**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Bankruptcy Cause 25 of 2009**

**PURITY GATHONI GITHAE. ..... FIRST DEBTOR**

**SAMUEL KAMAU MACHARIA. ..... SECOND DEBTOR**

**AND**

**OCEANFRIEGHT TRANSPORT COMPANY LTD. ..... PETITIONER**

**R U L I N G**

1. By a decree issued in **HCCC No 3958 of 1991 Ocean Freight Transport Company Ltd Vs Purity Gathoni Githae & S K Macharia** on 23rd October, 2001, judgment was decreed in favour of the Respondent in these proceedings against the Applicants for Ksh.500,000/- with interest at 19% per annum compounded monthly from 6th December, 1986 until payment in full. The Applicants having failed to settle the decree, the Respondent filed these Bankruptcy proceedings whereby, by a judgment entered on 28th January, 2011, Hon. Koome J (as she then was) issued a receiving order against the Applicants and directed that the estates of the Applicants henceforth be placed under the Official Receiver of the Republic of Kenya.

2. By a Notice of Motion dated 31st January, 2012, brought under Order 42 Rule 6 of the Civil Procedure Rules and Rules 16 and 147 of the Bankruptcy Rules and Section 3A of the Civil Procedure Act, the Applicants have applied for the stay or suspension of the receiving order/orders or any further proceedings to the said receiving orders pending the hearing and determination of the intended appeal. They also seek that the official receiver be restrained from Gazetting the receiving orders or publishing the same in one of the local dailies.

3. The parties filed their respective submissions which were ably hi-lighted by their respective counsels. The application was supported by affidavits of Samuel Kamau Macharia and Purity Gathoni Githae sworn on 31st January, 2011 and a Supplementary Affidavit of Samuel Kamau Macharia of 24th February, 2012. The Applicants contended that they had filed a Notice of Appeal in the Court of Appeal against the Judgment of 28th January, 2011, that they are associated with one of the largest media houses in the country, that they were ready and willing to deposit in court within 24 hours Kshs.34,854,570/- as security for the due performance of the order that shall ultimately be binding upon them.

4. It was submitted on behalf of the Applicants that they had on 29th March, 2011 filed Civil appeal No. 62 of 2011 against the judgment of 28th January, 2011, that the court should give effect to the overriding objective of the Act by ensuring fairness and equality by maintaining the status quo pending the

determination of that appeal, that on 1st February, 2011 certain orders were made by this court which were complied with by the Applicants, these include the deposit of Kshs.34,854,510/- in court, that if the order of 28st January, 2011 is executed through the enforcement of the receiving orders the Applicants assets will be taken possession of by the official receiver and they will not be able to carry on with their media business.

5. It was further submitted for the Applicant that a receiving order has drastic consequences including the placement of the property of a debtor in the hands of the official receiver, the adjudged bankrupt cannot hold various public offices under Section 101 of the Bankruptcy Act, that the publication of the orders would destroy the Applicants. Dr. Kamau Kuria appearing for the Applicant contended that before the introduction of Sections 1A and 1B of the Civil Procedure Act, it was a requirement that decretal sums be deposited in court, that the said enactment now enjoins the court to deal with cases justly and fairly, that the court has to consider the hardship of the parties before it, the cases of **African Safari Club Ltd Vs Safe Rentals ltd CA Nai 53 of 2010 (UR**) and **Hellen Njeri Nderu Vs Oriental Commercial Bank Ltd CA No. 64 of 2011 (UR)** we relied on the proposition that there was no requirement that the entire amount decreed be deposited in court. The case of **Southern Credit Vs Atlantic Products, HCCC 922 OF 2000 (UR)** was relied on the proposition that depositing a portion of the decretal sum is sufficient. Dr. Kamau, therefore, urged that the application be allowed.

6. In opposition to the application, the Respondent filed Grounds of Objection and a Replying Affidavit of Livingstone Ndungu Waithaka sworn on 11th February, 2011. The Respondent contended that the Applicants were guilty of misrepresentation, concealment and non-disclosure of material facts, that the Applicants were in willful disobedience of the orders of this court thereby disentitling them of the exercise of the courts discretion in their favour, that this Court and the Court of Appeal have previously ruled that being declared bankrupt would not render the Applicant's appeal nugatory. The Respondent contended that it was imperative to refer to the background that led to the judgment that was being appealed against so as to understand how the parties have conducted themselves in the past, that the Applicants had taken ten (10) years to file an appeal (CA No. 85 of 2011) against the decree of Hon. Rawal J (as she then was) of 23rd October, 2001 whose filing was an abuse of Court Process, that the Applicants had filed a Constitutional Reference which had remained unprosecuted now for ten (10) years which was a clear sign of the Applicants abuse of the court process.

7. The Respondent further contended that in trying to further frustrate the execution the decree of 23rd October, 2001, the Applicants filed objections in Bankruptcy Notice Numbers 3 and 4 of 2008 which were dismissed and NRB ELC No. 406 of 2008 which was also dismissed on 26th January, 2012 for want of prosecution, that the Applicants have also filed four (4) previous applications which have all been declined by the various courts, that there was outright concealment of material facts which on the authority of **R Vs Kesington Income Tax Commissioner (1917) IKB 486** as has been variously applied by our courts, the application should be dismissed. It was further submitted for the Respondent that it had not been shown what substantial loss the Applicants will suffer, that the debtors can pay the debt then pursue their appeal, that the remedy being sought by the Applicants was discretionary to which the Applicants had disettled themselves by their conduct. That the Applicants have engaged in vexations proceedings that have generated thirteen (13) rulings and judgments, the Applicants have, therefore, abused the court profess and are not deserving of the prayers sought, that if the court grants them a stay, the Applicants should be ordered to settle Rawal's decree and finally that litigation must come to an end. The Respondent urged that the application be dismissed with costs.

8. I have carefully considered the Affidavits on record, written submissions, oral hi-lights of counsel and authorities relied on.

9. As submitted by Mr. Raiji appearing with Mr. Murage for the Respondent, the order for stay, such as the one sought by the Applicants is a discretionary remedy which discretion is only fettered by the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules. These conditions are that an application for stay must be made timeously, that substantial loss will result if the stay is not granted and that the Applicant must give security for the due performance of the decree that will be ultimately binding

upon him. All these conditions **MUST** be satisfied before the court can exercise its discretion in favour of an Applicant.

10. On the first condition, the Judgment appealed against was delivered on 28th January, 2011 and this application was made on 31st January 2011 barely three (3) days after the delivery thereof. In my view, the first condition was satisfied. The other condition is that the Applicant must give security for the due performance of the decree. The Applicants in this matter offered security of Ksh.34,854,510/- which was deposited in court on 1st February, 2011 to be able to have enjoyed a temporary order of stay todate. Although this money was deposited as aforesaid, the Respondents took issue with the same. The Respondent contended that as at 31st January, 2011, the amount due was Ksh.47,721,561/80 which should have been the amount deposited other than the said Ksh.34,854,510/- The Applicants stated in their application that they were able, ready and willing to deposit the said sum since it was the amount founding the Petitions the subject of these proceedings. That was, the ascertained amount then. I am alive to the fact that, that was the sum due as at the time the Petitions commencing the proceedings herein were filed and that the sum **MUST** have changed due to the interest on the decretal sum. However, since that was the amount the court had formally certified, I am of the view that the Applicants were entitled to disclose and offer to deposit the same as they did not and they may not have been under a duty to calculate the interest that had accrued from the date the petitions were filed and the date of making the application. Accordingly, in my view, the Applicants have attempted to comply with the second condition under Rule 6(2) of Order 42 of the Civil Procedure Rules. I say attempted because under that rule the security to be given is not that which an Applicant thinks to be sufficient but that which the court shall order. I will come to this limp later in this ruling.

11. The 3rd and last condition is that the applicant must show that he will suffer substantial loss if the stay is not granted. Before I address this issue, I think it is prudent to first address several issues raised by the Respondent.

