuant to the provisions of Section 38 and 44(1) of the Civil Procedure Act, Order 22 Rule 6 and 18 (2)(3) of the Civil Procedure Rules and Section 52 of the Advocates Act Cap 16 of the Laws of Kenya.

[11] The Applicant rejected the offer by the Advocate for the Respondents to deposit the decretal sum in a joint account in the names of both parties as security or for any other security in order to avert execution. His reasons were that the proposal has no basis in law and therefore not acceptable to the Applicant because:-

- i. The Respondents have not filed an application seeking a stay of execution of the decree.
- ii. The Applicant has a valid and enforceable decree against the Respondents and there is no justification to stop the execution of the same.
- iii. The Applicant is entitled to reap the fruits of his judgment which has taken a period of six (6) years since the process of taxation commenced against the Respondents.
- iv. There is no Affidavit filed by the Respondents (except by their Advocate) stating what loss and/or substantial loss (if any) they stand to suffer if the decree is executed.
- v. The Respondents have not filed any Appeal yet!

[12] See the case of **ALIBHAI SHARIFF & SONS LTD vs. TECHNICAL TRADING COMPANY LIMITED, HCCC NO. 1950 OF 2000** by the honourable Mr. Azangalala J. (as he then was) who rejected an offer to deposit the decretal sum in a joint account. After all, the Respondents are the authors of their own misfortune for having filed and withdrawn the application for stay of execution. They cannot now purport to informally urge this honourable court to stay the execution of the decree in exchange for depositing the decretal sum in a joint account without a substantive application in that behalf.

#### **Applicant's Submissions on Respondents' application**

[13] It was the Applicant's submission that, since the court declined to issue an interim order of stay of execution, therefore, prayer 2 of the application is spent. The prayer was for stay of execution **“pending the hearing of this application”** as expressly stated on the face of the application. The Applicant was of the view that, essentially, therefore, the motion seeks orders for leave to appeal against the orders given on 19<sup>th</sup> June 2014 and to file the Notice of Appeal out of time. See also submissions by counsel for the Respondent. The Applicant urged the court to disregard any submissions on stay of execution of the decree in the absence of application in that behalf.

[14] The Applicant opposed the application on the basis of the Replying Affidavit of **GEORGE KANG'ETHE** sworn on 29<sup>th</sup> October 2014 and Applicant's List of Authorities filed on 29<sup>th</sup> October 2014. He submitted that the application is fatally defective and incompetent in that the Applicant has not invoked the relevant provisions of the law to enable this honourable court to consider and grant leave to

Appeal and/or to enlarge the time as sought. The power and jurisdiction of the court to enlarge time is vested under the provisions of **Order 50 Rule 6 of the Civil Procedure Rules** and not under any of the provisions of the law under which the application is purported to have been filed. In the premises, the jurisdiction of this honourable court has not been invoked and the orders sought cannot be granted. The Notice of Appeal filed by the Respondents in this court on 30<sup>th</sup> June 2014 and at the court of Appeal on 7<sup>th</sup> July 2014 in respect of the same decision/order had not been withdrawn by the Respondents. They were still on record by the time the application was filed. The Applicant purported to withdraw the same on 31<sup>st</sup> October 2014 after being served with the Respondent's Replying Affidavit sworn on 29<sup>th</sup> October 2014 which raised the issue at paragraph 4 thereof. Nonetheless, the Applicant submitted that the purported withdrawal is inconsequential since the Notice of Appeal filed at the Court of Appeal on 7<sup>th</sup> July 2014 has not been withdrawn to-date. It would be superfluous and/or an abuse of the process of the court to grant leave to file a second Notice of Appeal while the first notice is still on record at the court of Appeal. This honourable court should not act in vain.

