REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 37 OF 2015

(Being an Appeal from Naivasha CMCC No. 622 of 2012)

LOCHAB TRANSPORT LIMITED…..……APPELLANT

-VERSUS-

TERESIA WANGARI AND KEZIAH MUKUHI MUIGAI

(*Personal representatives of the Late*

ISAAC MACHARIA MUTUNGA……RESPONDENTS

R U L I N G

1. The Appellant was dissatisfied with the judgment of Hon. Mwinzi SRM in Naivasha CMCC No. 622 of 2012 Teresia Wangari & Ano. –Vs- Lochab Transport Limited which was delivered on 25th March, 2015. He filed a memorandum of appeal on 8/4/2015. At the same time he filed a motion for stay of execution pending appeal before the lower court which was allowed on condition that a sum of Shs 1,300,000/= be paid to the Respondent, and the balance of the decretal sum be deposited in a joint fixed interest earning account.

2. The Appellant was equally dissatisfied with the condition as his appeal challenges both liability and quantum. These are some of the depositions contained in the affidavit of the Applicant sworn in support of the present application for stay pending appeal brought under Order 42 rule 6 (2) of the Civil Procedure Rules. Two key grounds in support of the application are that the Respondent will be unable to refund the decretal sum if the appeal succeeds thereby exposing the Appellant to substantial loss and; secondly, that the Appellant is willing to deposit the entire decretal sum into a fixed joint interest earning account as security for the performance of the decree.

3. Through their replying affidavit the Respondents contended that there is no proof that the Applicant will suffer substantial loss and that the Respondents are capable of refunding the decretal sum. The Respondents also alleged tardiness on the part of the Applicant as a result of which she said she would be subjected to delay and prejudice.

4. The parties' oral arguments in took cue from the respective affidavits filed. In addition the Respondents described the application as non-starter in light of a similar application made before the lower court. It was the Respondents' position that a conditional stay having been given, the Appellant should have either complied with the conditions or appealed the orders of the lower court. That it was not open to the Appellants to file a similar application in this court and hence the present application amounts to an abuse of the court process, is frivolous and vexatious. The Respondent relied on the decision of the Court of Appeal in **Hunker Trading Company Ltd -Vs-**

Elf Oil Kenya Ltd [2010] eKLR. In response counsel for the Appellant offered to deposit the entire decretal sum in a joint account.

5. I have given due consideration to the material canvassed before me. I take the following view of the matter. The application before me fall under Order 42 Rule 6 (1) of the Civil Procedure Rules and not subrule 6 (6) as the heading of Notice of Motion states. The orders sought clearly sit with Order 42 Rule 6 (1). Order 42 Rule 6 (1) is in the following terms:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from any for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as ma to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

6. With regard to the legal objection raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay pending execution. Order 42 Rule 6 (1) contains the words:

"……whether the application for such stay shall have been granted or refused by the court appealed from, the court to which the appeal is, preferred shall be at liberty to consider such application and make such order thereon as may to it seem just……"

7. There is before this court an appeal filed by the Applicant in respect of the substantive decision of the lower court. On the authority of **Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838** it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6 (1) to consider an similar application to the one heard in the lower court. It matter not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court.

8. This case is distinguishable from the case of **Hunker Trading Co. Ltd** for two key reasons in my view:

1. The Court of Appeal Rules 5 (2) b) upon which the application to the Court of Appeal was premised does not have a provisions corresponding fully with Order 42 Rule 6 (1) and the particular words I have highlighted hereinabove are not included.

2. The Hunker case was determined on a novel point and the court itself described the application as unique being based interalia on the then new provisions of the Appellate Jurisdiction Act, Sections 3A & 3B.

9. In that case a substantive appeal against the High Court Judgment had been field but no appeal had been filed in respect of the ruling on stay in the High Court. The foregoing is also true in this case.

10. In a recent case, **Equity Bank Ltd – Vs – West Link MBO Ltd [2013] eKLR** the Court of Appeal discussed at length the nature of its jurisdiction under Rule 5 (2) b) of the Court of Appeal Rules which states:

"Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may

a)……,

b) In any civil proceeding where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, injunction or stay any further proceedings on such terms as the court may think just."

11.Githinji JA stated *interalia* in his judgment:

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

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

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

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

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

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

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

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

16.It suffices in my opinion in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. I do agree of course with the Court of Appeal in the **Hunker** case that the overriding objective in section 1 A and 1B of the Civil Procedure Act binds both the

court and litigants for the purpose of ensuring expeditious dispensation of justice. The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

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

18. Notably the decision in Hunker was made before the promulgation of the new Constitution and therefore Article 159 (9) 2 (d) did not exist. I hope I have said enough to indicate that this court has the necessary jurisdiction to entertain the present application for stay pending appeal. The considerations for the grant of a stay pending in this court are set out in Order 42 Rule 6 (2). The decree in the lower court is substantial (Over Shs 2 million). Through its affidavit and arguments the Applicant asserts that it will suffer substantial loss if the order for stay is not granted as the Respondents have no means to refund the amount should the appeal succeed. The Respondent's answer is a bold contention that they are able to refund the amount in that event. However no evidence of means is indicated.

19. A challenge having been raised as to the decree holders' ability to refund the decretal sum, it is an invitation for the Respondents to rebut the same. As **Kasango, J** noted in **Kenya Orient Co. Ltd –Vs- Paul Mathenge Gichuki & Others [2014] eKLR**:

"……**the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent's resources"**

20. The learned Judge was relying on the decision of the Court of Appeal in **Civil Application No NAI 15 of 2002 ABN AMRO Bank –Vs- Le Monde Foods Ltd:** where the court stated *interalia*:

"……So all an Applicant in the position of the bank (Appellant) 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."

21. The Applicant came to court with dispatch and has offered to deposit the entire decretal sum as security. While it is true that the Respondent will be forced to wait a little longer for the fruits of her judgment if the application is allowed, any prejudice she might suffer will be adequately compensated by way of interest and costs if appeal fails. All matters considered, I am of the view that the application before me has merit.

22. I do allow prayer 3 of the Notice of Motion filed on 8/6/2015 with costs to the Respondents. The order for stay is conditional upon the Applicant depositing the entire decretal sum in an interest earning account in the joint names of the parties' advocates within 14 days of today's date.

Delivered and signed at Naivasha this **31st** day of **July, 2015.**

In the presence of:

Mr. Mburu holding brief for Mr. Wamaasa for Appellant

N/A for Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE