REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 471 OF 2012

SANKALE OLE KANTAI t/a

KANTAI & CO. ADVOCATES .....PLAINTIFF

Versus

HOUSING FINANCE CO. (K) LTD .....DEFENDANT

RULING

Stay of execution pending appeal

[1] The Defendant has applied under Order 42 rule 6 of the Civil Procedure Rules for stay of execution of the decree herein pending appeal. The principles which will guide the exercise of discretion under Order 42 rule 6 of the Civil Procedure Rules are found in rule 6(2) which provides as follows:

> ***"No order for stay of execution 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 that 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.***

[2] On the above thresholds, see the case of **Kenya Orient Insurance Co. Ltd vs. Paul Mathenge Gichuki & Another (2014) eKLR** where the case of **Peter Ondande T.A Spreawett Chemist vs. Josephine Wangari Karanja (2006) eKLR** was applied with approval and the court stated:-

> *"**The issue for determination by this court is whether the applicant has established a case to enable this court grant him the orders of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if say is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him."***

And again, see the case of **Peter Samoei vs. Issack K. Ruto (2012) e KLR** but the important

addition is where the court said'

> ***"...under Order 42 rule 6, one need not be satisfied that an appeal is frivolous."***

[3] The court has also had occasions to discuss these thresholds within the current constitutional and legal structure of this nation. And the following rendition in the case of **Jason Ngumba Kagu vs. Intra Africa Insurance Company Ltd [2014] eKLR** is quite apt, that:

> ***[9] 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.***

a. **Application made without unreasonable delay**

[4] The judgment herein was delivered on 25th July, 2014. The Notice of Appeal and this application were filed on 8th August, 2014 and 27th August 2014, respectively. This was slightly over one month of the delivery of judgment. Although the Applicant has not explained why they did not file the application earlier especially because the Notice of Appeal was filed on 8th August 2014, I do not consider that period to be unreasonable delay in the circumstances of this case. See what the court stated in the case of **Gabriel S. Imbali & Another vs. Rev. Douglas Beru (Suing for Africa Divine Church) 2014 eKLR** that:

> ***"The order by the learned magistrate was issued on 20th December, 2013. The application was filed on 18th February, 2014. The delay was of approximately two months. While I cannot say that the applicant moved in this application with the expected speed, I do not think that the delay of two months can be deemed as inordinate delay."***

The application has passed the first test and I hold it was brought without unreasonable delay. I will now move to the more substantial issues in the matter.

b. **Substantial loss occurring**

[5] As I have often stated, the possibility of substantial loss occurring upon the Applicant unless

an order of stay of execution is made is the cornerstone of the jurisdiction of the court in granting stay of execution under Order 42 rule 6 of the CPR. And the decision of the Court on whether substantial loss will occur will depend on the final analysis by the court when it performs the delicate and always novel balancing act between the rights of the parties; the Applicant's right to his appeal and its prospects, on the one hand; and, the right of the Respondent to the fruits of his judgment, on the other. Where the court decides to grant stay of execution, it must be on sufficient cause being shown, and then securing the pain of postponement of the Respondent's right to realize the judgment with sufficient security for the due performance of the decree that might ultimately become binding on the Applicant. The onus of proving that substantial loss would occur unless an order of stay is made rests upon and must accordingly be discharged by the Applicant. On this, see what the Court said in the case of **Jason Ngumba** (supra) that:

> ***''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in Bungoma Hc Misc Application No 42 Of 2011 James Wangalwa & Another vs. 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...''***

[6] The Applicant submitted that the judgment herein awarded the Respondent a sum of Kshs. 9,200,000.00 together with interest. Therefore, the decretal sum payable is in excess of Kshs. 10,000,000.00 which if the Defendant is compelled to pay will occasion enormous loss and damage on them. They see substantial loss in the fact that the Defendant's liquidity ratio will be gravely and negatively affected. Similarly, the Applicant consider the decretal sum to be a huge amount which, if paid over to, it would be very difficult to recover the money from the Respondent in the event that the intended appeal is successful, thus causing substantial loss to the Applicant. In other words, if the appeal is successful, inability to recover the decretal sum from the Respondent will render the appeal nugatory. Despite the fact that the Respondent is entitled to the fruits of its judgment, the Applicant is apprehensive that the Respondent would not be in a position to refund the decretal amounts in the event of the appeal being successful which fear is not unfounded as the Respondent has no information regarding the financial status of the Respondent hence at great risk of suffering substantial loss. The Applicant is, therefore, convinced the only way to avert the loss is by an order of stay of execution of the decree herein. The stay will not only preserve the substratum of the appeal but will also allow parties to canvass the appeal to logical conclusion.

