REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 372 of 2012

JOSEPH GACHIE T/A JOSKA METAL WORKS.....……....APPELLANT/APPLICANT

VERSUS

SIMON NDETI MUEMA…….....…..…….RESPONDENT/RESPONDENT

RULING

On 20th July 2012, the appellant herein filed a Notice of Motion dated the same day expressed to be brought under Section 1A, 1B, 3, 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya; Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law seeking the following orders:

1. This Application be certified urgent and service be dispensed of and it be heard ex-parte in the 1st instance due to its urgency.

2. Pending the hearing and determination of this Application, this Honourable Court do order a stay of execution of the Judgement delivered on 26th June 2012 by the Honourable Mrs. T. W.C. Wamae (Chief magistrate) at Nairobi Milimani CMCC NO. 5175 of 2010 Simon Ndeti Musema Vs Joseph Gachie trading as Joska Metal Works.

3. Pending the hearing and determination of this Appeal, this Honourable Court do order a stay of execution of the Judgement delivered on 26th June 20102 by the Honourable Mrs Wamae (Cshief Magistrate) at Nairobi Milimani CMCC No. 5175 of 2010 Simon Ndeti Muema Vs Joseph Gachie trading as Joska Metal Works.

4. The costs of this application be provided for.

The grounds upon which the application is based are:

a) The Applicant being dissatisfied with the Judgement delivered on 26th June 20102 by the Honourable Mrs T.W.C. Wamae (Chief Magistrate) Milimani CMCC No. 5175 of 2010 Simon Ndeti Muema Vs Joseph Gachie trading as Joska Metal Works has filed an appeal against the Judgement.

b) The Appeal will be rendered nugatory and the Applicant will suffer substantial loss should execution proceed and the Decretal sum of Kshs. 500,000.00 be paid to the Respondent and the Appellajnt eventually succeeds in the Appeal as it is highly unlikely that in the event the respondent is paid the Decretal sum he will have any further interest in the matter as in the lower court he had testified to the effect that he was jobless hence in any event he will be unable to refund the decretal

sum.

c) The Applicant is able and willing to give such security as the court may order for the due performance of the Decree or any other Order of the Court.

The application is supported by an affidavit sworn by **Joseph Gachie,** the appellant herein,on 20th day of July 2012. In the said affidavit it is deposed that the appellant being dissatisfied by the judgement delivered on 26th June 2012 in the said case has instructed his advocate to lodge an appeal against the said decision and pursuant thereto has requested for certified copies of the proceedings and judgement and Decree. According to the deponent he has a meritorious and arguable appeal with very high chances of success. The said appeal, according to the applicant, will be rendered nugatory and he stands to suffer substantial loss should execution proceed since he is apprehensive that in the event that he makes payments to the respondent and the appeal succeeds, the respondent will be unable to refund the sums paid. The respondent, however, stands to suffer no irreparable loss should the appeal succeed. To support this contention he states that the respondent had at the hearing testified that he is a man of extremely meagre means. He, on the other hand, deposes that he is able and willing to give such security as the court may order for the due performance of the Decree or any other order of the Court.

In opposing the said application the respondent, **Simon Ndeti Muema**, through his replying affidavit sworn on 24th July 2012, contends that the applicant has not demonstrated that he shall suffer substantial loss if the orders sought are not granted. He counters that he is ready and able to refund the decretal amount to the appellant in the unlikely event that the applicant succeeds in the appeal. He denies the allegation that he stated during the trial that he is a man of meagre means. To the respondent, the said deposition is false aimed at misleading the court into granting the orders sought. In his view, he stands to suffer great prejudice if the orders sought are granted since it will amount to denial of his right to enjoyment of the fruits of his successful litigation. To him the appellant's appeal is not meritorious but just a gimmick meant to delay the expeditious disposal of the dispute. To him the appeal is an afterthought since the appellant's advocates had requested for 30 days stay of execution to enable them make a proposal on how to pay the decretal sum. According to the respondent the application does not meet the criteria governing the grant of stay under the Civil Procedure Rules.

The application was prosecuted by way of written submissions. In the applicant's submissions it is submitted that the application has been filed without delay and that since the respondent in his replying affidavit has not demonstrated that he has either means or capacity to refund the decretal amount should execution succeed, the applicant stands to suffer substantially. The mere denial by the respondent that he is not a man of meagre means, it is submitted, is not sufficient to counter the assertion to the contrary supported by the lower court proceedings. It is submitted that unless the application is allowed, the respondent will have no interest in the appeal and is unlikely to participate in the appeal and if successful the applicant will be faced with arduous task of pursuing the recovery. However, allowing the application will ensure the respondent's interest in retained the appeal and the subject matter is preserved. It is further reiterated that the appeal raises *prima facie* grounds of appeal which confirm that the appeal is meritorious.

On behalf of the respondent it is submitted that the applicant has not demonstrated that he stands to suffer substantial loss since no material has been tabled before the court to show that the respondent will be unable to refund the amount. According to the respondent, it is not upon the respondent to show that he shall be able to refund the amount but the appellant to show the respondent's inability. Therefore the applicant should not be allowed to deny the respondent the right to enjoy the fruits of his successful litigation. It is further submitted that since the appellant participated in the hearing the intended appeal is merely meant to delay the expeditious disposal of the claim. Since the respondent has deposed that he is able to refund the decretal amount should the appeal succeed the application ought to be dismissed. However, the respondent submits that should be Court be inclined to grant the stay sought the same should be conditional on depositing he decretal sum in a joint interest earning account and timelines be given within which the appeal be filed and served to encourage expeditious disposal thereof.

Having considered the application, the supporting affidavit as well as the submissions, this is the view I

form of the matter. 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 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.

Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of his judgement. **See Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.**

As was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

"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".

It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.**

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 in his evidence before the trial court stated that he was a person of meagre means. That if true, would in my considered view amount to a reasonable ground for believing that the respondent is unlikely to refund the decretal sum if the appeal succeeds. It is, however, upon the applicant to lay a basis for this belief. In this case, the proceedings in which the alleged statement by the respondent was made have not been exhibited. Both parties have sworn affidavits with the respondent denying that he made such a statement. Confronted with a similar matter, **Ringera, J** (as he then was) in **Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**stated as follows:

"Where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved".

Accordingly, I find that since the fact of the respondent's impecuniosity is neither proved nor disproved, it is therefore not proved.

It follows that the applicant has failed to satisfy me that he stands to suffer substantial loss if the stay sought is not granted in the event that the appeal succeeds.

Having so found it is unnecessary for me to deal with the other conditions for the grant of stay of execution pending appeal

In the result the application dated 20th July 2012 lacks merit and is dismissed with costs.

Dated at Nairobi this 17th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of:

Mr Odawa for the applicant

Mr Mburu for Mr Nzavi for the respondent