12. The Respondent raised various weighty and substantial issues to show that the Applicants are not deserving of the exercise of this courts discretion in their favour in this matter. The first issue was the one of concealment of material facts. The Respondent contended that the Applicants failed to disclose that the amount due under the decree as at the 31st January, 2011 when the application was made was Ksh.47 million and not Kshs.34 million disclosed, that there were parallel proceedings in HCCC no. 3958 of 1991 and that they had not filed an appeal against the judgment of Rawal J, of 23rd October, 2001. As I have already stated, I do not think that the Applicants should have disclosed more than they did that they were willing to deposit Ksh.34,854,510/-, which was the amount commencing the petitions herein. Since HCCC No. 3958 of 1991 was not for stay of proceedings of the Receiving order and was only seeking certain declarations under the old Constitution directed against the decree made on 23rd October, 2001, I do not think that there was any duty on the part of the Applicants to disclose the existence of those proceedings. As to what will ultimately be binding upon the Applicants, since the Receiving Order is as a result of a debt by way of decree, I believe that the decretal sum thereof will be the amount that is the amount that may ultimately be binding upon the Applicants. I, therefore, reject the Respondents contention of material non-disclosure. My understanding of the duty to disclose to an ex parte Applicant to be is, a duty to disclose all the material that is relevant to the matter before the Court, the material that as if one way of the other may have affect the decision of the court. In the matter before me, what the court was to consider in my view was whether there was a judgment in existence, whether it had been appealed against, what security was being offered and how such security would courtion the Respondent if at all. Other matters over and above these in my view would be mere supplasage.

13. The Respondent submitted that there cannot be a stay of execution of an execution process. That the Bankruptcy proceedings themselves are a process of execution and that that process cannot be stayed. Given, these proceedings may be an execution process, but under Section 103 of the Act a party upon whom a receiving order has been made is entitled to appeal. Section 108 of the Act also allows proceedings in bankruptcy to be stayed. My view is that notwithstanding that the bankruptcy proceedings herein are in the nature of execution process, there is nothing both in the Bankruptcy Act as well as the Civil Procedure Act and Rules that bar a stay of such proceedings. This court is not prepared to read into

the law that which is not written therein. For indeed, it is a rule of construction that a Court of Law should not interpret a statute as to whittle down the rights of a litigant. Reading the Sections of the law I have cited above otherwise than I have will whittle down a party's right of appeal.

14. What deeply concerned this court is the number of proceedings and applications that have been made in this matter. I have considered all of them before arriving at this decision. My view is that all through the Applicants have either been misadvised or they have outrightly been engaged in side shows to vex the Respondent. In my view, the lesser I talk about them, the better. Be that as it may, I need to set out what the previous courts have delivered themselves on the two applications which I think are relevant to the application before me and which the Respondent urged me to apply. On 2nd July, 2009, Hon. Kimaru J, stated:

***"This court cannot however exercise its discretion in favour of an applicant where it appears to the court that the process of the court is being abused to achieve the purpose of frustrating the execution of a valid and undisputed decree of this court..... This court cannot exercise its discretion to stay bankruptcy proceedings pending the hearing of an intended appeal where it appears to the court that the debtors are abusing the due process of the court to achieve the sole purpose of frustrating the execution of a valid decree that is not subject to any appeal."***

The Court of appeal held on 16th October, 2009: -

***"On the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will not be rendered nugatory. We recognize the argument put forward by the applicants that there is a threat of Receivership Orders being made against them which would effectively seal their fate. But we are also conscious of the case put forward by the respondent that the judgment debt which now stands at a staggering sum in excess of Kshs. 30 million continues to rise, and must indeed be paid. We also note, once again, that no appeal was ever preferred against that judgment."***

These are only two of the many decisions the courts have delivered in the dispute between the parties. On the foregoing, the Respondent urged that the courts have found that refusal of stay of a Receiving Order will not render an appeal nugatory.

I have carefully considered the more than 10 rulings in this matter. In all those rulings, the courts were of the view, which I agree with that the Applicants were on the wrong route. The Applicants have all through been trying to challenge the process of execution whilst the basis and/or foundation thereof or the root cause thereof remained unchallenged. The decree of 23rd October, 2001 remained unchallenged. On that basis, there is no way any of the said courts could have granted any order of stay or could have arrived at any other decision than as they did.

15. The question this court would ask is, are the circumstances then obtaining the same as now? I think not. There is evidence on record, and it has been admitted that for the first time after nearly ten (10) years, the Applicants have woken up from their long slumber and have filed an appeal in the Court of Appeal challenging the decree of 23rd October, 2001. Although there is no stay that has been sought and granted against that decree, at least, the Applicants have shown an intention to challenge that decree which the courts have held should be settled. The Respondents submitted that the filing of that Appeal in or about May, 2012 was meant to defeat several grounds raised against this application. The Respondent also doubted whether with a delay of ten (10) years, that appeal will ever find the light of the day. That may be so, but the fact is that for the first time at least an Appeal has been lodged to challenge the decree of 23rd October, 2001. On the validity of that appeal, I think that is a matter for the Court of Appeal to deal with and not this court. In my view, therefore, were there in existence an appeal challenging the decree of 23rd October, 2001, the courts that have previously dealt with the applications for stay would probably have not delivered themselves as they did. All those decisions referred to the fact that the proceedings undertaken by the Applicants were meant to avoid settling a valid decree that had not been challenged.

