REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISON

HCCC NO 288 OF 2011

JASON NGUMBA KAGU (Suing as the personal representative of

NANCY NYAWIRA NGUMBA (Deceased)……….........……………1st PLAINTIFF

GATHONI NGUMBA…………………………….................………2ND PLAINTIFF

NYAMBURA NGUMBA……….................……………………….…………3RD PLAINTIFF

Versus

INTRA AFRICA ASSURANCE CO. LIMITED ……….............….………DEFENDANT

RULING

[1] I have been asked by the Defendant in a Motion dated 8th May, 2014 to:

i. Order stay of execution or enforcement of the judgment delivered on 31st March, 2014 and the decree arising therefrom or any part thereof, pending the hearing of the intended appeal and/or until further orders of this court.
ii. Make a declaration that the interest payable on the decretal sum should run from 31st March, 2014 and not 31st October, 2000.

[2] The application is expressed to be brought under Order 42 Rule (6) Sections 1A, 1B and 3A & 63 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, the inherent jurisdiction of the court and all enabling provisions of the law. It is supported by the affidavit of Solomon Mwangi sworn on 8th May, 2014 and the annexures thereto. It is also founded on the grounds expressed on the face of the Motion which are that;

a. This is declaratory suit and judgment was delivered on 31st march, 2014 awarding a sum of Kshs. 6,447,962 plus costs and interest to the Plaintiff.

b. There was an earlier judgment in the primary suit delivered on 31st October, 2000.

c. The defendant/applicant filed a Notice of appeal and requested for certified copies of proceedings on 10th April, 2014.

d. Both the notice of appeal and the letter requesting for the certified copies of proceedings have been served upon the Plaintiff/Respondent.

e. The plaintiff has applied for stay of execution of the decree herein based on reasonable apprehension of likelihood of execution.

f. The decretal sum exclusive of costs and interests is Kshs. 6,447,962. The total decretal sum as calculated by the plaintiff is Kshs.17, 280,538.16 which is a substantial sum by any standard.

g. The financial status of the plaintiffs is unknown and there is no guarantee that if this amount of money is paid out to them, they will be in a position to refund if the appeal is successful.

h. On the other hand, the Applicant is a financially stable insurance company which will be in a position to pay the decretal sum if the appeal is unsuccessful.

i. The plaintiff has calculated and demanded interest from the date of judgment in primary suit i.e. 31st October, 2000 as opposed to the date of judgment herein i.e. 31st March, 2014 thereby arriving at a colossal and unconscionable figure of Kshs. 10,832,576.16 in interest alone.

j. The plaintiffs in their plaint herein sought interests from the date of judgment until payment in full and they must be bound by their pleadings. The date of judgment herein is 31st March, 2014.

k. In any event, it would be grossly unfair and punitive if the applicant were to pay interest from the date of the primary judgment when that judgment was not against it and it was not a party and did not participate in that suit in any manner whatsoever contemplated by the Insurance Act Cap (405) Laws of Kenya.

l. That with the plaintiffs having taken more than ten (10) years to file this declaratory suit, it would be grossly unfair and unequitable for them to benefit from their indolence at the expense of the defendant.

m. The steps now taken by the plaintiffs if not arrested will render the present application and the intended appeal nugatory and will cause irreparable and substantial loss to the Applicant.

n. The application herein has been made without undue delay, and the applicant is ready and willing to abide by such terms on security as the court will impose.

o. This court is constitutionally bound to ensure that the Applicant's undoubted right of appeal is not unjustly compromised.

[3] The Applicant has already filed a Notice of Appeal on 10th April, 2014 against the judgment of this court delivered on 31ST March, 2014. On the basis of the appeal, the Applicant has applied for stay of execution under Order 42 rule 6 of the Civil Procedure Rules. However, the Applicant made submissions which caught the curiosity of the Court; that before the amendments to the Civil procedure Act in 2009 which added Sections 1A, 1B and 1C of the Civil Procedure Act, the discretion of the court in granting stay of execution was fettered by the provisions of order 42 Rules 6 which requires that an applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, that the application must have been made without unreasonable delay and finally the applicant must furnish security. But, with the introduction of Sections 1A, 1B and 1C of the Act, the jurisdiction of this court to grant stay of execution has been fundamentally altered and broadened. They cited the decision in **AFRICAN SAFARI CLUB v SAFE RENTALS LIMITED, COURT OF APPEAL AT NAIROBI, CIVIL APPEAL NO. 52 OF 2010** where the Court of Appeal stated:-

> ***"……however, after the enactment of the overriding objective, we believe that the court is now required to take a much broader view of justice and therefore the two requirements can no***

longer be regarded as exhaustive.

