REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 31 of 2012

TABRO TRANSPORTERS LTD.....APPELLANT

=VERSUS=

ABSALOM DOVA LUMBASI.....RESPONDENT

RULING

INTRODUCTION

Preliminary

[1] Parties herein agreed by consent that the application dated 28th of August 2012 should be heard today the 22nd of October 2012, and the one dated 4th of October 2012 to be held in abeyance to await the outcome of the instant application.

The application

[2] The Appellant/Applicant (hereafter the Applicant) has moved the court by way of Notice of Motion under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, seeking inter alia, orders that;

a. There be stay of execution of the judgment and decree herein pending the hearing and determination of the appeal in BUNGOMA HCCA NO. 31 OF 2012: TABRO TRANSPORTERS LTD V ABSALOM DOVA LUMBASI

b. Cost of this application be provided for

The other orders sought in the application are spent and I will say nothing more about them.

In support of the application is the affidavit of Brendon Wanyama and the grounds on the face of the application.

THE APPLICANT'S CASE

[3] M/S Swaleh, Advocate argued the case for the Applicant. She relied on the affidavit of Brandon Wanyama sworn on 28th August 2012 and the submissions dated 21.9.2012 and filed on 28.9.2012. She informed the court that orders No. 1 and 2 in the instant application were granted and what was remaining for argument is order No. 3.

[4] According to her, the gist of the application is that judgment had been obtained in the lower court. And on being aggrieved by that judgment, the Applicant preferred an appeal. For disclosure purposes, she informed the court that an application for stay had been made in the lower court but had been dismissed, hence this application in the High Court. She urged that the application in the High Court, having been made under Order 42 rule 6 of the CPR, is well grounded.

[5] The said counsel for the Applicant told the court that conditions under order 42 of the CPR have been met.

[6] First, the application was made without a reasonable delay and the affidavit in support of the application discloses that fact.

[7] Second, the Applicant is willing to provide security for the grant of stay of execution. In accordance with paragraph 8 of the supporting affidavit the Applicant is ready and willing to deposit the decretal sum in an interest earning account in the names of advocates of the parties herein. As a sign of good faith and willingness to comply with orders of the court, the Applicant drew a cheque in the sum of Kshs.439, 020/= in the names of Nyaundi Tuiyott, and Omondi & Co. Advocates in compliance with the order of court made on 18th of September 2012.

[8] Third, the Managing Director for the Applicant company has indicated in paragraph 5 of the Supporting Affidavit that the Applicant is likely to be prejudiced if the decretal amount is released to the defendant and the appeal is successful. Recovery will be difficult since the plaintiff in his evidence in chief admitted he was a driver with Butali Sugar Company. According to the counsel for the Applicant, the Respondent did not produce anything to show he is employed on permanent basis not even a pay slip or contract of employment. These issues were not even canvassed in the Replying Affidavit by the Respondent. The Respondent is a man of straw and may not be able to make a refund.

[9] Fourth, the appeal has high chances of success. The Applicant contended further that, in the event the instant application is allowed, the Respondent will not in any way be prejudiced as the decretal sum will have been deposited and will be available.

[10] On the Replying Affidavit, counsel for the Applicant told the court that it is sworn by Mr. Omondi's, who is the advocate for the Respondent. She maintained that paragraphs 11 and 12 of that Affidavit are merely speculative as Gateway Insurance Company is not a party in the suit. She also pointed that those paragraphs raise contentious issues that will require cross examination of the deponent. Accordingly, the advocate has exposed himself into being called as a witness. The law requires such paragraphs to be expunged and so she prays.

[11] M/S Swaleh insisted that costs were assessed on 5.6.2012 before the appeal herein was filed.

[12] For those reasons she prays the court to find all conditions for grant of stay of execution have been met and accordingly grant the application.

[13] On section 27 of the constitution, she argued it offers equal protection and benefits of the law to all parties including the Applicant.

THE RESPONDENT'S CASE

[14] Mr. Omondi prosecuted the Respondent's case and opposed the application in a vehement way. He relied on the Replying Affidavit sworn by him on 31st of August 2012, together with the annexure thereto.

[15] First, he refuted the claim that his said Affidavit contains contested matters of fact. He claimed that issues therein relate to information that came to his knowledge in the process of conducting the Respondent’s case in the subordinate court.

[16] He implored the court to note that liability was settled by consent a copy of which is annexed. The only thing in dispute is quantum of damages. This means the Applicant concedes that the Respondent is entitled to a certain amount of the decretal sum. Accordingly, the Respondent is entitled to damages as of right. According to him the appellant should have indicated how much they are willing to pay over to the respondent and how much to be deposited. It is therefore in bad faith that the Applicant is seeking a blanket stay of execution.