16. The Respondent urged that the application should be rejected on the ground that it is an abuse of court process. That the existence of a litany of previous vexatious proceedings was evidence of the Applicants abusing the court process. My view of the matter is that certain steps taken in the past by the Applicants, like applying for stay of the orders refusing the setting aside of the Bankruptcy Notices, or the Constitutional reference may have been wholly misadvised taking into consideration that the decree of 23rd October, 2001 still remained unchallenged. However, since that decree now is being validly challenged through Civil Appeal No. 85 of 2012 (whether competent or otherwise), it cannot be said that the application herein is an abuse of the process. I hold this view because I have already found that there is a right of appeal against the Judgment of 28th January, 2011 and that there is nothing in the Bankruptcy Act and the Civil Procedure Rules that bar the Applicants from making the present application. In my view, for what I will state hereafter, the present application cannot be said to be an abuse of the court process.

17. This now brings me to the issue of substantial loss. The Respondent urged that the Applicants have not demonstrated that they would suffer any substantial loss, that they had not shown that the loss to be suffered was over and above that of an ordinary Judgment-debtor in the normal process of a decree-holder executing a decree against him. The Applicants contended otherwise.

On my part I agree with the Respondent that whilst looking at the issue of substantial loss, the status of the litigant is immaterial, the court is only enjoined to look at the character and nature of the alleged substantial loss to be suffered.

18. The Applicants urged that they are directors of a leading media house. That if the stay is not granted their position in the said media house may be adversely affected. They contended that the publication of the order will adversely affect their media houses and their personality. **In Halsburys Laws of England 3rd Edition Vol. 2 Para 352** the learned Authors have stated: -

***"A receiving order is an order of the bankruptcy court placing the debtor's estate under its custody and control through its officer, the official receiver. .... A receiving order.... must be gazetted by him and advertised by the official receiver in such local paper..."***

Section 101 of the Bankruptcy Act specifies the disqualifications which attach to a person adjudged bankrupt. In my view, the issue this court, has to address is if the stay is declined and the Receiving Order is publicized in accordance with the law and the personal affairs of the Applicants are taken over by the official Receiver, will the appeal be rendered nugatory thereby rendering the applicants to suffer substantial loss.

19. 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 if 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 from the management thereof may have a permanent and irreversible negative impact thereon. This is my view is substantial loss.

20. In the Court of Appeal in the case of **E. Muiru Kamau and Another –vs- National Bank of Kenya Ltd (2009) eKLR**, the court observed as under: -

***"The Courts including this court in interpreting the Civil Procedure act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in 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." (Emphasis supplied)***

21. I am convinced that in arriving at this decision, it is imperative for this court to balance the interests of the parties before me. Whilst the Applicants are to be courtioned against suffering substantial loss, the Respondent must also be assured of the safety of its judgment. If the appeal succeeds, the effect of the receiving order may not be easily reversed. Applying the principle of proportionality, I am of the view that the security offered be increased to a reasonable sum considering the amount the Respondent urged to have been due as at January, 2011. Further, having the amount deposited in court does not make any commercial sense.

22. Accordingly, I will allow the application in terms of prayer **No's 5** and **6** of the motion dated 31st January, 2011, on the following terms:-

***a) That the Applicants do increase the amount of security from Kshs.34,854,510/- to Kshs. 45 Million within 21 days of the date hereof.***

***b)That the amount of Ksh.34,854,510/- deposited as security in court on 1st February, 2011, be transferred into an interest bearing account in a reputable bank in the joint names of the Advocates appearing for the parties in this matter.***

***c) That the said total sum of Kshs.45 million be held in the joint names of the Advocates for the parties as aforesaid until the hearing and determination of Civil Appeal No. 62 of 2011.***

***d)Since the application succeeded only partially, the costs of the application will be in the cause.***

***It is so ordered.***

**Dated and delivered at Nairobi this 31st July, 2012.**

.....
**A MABEYA**
**JUDGE**