With the above scenario of almost equal hardship by the parties it is incumbent upon the court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second is to put the hardship on the scales. On this point the offer by the applicant of the security of the yatch and the immovable property although not ideal would in our view place the respondent in a much better position….. we think that the balancing act as described in the analysis of the positions of the parties before us is in keeping with of the principal aims of the overriding objective principal of treating both parties with equality or in other words placing them on equal footing as far as is practicable pending the determination of the intended appeal on merit. This we think is what the special circumstances of the situation before us and justice demand. We believe that the rules of procedure including rule 5(2) (b) have considerable value in terms of administration of justice but the new challenge brought about the enactment of the overriding objective principal brings into focus the fundamental purpose of civil procedure which is to enable the courts to deal with cases justly and fairly.

The court of appeal emphasized this principle further in the case of **E. Muriu Kamau & Another vs National Bank of Kenya Ltd (2009) eKLR** when it observed as follows;

"…the courts including this court in interpreting the Civil procedure Act or the appellant jurisdiction Act or exercising any power must take into consideration the overriding objective as defined by the two Acts. Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing."

[4] According to the Applicant, harmonization of the requirements of Order 42 rule 6 with the overriding objective is needed. The Applicant gave reasons why the application for stay should succeed. First, there has been no unreasonable delay in bringing the application. The judgment in this matter was delivered on 31st March, 2014. Notice of Appeal was filed on 10th April, 2014 and this motion was filed on 8th May, 2014 a period of twenty eight (28) days cannot be said to be unreasonable. Second, the applicant is reasonably apprehensive that if the orders for stay are not granted it will suffer substantial loss and cited the grounds contained in the application and are reproduced herein above. They relied on the following decisions;

a. In **Mombasa HCCC No. 274 of 2009** where Okwengu J (as she was then) held inter alia;

"…the main consideration herein is whether the plaintiffs intended appeal would be rendered nugatory if the orders sought are not granted.

In my considered view the defendants would not in any way be prejudiced by the issuance of an order for injunction restraining them from alienating or transferring or charging the suit property. On the other hand, if the order for injunction is not given, the defendants who are in possession of the title to the suit properties may dispose off the suit property or deal with it in a manner that may render the plaintiff's appeal nugatory if successful. I think in the circumstances of this case it is fair and just that in the interest of justice that the subject of the suit be preserved."

b. In **Butt Vs Rent Restriction Tribunal Civil Application No. Nai 6 of 1979 (982) KLR 417** (see page 19 of the list of authorities), the Court of appeal stated the law as follows:-

"…the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's decision.

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

c. In **Otieno Vs Ougo Civil Application No. NAI 18 of 1987 (1987) KLR 400** the Court of Appeal states as follows:-

"The established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

The object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal is successful from being nugatory."

d. In **Milimani Commercial Court Bankruptcy Causes No. 25 and 2 Purity Gathoni Githae & Another Vs Ocean Freight Transport Company Ltd** Justice Mabeya, J delivered himself as follows:

"To my understanding, the cardinal consideration of the stay jurisdiction is that when an unsuccessful litigant is exercising his undoubted right of appeal, the court should guard against the appeal is successful, being rendered nugatory. But parallel with that, is the important principle that a successful litigant should not be deprived of the fruits of a judgment in his favour without a just cause. Having considered all the circumstances in this matter, I am of the view that if the stay is not granted, the affairs of the applicants will be taken over by the official receiver, they have urged that the publication of the order will adversely affect their leading media houses as they can no longer hold directorships thereon. Of course that business, which does not only sustain the Applicants but also other Kenyans dependent on it, is a matter of public interest. It may be that the removal of the applicants form the management thereof may have a permanent and irreversible negative impact therein. This in my view is substantial loss.

