REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 542 of 2012

SOCFINAC COMPANY LIMITED……..……...…....APPELLANT

VERSUS

NELPHAT KIMOTHO MUTURI…….RESPONDENT

(An Appeal from judgement of the Principal Magistrate, Kandara Law Courts, Hon. T M Gesora, delivered on 21st September, 2012 in Civil Case No. 304 of 2009)

NELPHAT KIMOTHO MUTURI ……..……....PLAINTIFF

VERSUS

SOCFINAC COMPANY LIMITED …….DEFENDANT

RULING

On 2nd November 2012, the appellant herein filed an amended Notice of Motion dated the same day expressed to be brought under Section 3A of the Civil Procedure Act, Order 42 rule 6, Order 50 rule 5, Order 51 rule 1 of the Civil Procedure Rules, 2010in which it seeks the following orders:

1. That this application be certified urgent and heard ex-parte in the first instance.

2. That pending the hearing and determination of this application, the Respondent be restrained from executing the judgement delivered in Kandara RMCC No. 304 of 2009.

3. That the execution of the judgement and the decree passed on 21st September, 2012 be stayed pending the hearing and determination by the High Court of Kenya at Nairobi of the intended appeal against the judgement and decree on such terms as this Honourable Court may deem fit.

4. That the costs of this application be in the cause.

The grounds upon which the application is based are that the appellant has appealed against the said judgement and will incur loss if a stay of execution is not granted; the orders of stay issued on 21st September 2012 lapsed on 20th October 2012; if a stay of execution is not granted the appellant's appeal if successful will be rendered nugatory; the appellant is ready to furnish such security as the Court may deem just; and that the application is made without delay and in the interest of justice.

The application is supported by an affidavit sworn by **Hassan Ndisho**, the appellant's Human Resources Manager on 2nd November 2012. According to him, the said Court on 21st September 2012 delivered a

judgement in which the appellant was ordered to pay the respondent Kshs 207,000.00 with costs.

Being aggrieved by the said decision, the appellant has lodged the appeal herein which according to his legal adviser has a good chance of succeeding since it raises serious issues of law and fact which are not frivolous but which evinces an arguable appeal. It is further deposed that the appellant stands to suffer loss of use and benefit of the decretal amount should the stay not be granted since the appellant has no knowledge of the Respondent's assets and believes the respondent is a man of straw who in the event that the judgement is reversed will be unable to refund the money hence the appeal will be rendered nugatory. The appellant, it is deposed, is ready and willing to put up such security as the Honourable Court may order pending the hearing and the determination of the appeal.

The application was opposed by a replying affidavit sworn by the respondent herein on 29th October 2012. According to him, he was awarded Kshs. 200,000.00 as general damages for injuries he sustained while working for the appellant after all the evidence was presented before the Court. According to him the appeal has no chances of success hence the appellant does not deserve the stay sought. In his view, the entire appeal is simply urging the court to rely on such speculation that he may not have been injured at work. According to him, it is not proper for the appellant to allege that he is a man of straw who may not be able to reimburse the appellant in the event that the appeal succeeds. He deposes that he is an experienced driver with property and if called upon to refund the said sum of Kshs 200,000.00 he would comfortably do so. Since the deponent to the supporting affidavit has no information regarding his financial capability, he is not in a position to alleged that the respondent is a man of straw hence it has not been shown how the appellant stands to suffer irreparable loss. In his view the award is not manifestly excessive and the appellant waited for a whole month before bring the appeal and the application for stay an indication that the same is an afterthought. It is unfair that he should be denied the fruits of his properly obtained judgement after he was injured at work and he was not even compensated under the ***Workmen's Compensation Act*** hence the application ought to be dismissed.

The application was prosecuted by way of written submissions. According to the appellant under Order 42 rule 6(2)(a) of the Civil Procedure Rules what is required is proof of substantial loss and not irreparable loss. According to the appellant the award of Kshs 207,000.00 is a substantial sum of money and the appellant stands to suffer loss of use and benefit thereof if the stay is not granted. While reiterating that the respondent's assets are unknown to the appellant and that the appellant believes he is a man of straw, it is submitted that the respondent will not be able to refund the decretal amount and this position, according to the respondent, is confirmed by the replying affidavit. While citing section 112 of the Evidence Act, Cap 80, it is submitted that in civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. The appellant further relies on **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another Civil Application No. Nai. 238 of 2005** to the effect that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them and that once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has. Therefore, it is submitted that since the respondent's financial capability is solely within the respondent's knowledge, and as such the burden is upon the respondent to show that he has the financial capability to refund the decretal sum should the lower court's decision not be upheld. According to the appellant no such evidence has been provided by the appellant hence on the authority of **University of Nairobi & Daniel Gichange vs. Peter Tum [2008] eKLR**, since the means of the respondent was not known there is a possibility that the appellant would suffer substantial loss if stay is not granted. On the authority of Butt vs. Rent Restriction Tribunal, it is submitted that the power to grant or stay an application for stay is a discretionary power and stay should be granted if there is no other overwhelming hindrance. It is further submitted that the memorandum of appeal raises serious issues of law such as the shifting of the burden of proof and failure by the respondent to prove his case as well as abuse of the court process by failing two suits in respect of the same cause of action. Since the appellant is willing to provide security, the respondent stands to suffer no prejudice. In the appellant's view the application has not been filed with undue delay and meets the test under Order 42 rule 6(2) of the Civil Procedure Rules.

On behalf of the respondent, it is submitted that the appellant is guilty of inordinate delay which delay has not been explained since it moved this court for stay at the very last moment upon realising that the respondent was moving to execute. In his view the appellant moved this court to avoid execution hence the application has failed to satisfy the provisions of Order 42 with respect to delay. The amount in question being Kshs 200,000.00 it is submitted no loss has been shown to be likely to be occasioned to the appellant since the respondent is capable of refunding the same in the event that the appeal succeeds. According to the respondent it has not been shown that the said sum is capable of bringing the appellant company down. Since the appeal will be limited to analysing the evidence on record which was the basis of the judgement, it is submitted that the appeal is frivolous and has no chances of succededing. It is further submitted that what is sought by the application cannot be granted since it seeks stay pending an intended appeal rather than an appeal which has already been filed. Relying on **Rose Mbithe Ndetei vs. Mathew Kyalo Mbobu Civil Appeal No. 86 of 2008**, it is submitted that since the respondent would be able to pay the sum, the application ought to be dismissed.

To these submissions, the appellant filed a rejoinder in which it contended that the mere fact that the appellant seeks stay pending the hearing and determination of an intended appeal cannot defeat the application for stay of execution. With respect to **Rose Mbithe Ndetei vs. Mathew Kyalo Mbobu** (supra) it is submitted that in that case the respondent had shown capability of paying the amount and is hence distinguishable.

I have considered the foregoing. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the andthat in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality.

On the first principle, an attempt has been made to distinguish between substantial loss and irreparable loss. I must say none of the parties has however attempted an in depth analysis of the two phrases. In **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, **Platt, Ag.JA** (as he then was) at page 416 expressed himself as follows:

"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 be kept out of their money".

On the part of **Gachuhi, Ag.JA** (as he then was) at 417:

"It is not sufficient by merely stating that the sum of Shs 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 judgement. 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 judgement."

From the foregoing it is clear that on occasions the expressions "substantial loss" and "irreparable loss" are precisely the same in effect. It may be a distinction without a difference.

The appellant's case, however, is that the respondent's assets are unknown to the appellant and hence the belief that if the decretal sum is paid over to the respondent, the respondent may not be able to refund the same. It is not alleged for example that the sum involved is so high that if the appellant is made to part therewith it is likely to bring the appellant's business to a standstill. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** 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".**

Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. 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. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is contended that the respondent's whereabouts are unknown to the appellant. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution. As was held in **Stephen Wanjohi Vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree

holder is not a dishonourable miscreant without any form of income; that in at least one matter he was unable to repay his loan. In the replying affidavit, the respondent has deposed that he is a driver and is capable of refunding the decretal sum. The appellant's belief that the respondent will be unable to repay the same is solely based on the appellant's lack of knowledge as to the respondent's financial ability or capability. In my view, the mere fact that an appellant does not know the respondent's financial capability does not give rise to the presumption that the respondent will be unable to repay the sum. There must be other factors that lead to that presumption.

On the material before the Court I am not satisfied that the appellant has shown that it stands to suffer substantial loss if the stay sought is not granted.

With respect to delay, I am not satisfied that a delay of 30 days in making the application in the circumstances of this case is inordinate. I am also not satisfied that the application as framed is incapable of being granted since there is no allegation that the respondent was prejudiced by the manner in which the same was framed. To the contrary the respondent was able to fully argue its case.

On the issue of the chances of success of the appeal, whereas this Court is perfectly entitled to take that issue into account, this being the Court to which the appeal lies, in the absence of the proceedings and judgement appealed from this Court is not in a position to form a view in respect thereof based solely on the memorandum of appeal. As was held by **Hancox, JA** (as he then was) in **Kenya Shell Limited vs. Kibiru** (supra):

"The record of the proceedings, though applied for, is, in the nature of things, not yet available, so it is equally impossible to assess the chances of success of the appeal, which are stated in the affidavit in support of the present motion to be overwhelming."

I am, similarly, unable to form an opinion as to the chances of success of this appeal at this stage.

Taking into account the principle of proportionality and equality of arms as required under the overriding objective principle I am of the view that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgement in his favour I am of the considered view that there would be a much larger risk of injustice if the court found in favour of the appellant, than if it determined this application in favour of the respondent.See**Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

In the result I do not have to consider the issue of sufficiency or otherwise of the security.

Consequently the amended Notice of Motion dated 2nd November 2012 lacks merit and the same is dismissed with costs.

Dated at Nairobi this 28th January 2013

G V ODUNGA
JUDGE

Delivered in the presence of Miss Mutisya for the Appellant