[15] In any event, the application seeking leave to appeal has been filed after a lengthy, inordinate and inexcusable delay on the part of the Respondents and no justifiable reason has been given to sufficiently explain why the application was not made soon after delivery of the Ruling on 19<sup>th</sup> June 2014 and/or immediately after the Respondent's counsel was served with the Applicant's Replying Affidavit sworn and filed herein on 8<sup>th</sup> September 2014 which alerted the Respondent under paragraph 3 thereof that leave to Appeal had not been sought by the Respondents. A party seeking a discretionally remedy ought to act swiftly otherwise the court is entitled to deny the grant of the remedy sought. Therefore, this honourable Court has no jurisdiction to grant an order for stay of execution of the decree in the absence of a valid notice of Appeal and/or an application seeking an order for stay of execution. Furthermore, the Applicant invited court to note that on 14<sup>th</sup> October 2014 the Respondents withdrew their application dated 13<sup>th</sup> August 2014 seeking for an order of stay of execution of the decree after realizing and acknowledging that the application was incompetent in the absence of leave to Appeal against the subject decision having been sought. The situation has not changed and they are acting improperly.

[16] In any case, the request for stay of execution is belated and cannot be granted at this stage since execution proceedings have already taken place and the Respondents property namely, **LR No. 7741/412 (Original No. 7741/71/4)** was attached vide a Prohibitory Order given on 15<sup>th</sup> October 2014. The said Prohibitory Order has already been registered against the property. It is also on record that this honourable court declined to grant a temporary order of stay of execution when the application was presented under Certificate of Urgency on 15<sup>th</sup> October 2014. The Respondent is estopped from re-visiting the same prayer again as the same is already spent. In the premises, an order for stay of execution if granted at this stage would be irregular, un-procedural and prejudicial to the Applicant who is entitled to the fruits of the judgment and to execute the decree. See the following authorities:-

a. **Vantage Road Transporters Ltd & Another –vs- Mistry Valji Naran Mulji & Others Civil Application No. NAI 223 of 2005 (132/2005 UR)**

b. **Mawji Patel –vs- Tony Keter – HCCC No. 140 of 1999**

They have not shown any justification or the substantial loss that they will suffer as required under Order 42 Rule 6(2) of the Civil Procedure Rules. The application for stay is filed with inordinate delay. See the following authorities:-

a. **Kenya Shell Limited –vs- Kibiru & Another Civil Application No. NAI 97 of 1986.**

b. **John Geoffrey Nganga –vs- Richard Otieno Kwachm HCCC No. 311 of 1996.**

c. **Dr. Kea N. Barua & Another –vs- Town Construction Company Limited – Civil App. No. NAI 47 of 2005 (UR. 25/2005).**

[17] The Applicant submitted that he is not an impecunious person who cannot be able to refund the

decretal sum to the Respondents if the intended Appeal succeeds. They have the onus of proving that the Applicant is so impecunious that he has no means of refunding the decretal sum if the intended appeal was eventually successful. Even without the said proof, the Applicant has given an undertaking under paragraph 11 of the Replying Affidavit that he is not impecunious and shall refund the money if the intended Appeal is successful. See the case of **VALLBODAS RAGHAVJI JETHA –VS- GHASHIRANT ZAVERCHAND VAGHJI SHAH T/A SUPREME STYLES, CIVIL APPLICATION NO. NAI 26 OF 1989** where the Court of Appeal while dealing with an application for stay of execution of money decree stated as follows:-

**“The Applicant has a money decree against him. So, besides demonstrating that any success in the intended appeal would be rendered nugatory, he has to persuade us that the respondent is so impecunious that the applicant will never be able to get his money back.....”**

**The applicant depones *inter alia* in his Affidavit in support of the Notice of Motion that from his many dealings with the Respondent he is able to swear that the latter’s financial position is unsound. With respect, it is not sufficient for the Applicant merely to swear. He ought to have furnished facts and figures of the many dealings. The burden was all the time on the Applicant to prove as required that the Respondent is impecunious. The Respondent had no such burden to establish his healthy financial position by producing bank statements as the burden did not at any stage of the proceedings shift to him.**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

They also relied on the case of **KENYA SHELL LIMITED –VS- KIBIRU & ANOTHER, CIVIL APPLICATION NO. NAI 97 OF 1986** where the Court of Appeal stated as follows:-

**“But this Court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The Affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings.**

**It is usually a good rule to see if order XLI 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should keep out of their money.”**

And on the following other authorities:-

- 1. John Geoffrey Nganga –vs- Richard Otieno Kwach HCCC No. 311 of 1996.**
- 2. Dr. Kea N. Barua & Another –vs- Town Construction Company Limited – Civil App. No. NAI 47 of 2005 (UR. 25/2005).**

[18] He urged the court to dismiss the Respondents’ application with costs.