[7] The Respondent did not take the submissions by the Applicant kindly, especially the insinuation that he is a man of straw who will not be able to refund the decretal sum herein of about Kshs. 10,000,000. He stated categorically that those allegations have been made without any proof or evidence. The Respondent went a step further and in his affidavit dated 23rd September, 2014 averred that he is a man of no small means by any standard and would be able to return the judgment sum should the said Appeal succeed. He deposed that he is of sufficient fund in his own right and employment owning property such as 1) L.R NO. 4943/4, Karen measuring about 2.5 acres on which stands, his residential house, whose estimated value is Kshs.100,000,000/=; 2) Plots No. Ngong Township/Block 11/416 and plot 417 on which stands a commercial building whose value is estimated to be Kshs.60,000,000/-. He is also currently a judge of the Court of Appeal with a handsome salary and he has no liabilities. According to the Respondent, these properties offer sufficient security that he can refund the decretal sum should the appeal be successful. On that basis the Respondent opines that the application should be dismissed with costs.

[8] I have considered all the rival submissions, the affidavits and judicial authorities cited by

parties on this matter. Courts have said time and again, that the onus of proving substantial loss would occur unless an order of stay is made rests on the Applicant. The standard of proof is on balance of probabilities. Therefore, mere allegations that the decretal sum of about Kshs. 10,000,000 is huge and that the Respondent will not be able to refund the decretal sum in the event the appeal is successful is not enough. Much more cogent and specific evidence is required to show the Respondent will not be able to refund the decretal sum should the appeal succeed. It is worth repeating that, the rationale for this position of the law is because the Respondent has a right to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient reasons to do so. The sufficient reason the law looks at under Order 42 Rule 6 of the CPR is that substantial loss would occur on the Applicant unless a stay is ordered. That decision is made after a delicate and novel balancing of both rights involved. None is greater or the lesser. And if the court finds there is sufficient reason to grant stay, such restriction or postponement of the Respondent's right to the fruits of his judgment must be secured by provision of security which is sufficient to guarantee performance of the decree which might ultimately binding on the Applicant. See the rendition in the case of **Kenya Shell Limited vs. Kibiru (1986) 1 KAR 1018** that:

> ***"It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment."***

[9] But let me dispel the notion that where the court orders stay of execution under Order 42 rule 6 of the CPR, it has taken away the right of a successful party or offends the principle of justice; to wit, justice shall not be delayed guaranteed under Article 159 of the Constitution. Such broad arguments tend to mislead, and also fail to appreciate that Order 42 rule 6 of the Civil Procedure Rules deals with a case of two competing rights where the only constitutional act is judicial balancing of those rights in order to grant a remedy which is appropriate in the circumstances of the case. Such scenario does not envisage preferring one right and not the other or over the other. It envisions a result of the balancing act as constitutional judicial remedy which does not produce any prejudice or discrimination to any party. See what the court said on the nature of a court order produced in such balancing of rights in the case of **Tarbo Transporters (supra)** that:

> ***The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.***

[10] Back to the major arguments on substantial loss. The Applicant has made the statement below in their submissions:

> ***''The Applicant is apprehensive that the Respondent would not be in a position to refund the decretal amounts in the event of the appeal being successful which fear is not unfounded as the Respondent has no information regarding the financial status of the Respondent hence at great risk of suffering substantial loss.***