[5] In the instance case, equitable justice will be served by granting the stay sought because nobody will be prejudiced. While the applicant will be allowed to exercise its undoubted right of appeal, the Respondent, in view of the applicants strong financial status, will be guaranteed that the money will be available if the appeal is lost. In any case, the applicant is ready and willing to abide by such terms as the court may order in terms of security. The applicant however urge this curt to recognize its sound financial status which will guarantee that the money is available should the appeal be disallowed.

Respondent's opposition to the motion

[6] The Respondents filed a short replying affidavit sworn by Jason Ngumba Kagu on the 23/5/2014 and submissions. They submitted that the jurisdiction conferred on the court under Order 42 Rule 6 is specific to stay of execution pending appeal and the court should not consider questions of interest on decretal sum in an application for stay of execution. Therefore, the prayer sought by the Applicant for a declaration on the period when interest should be applied is not only misconceived but patently staked in the wrong forum at the wrong time. Unless the court is moved appropriately to settle the decree (which has not been done) then the question of interest etc…are misplaced and ought not to be considered at this stage. That limb of the application should be rejected out-rightly.

[7] The test of whether to grant stay of execution or not is fairly settled. Key amongst the considerations is whether there is substantial loss to the applicant and whether the applicant has offered security. The applicant has placed much emphasis on its financial capability and referred itself as a corporate of great financial standing. It, however, also stated that the respondents would not be able to refund the decretal sum if the same was paid to them. Are these assertions a ground for substantial loss? In the case of **Josephine Seraphine Wadegu Vs Kenya Power & Lighting Co. Ltd (2013) eKLR the court quoting with approval the decision in Reliance Bank Ltd Vs Norlake Investments Ltd (2002) 1 EA 227** stated that:

"…unless the applicants demonstrate this inability, it would be speculative for his court to rule

that indeed the respondent cannot refund the respondents applicants if the appeal succeeds."

Accordingly, the Applicant must demonstrate the inability of the respondents to repay the decretal sum; the burden lies with them and does not shift. Such inability has not been shown and so there is no demonstration of likelihood of substantial loss occurring to the Applicant on that basis. The said alleged inability is the sole ground relied upon by the Applicant. Indeed there is contradiction when the Applicant prides itself as financially endowed corporate and again claims the decretal sum in this matter would dent its corpus. As it has not demonstrated any substantial loss would be suffered by the Applicant, the stay should be denied. Lastly, the law enjoins the Applicant to offer such security. None has been offered in this case. The Applicant has just relied on its most touted financial stability. The financial statement attached to the affidavit help little on this matter. The financial stability of the Respondent is not a guarantee because the rate at which Insurance Companies in this country are falling is a matter the court can take judicial notice of. Therefore, the ultimate test is for this court to balance of rival claims, apply the principle of proportionality and substantive justice. Whereas it is conceded that the courts have considered other factors notably the aspect of balance of convenience as in the **Reliance Bank case** (supra), the principle of proportionality as in the case of Purity Gathoni (as quoted by applicant on page 22) and even Substantive Justice (See the case of African Safari Club Page 1 of the authorities by the applicant), the Applicant took the view that all these factors to be considered by the courts favour the respondents. The respondents have acquired what are undeniably proprietary rights by virtue of the decree passed by this court. To delay the vesting of that property at the convenience of the applicant and for what is unknown period of time is to interfere with that right. The Applicant's right to appeal would not be affected if the money is paid over to the respondents and if the appeal were to succeed, the restoration of the Applicant's position has not been shown to be impossible especially in view of the Replying Affidavit and the issues highlighted hereinabove. Consequently, the application lacks merit and should be dismissed with costs.