**RESPONDENTS’ SUBMISSIONS**

**(On Applicant's Notice of Motion dated 15<sup>th</sup> October 2014)**

[19] The Respondents opposed the Applicant's application dated 5<sup>th</sup> October 2014. They filed Replying Affidavit sworn by their Advocate, **JAMES GITAU SINGH**, on 29<sup>th</sup> October 2014. He deposes that whilst it is true that the Applicant obtained judgment against the Respondents as detailed by the Applicant in his affidavit, the Respondents were dissatisfied with the Court's Ruling and Orders and filed a Notice of Appeal on 30<sup>th</sup> June 2014 and an application for stay of execution pending appeal dated 13<sup>th</sup> August 2014. The application for stay of execution pending appeal was later withdrawn after realizing that leave to appeal against the Ruling and Orders of 19<sup>th</sup> June 2014 had inadvertently not been obtained. The Respondents have now filed an application seeking leave to appeal the said Ruling and Orders of 19<sup>th</sup> June 2014. The Respondent stated the following as the issues for determination;

- 1. Whether the Applicant should be allowed to execute the decree immediately.**
- 2. Whether the Respondents' appeal will be rendered nugatory and cause the Respondents to suffer substantial and irreparable loss if execution proceeds.**
- 3. Whether the Applicant exhibited bad faith by rejecting the Respondents' proposal to deposit the decretal sum in court and proceeded to apply for execution the next day.**

[20] According to the Respondent the Applicant should not be allowed to execute the decree immediately considering that a proper appeal is yet to be filed. The Respondents are desirous of pursuing an appeal against the Ruling and Orders of 19<sup>th</sup> June 2014. They filed a Notice of Appeal, within time, on 30<sup>th</sup> June 2014. They have also filed an application seeking leave to appeal against the said Ruling and Order of 19<sup>th</sup> June 2014 and extension of time within which to note the appeal. The question before this honourable Court is therefore whether execution of the Decree dated 19<sup>th</sup> June 2014 should be stayed and the Respondent be allowed to pursue an appeal challenging that Decree. **Order 22 Rule 22** of the Civil Procedure Rules provides as follows:

**“(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.**

**(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.**

**(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit”**

[21] The subject property, LR NO. 7741/412 is the Respondents' marital home. The Respondents are willing to deposit the decretal amount in Court and urge the Court. And in the circumstance allowing the sale of the Applicant's matrimonial home while they are pursuing an appeal would visit on them a grave injustice. The error of the Advocate should not be visited on the client, especially in the present situation where the consequence of that error would be that much more devastating on the livelihood of the Respondent. In the case of *MURAI vs. WAINANA*, as quoted by Kneller J in *KIPANGA MBOROGI vs. FARHAT T RALIWALLA (1984) eKLR*, the Court held that: an Advocate's bona fide error on a point of law is a mistake and constitutes sufficient reason for the purposes of considering the exercise of the Court's discretion. Similarly in *George Roine and Another versus John P. Nangurai (1999) eKLR (Appendix 2 hereto)* the Court of Appeal borrowed the reasoning in the *Murai* case.

[22] The Respondents have explained the mistake that led to their advocate not requesting for leave to appeal against the Ruling and Order of 19<sup>th</sup> June 2014 in their application dated 15<sup>th</sup> October 2014 and beseech the Court to exercise its discretion in the Respondent's favour and grant the Respondents leave to appeal as prayed.

