REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 172 OF 2011

EDWARD KANYIRI NDERITU……..……APPELLANT/APPLICANT

VERSUS

RESMA COMMERCIAL AGENCIES LTD…….…….RESPONDENT

RULING

By way of a notice of motion dated 3rd February 2012, the applicant moved this court under certificate of urgency seeking orders that:-

i. *That this application be heard ex-parte in the 1st instance due to its urgency.*
ii. *That this honourable court be pleased to order a stay of execution of orders dismissing both the lower court suit being suit number 236 of 2005 and the application dated the 23rd May 2011 for reinstatement of the same pending the hearing and final determination of this application and or appeal.*
iii. *That the costs of this application be provided for.*

The application is expressed under Order **42** Rule **(1)** & **2** and Section 1 **A & 1B** of the civil Procedure Rules 2010 and is premised on the grounds enumerated on the face of the application and the annexed affidavit of the applicant sworn on 3rd February 2012. Even though the application was filed under certificate of urgency on 3rd February 2012, it's not clear why the same has not been determined for over three years, a truly deplorable state of affairs.

The applicant essentially relies on the following grounds, namely:-

a. *That the application was brought without un due delay.*
b. *That the applicant has been denied unfairly the natural right to be heard*
c. *That the applicant will suffer irreparable loss in the event the orders sought are not granted.*

The respondent filed a replying affidavit on 8.10.2012 and at the hearing of this application counsel for the respondent adopted the said affidavit and added the following arguments, that the applicant has not demonstrated substantial loss which is a requirement for an application of this nature, that the prayers as framed are faulty in that two substantive prayers have been combined in one, namely, a prayer for stay of execution and reinstatement. The Counsel relied on the case of **Kenya Shell Ltd vs Kibiru & Another** and asked the court to dismiss the application.

I have carefully considered the arguments advanced by both parties in this case and the relevant law ant

authorities as enumerated later in this ruling.

As earlier mentioned, the application is expressed under Order **42** Rules **(1) & (2)** of the Civil Procedure Rules 2010. However, the correct provision for an application of this nature is Order **42 Rule 6 (1) & (2)** of the Civil Procedure Rules 2010. Clearly the applicant has invoked the wrong rules. However, I am alive to the provisions of Order 51 Rule **10 (1) & (2)** of the Civil Procedure Rules 2010 which provides that:-

1. *Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.*

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

Order **42** Rule **6 (1) & (2)** provides as follows:-

1. *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may 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.*
2. *No order of stay 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 the application has been made without unreasonable delay; and*
b. *Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant*

The Court of appeal in the case of **Butt vs Rent Restriction Tribunal (Madan, Miller and Porter JJA)** whole considering an application of this nature had this to say:-

i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

ii. *The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

iii. *A judge should not refuse a stay if there are god grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iv. *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

It is clear from the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the above conditions, namely; **(a)** Substantial loss may result to the applicant unless the order is made; **(b)** The application has been made without undue delay; **(c)** such security as to costs has been given by the applicant.

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed **Gikonyo J** in the case of **James Wangalwa & Another vs Agnes**

Naliaka Chesetowhere it was held *inter alia* that:-

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*
>
> *The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of* ***Silverstein vs. Chesoni****, ……..…….the issue of substantial loss is the cornerstone of both jurisdiction of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"*

In my view, the applicant has not established to the court what loss he is likely to suffer if the stay is not granted. In **Equity Bank Ltd vs Taiga Adams Company Ltd** the court stated a follows:-

> *"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant."*

In **Elena D. Korir vs Kenyatta University Justice Nzioki Wa makau** had this to say:-

> *"the application must meet a criteria set out in precedents and the criteria is best captured in the case of* ***Halal & another vs Thornton & Turpin Ltd*** *where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, 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) 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. <u>These twin principles go hand in hand and failure to prove one dislodges the other".</u>*

On whether or not the application was brought without undue delay, I note that the application was filed on 13th February 2012, while the appeal was filed on 24th November 2011. Unreasonable delay depends on the circumstances of each case. In **Jaber Mohsen Ali &b Another vs Priscillah Boit & Another** the court held:-

> *"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter. In the case of* ***Christopher Kendagor vs Christopher Kipkorir,*** *the applicant had been given 14 days to vacate the suit land. He filed a application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land"*

The applicant is aggrieved by a ruling delivered on 31.10.2011, the appeal was filed on 24.11.2011 and

the present application was filed on 13th February 2012 and has not been heard until the matter came before me on 17th September 2015. I find that there has been inordinate delay in both filing the application and prosecuting it.

Apart from proof of substantial loss the applicant is enjoined to provide security. Once again the applicant has not dealt with the issue in the supporting affidavit. There is therefore absolutely no offer of security coming from the applicant in satisfaction of the said requirement in absence of which no stay can be granted. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the supplicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**

In the above cited case of Equity Bank Ltd vs Taiga Adams Company Ltd it was held 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 of 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.**

The importance of complying with the said requirement in my view was well emphasised in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2)** where it was held that:-

> *"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".*

Having carefully considered the application before me and the law, I a persuaded that the applicant has not satisfied any of the conditions stipulated under Order 42 Rule 6 and in the circumstances the application is bound to fail.

I am fortified in my finding by the following excerpt from **Halsburys Laws of England** wherein the learned writers observe that:-

> *"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."*

In the case of **Global Tours and Travels Ltd** it was held that:-

> *".....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the*

sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously." (Underlining provided)

No execution has taken place so far, and even if it takes place, it will be for recovery of costs. Thus, the claim that can be raised against the applicant is for recovery of costs hence a money decree or a liquidated claim. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of **Kenya Hotel Properties Ltd vs. Willesden Properties Ltd** had this to say:-

> *"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."*

In this application, what appears to be at stake is recovery of costs for the lower court case which have not been disclosed to this court. Needless to say there was no suggestion before me or in the affidavit in support of the application that if the applicant pays the costs he would not be able to recover the same from the respondent should the appeal succeed. Further, there was no suggestion of depositing the costs in court.

I agree with the principles outlined in the authorities cited above and find that the application before me does not in my view satisfy the above principles.

Counsel for the respondent took issue in the manner the main prayer in the application has been framed and argued the court to reject the application as the said order is uncertain and seems to have combined two prayers in one which is improper. For ease of reference, I reproduce the order sought below:-

> *"That this honourable court be pleased to order a stay of execution of orders dismissing both the lower court suit being suit number 236 of 2005 and the application dated the 23rd May 2011 for reinstatement of the same pending the hearing and final determination of this application and or appeal."*

These are two prayers combined in one. The appeal before the court is against the order delivered on 31st October 2011 refusing to reinstate the suit in question; it's not against the dismissal of the suit. Thus, even if the court was to overlook the way the orders are framed and treat them as to two avoid rejecting the application on technicalities, still the first limp dealing with stay of the order dismissing the suit would not be properly grounded because the appeal is only against the order mentioned above. There is no appeal before the court challenging the dismissal of the suit. The appeal is against the order refusing to reinstate the suit, hence the order as framed is misleading.

The upshot is that the application is hereby dismissed with costs to the respondent.

Right of appeal 28 days

Dated at Nyeri this 29TH day of September 2015

John M. Mativo

Judge