THE DETERMINATION

The threshold

[8] The thresholds for granting a stay pending appeal are set out under Order 42 rule 6 of the Civil Procedure Rules. The conditions therein simply act as legal guiding principles or considerations in the exercise of court's discretion-that is quite in line with the command of law that discretion should be exercised judicially and in accordance with defined legal principles. And to my knowledge, I do not think those considerations under Order 42 rule 6 of the CPR have been obliterated or in any way diminished by the introduction of the principle of overriding objective in sections 1A and 1B of the Civil Procedure Act as the Applicant seems to argue. On the contrary; the correct position arising out of the decisions of the Court of Appeal and recently the Supreme Court is that the principle of overriding objective now enables the court to have a much wider approach in applying those thresholds set out by law in a manner that it will exercise discretion for the sake of substantive justice under the Constitution. And, that does not mean the conditions in Order 42 rule 6 of the CPR are to be ignored or have been supplanted by other utopia or superior grounds. What it means, and I have already stated this, is that courts should apply them within the constitutional desire to serve substantive justice by acting fairly and justly; in the circumstances of each case as opposed to strict application thereof without regard to the context and the demands of justice in the case. Such approach and development of the law is a constitutional matter which recognizes that ***the law has always kept growing to greater levels of refinement, as it expands to cover new situations exactly not foreseen before.*** See the case of **SULEIMAN v AMBOSELI RESORT LTD (2004) eKLR 589** Ojwang Ag.J (as he then was) and Justice Hoffman in **FILMS ROVER INTERNATIONAL (1986) 3 ALL ER 772.** That is the test and approach I shall apply here. Let me start with the straight forward issue on whether this application has been brought without unreasonable delay.

Unreasonable delay in bringing application

[9] This application was filed within 28 days after delivery of judgment. The Applicant, I should state without much ado; acted with speed in filing a Notice of Appeal as well as applying for stay of execution pending appeal. Therefore, this application was brought without unreasonable delay.

Substantial loss

[10] The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of ‘’the appeal will be rendered nugatory’’, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. 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. That is why I stated in **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER v AGNES NALIAKA CHESETO** that:

> ***‘’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...’’***

[11] The onus of establishing that substantial loss would occur unless stay is ordered rests upon the Applicant. The Applicant has alleged that the decretal sum runs into over Kshs. 17,000,000 which is by any standard colossal, and if it is paid over to the Respondents, they will not be able to refund. See the case of **TARBO TRANSPORTERS LTD v ABSALOM DOVA LUMBASI [2013] eKLR** on this issue where the Court held that:

> ***‘’The burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent lies on the Applicant. But where the records show some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means. In this case the Respondent’s income is such that it may not be sufficient to constitute ability to pay…’’***

[12] Other than making a general allegation that the financial status of the Respondent is not known, the Applicant did not present before the Court any concrete evidence which would make the Court say that evidential burden has been raised on the Respondent as to call upon the Respondent to discharge it or file an affidavit of means. I have stated time and again that the basis for the approach taken by the Court is the recognition that both parties have rights: and, neither the right of the Respondent to his judgment nor the Applicant’s to its appeal is the lesser. However, the appeal relates to reversal of the judgment of the Court and the Court should strike a balance that will hold the parties at almost a symmetrical bound. In balancing these rights, the Court is minded of the role of security required under Order 42 rule 6 of the CPR. Accordingly, in light of my finding above, I will grant a stay of execution pending appeal on condition that; the Applicant pays one half of the decretal sum to the respondents and deposits the other half in an interest earning account in the names of counsels for the parties and the Deputy Registrar, at Kenya Commercial Bank, Milimani High Court Branch within 45 days. The Deputy Registrar is a signatory to and the location of the account has been determined by Court because the money is held as security for the due performance of such decree or order as may ultimately be binding on the Applicant. I have also ordered investment in an interest earning account because of two reasons; 1) the dictates of economic realities; and 2) this case has a component of interest and should the Applicant ultimately be made to pay the decretal sum, it will be with interest. Thus, the practice of law is that such security in the form of cash should be so invested. Before I close the decretal sum for purposes of this ruling only and to determine the security, shall include the judgment sum of Kshs. 6,447,962 plus costs and interest at court rates from the date of the declaratory judgment. The issue of interest is one of the sticky issues and an appeal has been preferred against the judgment herein. I am not prepared to determine it in this application for stay of execution pending appeal.

Dated, signed and delivered in court at Nairobi this 22nd day of October, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

No appearance for the plaintiff

Ranja for Thangei for defendant