[23] The Respondents believe that their appeal will be rendered nugatory and cause the Respondents to suffer substantial and irreparable loss if execution proceeds. The loss will be even more substantial considering that the Applicant seeks to attach the Respondents' matrimonial property to satisfy the Decree of 19<sup>th</sup> June 2014. The Respondents would suffer untold difficulty and trauma. Grant of leave to appeal without stay of execution will be in vain because the value of the home is much more than its monetary worth and its loss would not be compensable in damages. The Respondent humbly submitted that they have met the conditions under **Order 42 Rule 6 (2)** of the Civil Procedure Rules for stay of execution. The application has, in the circumstances, been made without unreasonable delay. The Respondents are also set to suffer substantial loss unless an order for stay of execution is made. The Respondents want to file an appeal against the decree and it is only just and fair that execution of the challenged Decree be stayed pending the determination of the appeal. The Respondents are ready and willing to offer such security as may be ordered by the court pending the determination of their intended appeal. In particular, they proposed to deposit the decretal sum in court or in a joint account held in the names of both parties' advocates. See **Bungoma High Court Miscellaneous Application 42 of 2011: James Wangalwa & Another versus Agnes Naliaka Cheseto (2012) eKLR (Appendix 3 hereto)** in which the learned Judge dealt with stay of execution pending appeal by the High Court under Order 42 Rule 6 as follows:

**“The granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is grantable 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. See the Halsbury's Law of England, vol.17, paragraph 14:**

**14. Incidence of the legal burden ..... in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.**

**Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:**

- a) Substantial loss may result to the applicant unless the order is made,**
- b) The application has been made without unreasonable delay, and**
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”**

The learned Judge went further to quote the case of ***Mukuma versus Abuoga (1988) KLR 645 (Appendix 4 hereto)*** in which it was held that:

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

[24] The Respondents urged this honourable Court to preserve the status quo of the parties so as not to allow them to suffer such loss that would render their appeal nugatory. The court should order stay of execution. According to the Respondents, the Applicant exhibited bad faith by rejecting the Respondents' proposal to deposit the decretal sum in court and proceeding to apply for execution the next day. The Respondents are convinced that the Applicant's application is meant to traumatize the Respondents than to satisfy the Decree of 19<sup>th</sup> June 2014. This is because the Applicant flatly rejected the Respondents'

proposal to deposit the decretal amount in court as security pending the filing of a formal application for leave to appeal against the Decree. The proposal to deposit the decretal sum in Court was made so as not to prejudice the Applicant as they pursue their application for leave to appeal. The Applicant would not be prejudiced if the decretal sum is deposited in Court pending the determination of the Respondents' appeal. The Applicant has not shown that the property known as LR No. 7741/412 is the only asset belonging to the Respondents within the Court's jurisdiction. It is true that the Respondents are foreigners but they reside and work for gain within the Country. The Applicant has represented the Respondents in several matters and is aware that they have movable and liquid assets which can settle the decree of 19<sup>th</sup> June 2014. Indeed, the Respondents made an application to deposit the decretal amount in Court which demonstrates that they are able to meet the sum. The mode of execution sought by the Applicant therefore demonstrates bad faith. Even if the Applicant was willing to refund the decretal amount to the Respondents in the event of their appeal succeeding it would be impossible to restore them to their original position since the property would have been auctioned off.

[25] The Respondents concluded by stating that they have shown that they have no intention of depriving the Applicant any monies that may be due to him. They are only intent on pursuing an appeal of the Decree. The Respondents, therefore, humbly urged this honourable Court to disallow the Applicant's application dated 15<sup>th</sup> October 2014 and grant the Respondents leave to appeal against the Decree of 19<sup>th</sup> June 2014 upon such terms as it deems just and fair to all the parties.