This statement looks very powerful in appearance but on close examination and when placed on the scales of proof; it is bare and is not backed by any evidence; it is founded on apprehension. The Respondent has gone ahead to provide details of properties he owns, his current employment

and other facts that he is not under liabilities which may diminish his ability to refund the decretal sums herein. The Respondent says he is of sufficient means to refund the decretal sum but he also says that the properties he owns are sufficient security for the refund of the decretal sum should the appeal succeed. As I stated earlier, the burden of proof that substantial loss will occur is on the Applicant. It is only after the Applicant has adduced such evidence that the other party will fail without any further evidence that evidential burden is created on the shoulders of the Respondent. In such cases, evidential burden arises when the Applicant has adduced enough evidence which show financial limitation on the part of the Respondent such that the court will call upon the Respondent to file an affidavit of means. See ***Halsbury's Laws of England*** as well as the case of **Tarbo Transporters Ltd vs. 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…''***

[10] From the material before the court, there is hardly sufficient evidence which can be said to raise evidential burden on, as to call the Respondent to provide affidavit of means. I should also state here that the Respondent is never under any obligation to show or provide security for the making of refund of the decretal sum should the appeal succeed. The security under Order 42 rule 6 of the Civil Procedure Rules is to be given by the Applicant for the performance of the decree which may ultimately be binding on him. But I should think that, when the Respondent said that his property is sufficient security, he meant that he is in a position to make refund of the decretal should the appeal succeed. The information he has given is nonetheless useful in this application. In sum, the Applicant has not shown that the Respondent will not be able to refund the decretal sum. The inability of the Respondent to make a refund of the decretal sum is what constitutes substantial loss to the Applicant because if the Applicant cannot get a refund if the appeal is successful, he shall surely be reduced to a pious explorer in his appeal. That is the kind of loss in monetary awards which a stay in Order 42 rule 6 of the CPR is intended to prevent. So where it is not shown to the satisfaction of the court that substantial loss will occur in the manner described above, the court will not order a stay of execution. The size of the amount involved should be seen within the entire circumstances of the case lest we should be saying that a small amount will not occasion substantial loss which I think is not correct because a Respondent may not be in a position to refund a small amount and the size of the amount involved notwithstanding, such would still be substantial loss to the Appellant if his appeal is successful. It is in the inability to recover the subject of the appeal where substantial loss lies.

c. **Security**

[11] Given the finding of this court that the Applicant has not shown it will suffer substantial loss, is it necessary to order provision of security? I am not sure where the court finds that no substantial loss would occur, it will still be feasible to order security to be furnished. Except, however, in peculiar or exceptional circumstances of a case the court may still order a stay of execution and call for security from the Applicant even where it has found there is no substantial loss which will occur- this is not uncommon and it happens where the court nonetheless orders half of the decretal sum to be paid over to the Respondent and the other half to be deposited as security or to be secured by such security as the court may order. The type of security to be given depends on the circumstances of the case and the judicious exercise of judicial discretion based on defined legal principles. On this see the case of **Gabriel S. Imbali & Another vs. Rev Douglas Beru (supra)** where the court expressed itself that:-

> ***"The security under this head maybe ordered as a discretion of the court, and where the circumstances of the case demand so. The same may not necessarily be of monetary***

nature. The discretion should however be exercised judiciously and so as to meet the ends of justice."

I note the Applicant is a reputable and financially sound public financial institution, whose shares are listed at the Nairobi Stock Exchange with 14 branches across the country and over 350 employees and can raise any appropriate security the court will order. Without doubt and from the statements made by the Applicant to court of its financial stature, its liquidity ration enjoys a wide dependable base. In light thereof, a security to cover the sums herein will not gravely and negatively affect the liquidity ration of the Applicant as it has been submitted elsewhere in this case.

[12] Ultimately, in order to attain an almost symmetrical balance of the rights of the parties, judicious exercise of discretion drawing from the circumstances of this case commends the following orders;-

1) That the Applicant shall pay one half of the decretal sum herein to the Respondent within 45 days of today; and

2) Deposit the other half of the decretal sum in an interest earning account in the joint names of the counsels for the Respondent and the Applicant within 45 days of today-to be held in such account as security for the performance of the decree that may ultimately become binding on the Applicant pending the determination of the intended appeal.

3) Each party is at liberty to apply for any appropriate order as may be necessary and permitted in law.

4) Costs of the application shall be in the cause.

Dated, signed and delivered in court at Nairobi this 24th day of November 2014

F. GIKONYO

JUDGE