**Respondent's  
(On Application Dated 15<sup>th</sup> October 2014)**

**Submissions**

[26] The Respondents' application essentially seeks the following prayers:-

- i. That they be granted leave to appeal against the Ruling and orders given on 19<sup>th</sup> June 2014;**
- ii. That this Court do enlarge and extend time within which the Respondents can file an Notice of Appeal against the Ruling and Order of 19<sup>th</sup> June 2014.**

The Respondents' application is supported by the grounds in the application and Mr Amaan Kassam's supporting and supplementary affidavit sworn on 15<sup>th</sup> October 2014 and 10<sup>th</sup> October 2014 respectively. They provided the factual background of the application but most important explanation is that Mr. Amaan Kassam, an advocate who was holding Singh's brief inadvertently failed to seek leave to appeal as advised; and Mr Singh believing that leave had been obtained filed a Notice of Appeal on 30<sup>th</sup> June 2014 (within time) and requested for copies of certified proceedings and Ruling for purposes of filing an appeal. See exhibit AK 2 and 3. The omission was no, therefore, intentional. The Respondents also made elaborate submissions in opposition to the application by the Applicant on this omission and why they should be granted leave and extension of time to file appeal. I need not rehash those submissions. They have annexed **Exhibit AK 4-** a draft Memorandum of Appeal as proof that the Respondents have an arguable appeal. They are ready to furnish security for due performance of the decree of 19<sup>th</sup> June 2014 as may be binding on them as they seek leave to appeal and subsequently apply for stay of execution pending appeal.

[27] Contrary to the arguments by the Applicant, proper enabling law has been cited namely inter alia, Order 43 of the Civil Procedure Rules which provides a list of Orders and Rules in which appeals shall be of right meaning that leave is to be sought for those not listed thereunder. As Section 51(2) of the Advocates Act and Section 1A, 1B and 3A of the Civil Procedure Act are not in the list, leave is required. In any event, failure to cite the provisions of the law under which an application is filed is not fatal to an application. See Order 51 Rule 10(2) which states that:

**“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

And Order 51 Rule 10(1) portends that “Failure to state an Order, Rule or Statutory provision under

which an application is filed shall not be used to defeat the application.” The focus of the court should be on the substance of the application. The application is seeking leave to appeal against the Orders of 19<sup>th</sup> June 2014. Therefore, the court has jurisdiction to grant leave. See the case of *DT Dobie & Co (K) Limited Vs. Alfred Machayo, Civil Application No. 337 of 2004 (Appendix 1)* at page 3 where it was stated:-

**“The only power donated to the superior court under Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya is for “extension of time for giving notice of intention to appeal for a judgment of the High Court.””**

Section 1 of the Appellate Jurisdiction Act defines judgment to include “*decree, order .... and decision.*” The Section therefore applies here and leave sought is required in respect of the Court Order and Ruling of 19<sup>th</sup> June 2014. See Hon. Justice Mabeya in *Nairobi HCCC 624 of 2007, Kanyotta Holdings Ltd versus Kenya Shell Ltd (Appendix 2)* at Page 3. The court should focus on “*focus on substantive justice.*” In view of the above, the Respondents should be given an opportunity to pursue their appeal. An inadvertent omission by counsel should not deprive the Respondents their right to apply for leave to appeal and pursue their appeal. See the case of *PHILLIP CHEMWOL & ANOTHER vs. AUGUSTINE KUBENDE (1986) KLR* Apaloo JA.

[28] The delay in filing this application has been explained. The moment the Applicant’s advocate realized that leave to file an appeal had not been sought they withdrew the said application and have now filed this one. The urged the Court to exercise its unfettered discretion, the overriding objective principle and Article 159 of the Constitution and allow the Respondents’ application.

## **DETERMINATION**

### **Leave to appeal**

[29] Arguments which have been presented by both parties on the application for leave are strong and well founded. I have considered all of them. I have also considered the applicable law herein and the circumstances of this case. Preliminarily, however, I should state that Mr Kang’ethe took out an objection on the failure to cite the rule or provision of law on which the application is made. He argued this point forcefully and majestically as good counsel would do. But, with the enactment of the new Constitution and the overriding objective there is added or new sparkle to the practice of law and adjudication of case; moving from the era of basing judicial decisions upon undue technicalities to one of serving substantive justice. Other than the express provisions of Order 51 rule 10 of the Civil Procedure Rules, we have the elegant provisions of Article 159(2) (d) of the Constitution which depreciated all such technicalities which do not affect the rights of the parties. Accordingly, I find and hold that failure to cite or citing wrong provisions of the law is not fatal to an application. I will, therefore, determine the application for leave and extension of time on merit.

[30] The point on which this decision will turn is whether the delay herein has been explained and, therefore, excusable. I note the Respondents’ advocate committed double omissions. He did not apply for leave to appeal yet he filed Notice of Appeal in this court and the Court of Appeal. He has withdrawn the Notice filed in this court. The status of the notice filed in the court of appeal is unknown. I note this is an omission by counsel and I will not visit it upon the Respondents. See what Apaloo JA. Said in the case of *PHILLIP CHEMWOL & ANOTHER vs. AUGUSTINE KUBENDE (1986) KLR* on blunders that:-

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits...The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

[30] Similarly in *George Roine and Another versus John P. Nangurai (1999) eKLR (Appendix 2 hereto)* the Court of Appeal borrowed the reasoning in the *Murai* case and quoted as saying:

**“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politically referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of justice”.**

[32] Taking into account all that has been submitted, I am convinced that the omission and the delay in applying for leave to appeal has been explained satisfactorily. I therefore, find and hold that the omission was that of counsel. Accordingly, I grant the Respondents leave to file appeal against the Ruling and Order of 19<sup>th</sup> June 2014. The requisite Notice of Appeal shall be filed within 14 days of today. The said advocates will, however, pay thrown away costs to the Applicant.

### **Execution and Stay of execution**

[32] The application before me is for attachment and sale of immovable property. The Respondent argued the attached is a matrimonial home and its attachment and sale will cause irreparable damage to them. The way I understand the law on execution by way of attachment and sale of the property of judgment-debtor is that, unless expressly exempted by law, any property belonging to the judgment-debtor is liable to attachment and sale in execution of a decree. Section 38(b) of the Civil Procedure Act Cap 21 of the Laws of Kenya is relevant and as follows:-

**“Subject to such conditions and limitations as may be prescribed, the court may on the application of the decree holder, order execution of the decree:-**

c. ....

**d. By attachment and sale or by sale without attachment, of any property”**

[34] I will also refer to **Section 44 (1) of the Civil Procedure Act Cap 21** of the Laws of Kenya which states as follows:-

**“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf shall be liable to attachment and sale in execution of a decree”**

Therefore, as the Applicant holds a decree against the Respondents, the immovable property belonging to the judgment-debtors herein is also liable to attachment and sale in execution of a decree. Accordingly, **(LR No. 7741/412 (original No. 7741/71/14)** Nairobi is liable to attachment and sale in execution of the decree against the Respondents as judgments-debtors and owners of the said property.

[35] I should also state that the law has provided specific ways of attachment and sale of different types of properties belonging to the judgment-debtors. Attachment of immovable property is done through a prohibitory order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete upon registration of a copy of the prohibitory order or inhibition against the title to the property. See Order 22 rule 48 of the Civil Procedure Rules. Thereafter, follows is affixing a copy of the prohibitory order on a conspicuous part of the property, order of sale, and settlement of terms of sale of the attached property.

[36] I note that the court had issued interim prohibitory order on the subject property and the said order has been registered already against the properties in question. Prohibitory order is issued in execution of a decree. There is no dispute that the decree herein has not been satisfied. Therefore, nothing would prevent the court from issuing a prohibitory order and sale of the attached property. Accordingly, I issue a prohibitory order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete upon registration of a copy of the prohibitory order or inhibition against the title to the property. But before I give my final order on whether the property should be sold, let me consider the other arguments on stay of execution especially now that I have granted the Respondents leave to appeal.

### **Stay of execution**

[36] There is really no formal application for stay of execution pending appeal as the application was withdrawn. The only request for stay of execution is styled as follows:-

**a. THAT there be a stay of execution of the Ruling and Orders of 19<sup>th</sup> June 2014 pending *inter partes* hearing of this application.**

[37] But copious arguments were made by the Respondent on Order 42 rule 6 of the Civil Procedure Rules and were replied to by the Applicant. The Respondents seem to argue that the attached property is a family home and if it is sold they will suffer irreparable damage especially now that they are zealous of pursuing their right of appeal. They forget that the Applicant is a decree holder and he has rights in the decree which are not the lesser. They also proposed to deposit the entire decretal sum in the court or in a joint interest earning account as a sign of good faith. The proposal was rejected by the Applicant and the Respondents saw the rejection as a demonstration of bad faith on the part of the Applicant. They submitted that the rejection of their proposal just shows that the Applicant is bent at selling their property rather than obtaining satisfaction of the decree herein. Even if I were to put these arguments on the legal threshold under order 42 rule 6 of the Civil Procedure Rules, I will have to balance the rights of both parties to almost symmetrical bound by asking the following traditional questions;

**a) Has the application been made without undue delay?**

**b) Will substantial loss occur unless stay is ordered? And**

**c) What security is sufficient to satisfy the decree which might ultimately be binding on the Respondents?**

[38] There is no formal application for stay so far. Even the one I am considering was filed on 15<sup>th</sup> October 2014 on a decision I made on 19<sup>th</sup> June 2014. There is delay there. The delay may be excused and the question would be whether substantial loss would occur unless stay is granted. Substantial loss normally lies in the inability of the Decree-holder to refund the decretal sum if the appeal is successful. Such occurrence, I always refer to it as converting the appellant into mere or pious explorer in the judicial system. He will have a barren judgment which he cannot realize. That is the loss which is sought to be prevented by stay pending appeal. In this case, all parties agree that the Applicant is able to refund the decretal sum in the event the appeal succeeds. The Respondents on the other hand have confirmed that they are able to pay the decretal sum except they want to pay it in court or in a joint interest earning account. The proposition is selfish and totally oblivious of the rights of the decree-holder in the decree. On that basis alone, the application for stay will fail. I wonder why the Respondents have prominently decried that the sale of the property should be stopped in order to prevent an injustice to them. Yet they forget that they hold the key to saving their property by paying over the decretal sum to the decree-holder. They will not suffer any prejudice as the decree-holder has the ability to make a refund. There is therefore no justifiable reason in law to postpone the enjoyment of the fruits of judgment by the decree-holder herein. The decree-holder is entitled to assert on his right to realize his judgment and reject a proposal he thinks will down-trod on his rights. Such rejection cannot be equated to malice or mala fides on the part of the decree-holder. I, therefore, reject the request for stay of sale of the attached property. However, I will allow the Respondents to pay over the decretal sum to the Applicant within 30 days of today.

Effectively, I grant a stay of sale of the attached property for thirty days only. Consequently, if the decree is not satisfied within the thirty days, the attached property will be sold on terms that will be settled by the Deputy Registrar at such time as shall be appointed by the Deputy Registrar.

### **Findings and orders**

[39] Ultimately, I make the following orders:-

- 1. Leave to the Respondents to appeal against the ruling and order made on 19<sup>th</sup> June 2014. The requisite Notices of Appeal to be filed within 14 days of today.**
- 2. A Prohibitory Order stopping the registration or any further dealings in respect of all that property known as Land Reference Number 7741/412 (Original No. 7741/71/4) situated in the City of Nairobi and registered in the joint names of the Respondents herein.**
- 3. The Respondents shall pay to the Plaintiff the decretal sum within 30 days of today. In default thereof, the attached property namely Land Reference Number 7741/412 (Original No. 7741/71/4) to be advertised and sold by public auction to recover the total outstanding decretal sum of Kshs. 1,583,884.12/- together with further accrued interest thereon until payment in full.**
- 4. The Respondents shall grant free and un-limited access to the subject property for the purpose of inspection and valuation.**
- 5. The Deputy Registrar shall settle terms and conditions of sale the property.**
- 6. Costs of valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.**
- 7. Effectively, sale of suit property as per Order (3), (4) and (5) above is stayed for 30 days.**
- 8. Costs of the Applicant's application shall be borne by the Respondents while that for the Respondents' application shall be borne by the advocates.**

Dated, signed and delivered in court at Nairobi this 26<sup>th</sup> day of June 2015

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**F. GIKONYO**

**JUDGE**