[17] According to the Respondent's counsel, the Applicant has not demonstrated that substantial loss will occur. Paragraphs 8, 9 and 10 of his affidavit disclose that there is another suit no. 163 of 2009 in Webuye arising from the same transaction as this where Gateway Insurance Company settled the claim. Even this one should be settled by the same insurance company. Therefore it is the Insurance Company that will suffer the loss and not the Applicant. The said Insurance Company has not sworn an affidavit to say there will be loss.

[18] The Respondent also says that there was an attempt by the Applicant to comply with the orders of the court of 18.9.2012 which further confirms that it is Gateway Insurance Company that will settle the claim. The burden of proving substantial loss lies with the Applicant. They must prove the Respondent is a man of straw and not the Respondent to prove he can pay the money.

[19] Article 27 of the Constitution gives every person equal protection and benefit of the law. Therefore, in view of this Article, it is no longer tenable to argue that the respondent is a poor man. That will constitute discrimination.

[20] Finally, the Respondents holds the view that this application is *res judicata* since a similar application was made and dismissed by the subordinate court, and there is no prayer to set aside that dismissal. Both the lower court and the High Court determine applications under Order 42 Rule 6 on same principles. As it stands now the position is that a court of competence jurisdiction has heard this application and dismissed it. It will embarrass the court for one to obtain a contrary decision other than in an appeal. They ought to have appealed to set aside the order of the lower court respecting the stay. He prays that the application be rejected.

[21] However, he argues, if the court is inclined to grant the application, then substantial sum of the decretal amount should be paid out to the Respondent.

[22] Mr. Omondi says that costs were assessed on 25.6.2012 and not 5.6.2012. That means that there is no dispute on cost because appeal was filed before the consent on cost was filed.

ISSUES FOR DETERMINATION

[23] After considering all the material placed before me, I am of the opinion the following are the issues in dispute for determination by the court;

a. Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending appeal

b. Whether the argument by the applicant that, the respondent is poor and cannot be able to refund the decretal sum herein, amounts to discrimination under Article 27 of the Constitution.

c. Whether an application made to the High Court under Order 42 Rule 6 of the Civil Procedure Rules, after a similar application had been dismissed by the subordinate court, is res judicata.

DETERMINATION BY THE COURT

Preliminary issue

[24] I need to decide from the outset, whether this application is *res judicata* as that issue, in the event it

is successful, forecloses any further proceedings on the application.

[25] The instant application has been made under Order 42 Rule 6 of the CPR. What does that Order provide? Below, I have cited the relevant part.

42(6) (1)…and whether the application for stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

[26] Under this Order, the Applicant is allowed to file an application for stay to the appellate court, even if a similar application had been previously rejected by the court appealed from. There is no any statutory restriction on the discretion of the appellate court in entertaining and determining such application for stay under Order 42 Rule 6 of the CPR. Even with extreme ingenious craft, rejection of a similar application by the lower court is not a fetter on the discretion of the appellate court under Order 42 Rule 6 of the CPR. The Order does not also require the Applicant to apply for the setting aside of a dismissal of an earlier application either to the trial magistrate or to the appellate court. It is only where a stay has been ordered that the person aggrieved by that order of stay may apply to the appellate court to set aside the order granting stay. The last procedure is primarily to cater for a Respondent who is aggrieved by the grant of stay by the trial court. That procedure does not apply where stay has been refused by the lower court.

[27] This very procedure has been adopted in the Court of Appeal Rules. It is a common and legal procedure in many jurisdictions, and is one of the legal instances where exception is made to the rule of *res judicata*. The procedure is so designed in order to offer an intermediate measure that is necessary to preserve the subject matter of the appeal, and also protect the rights of the parties in the appeal. I have said elsewhere in this case and in others that the appellant's right of appeal includes the prospects that the appeal is not rendered nugatory. See the opinion of the court in the case of **BGM HC MISC APPL NO 42 OF 2001 JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO** that;

The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.

[28] By law, it is the obligation of the court to preserve the subject of the suit which is inherent in the administration of justice. If the appellant is successful in the appeal, there will be a barren result unless the subject of the appeal is preserved in whatever way the court may deem fit. See the case of **ERINFORD PROPERTIES V CHESHIRE [1974] 2 All ER** 448. The case of **SHIVABHAI NATHABHAI PATEL V MANIBHAI NATHIBHAI PATEL [1959] EA 907** offers an extremely marked grip on this issue when it rendered itself that;

…it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so.

[29] If it be the way proposed by Mr. Omondi, that very purpose of preserving the subject of the appeal will be defeated thereby causing extreme injustice. I take judicial notice that courts of law and the entire system of administration of justice are not designed to preside over a procedure that will result into injustice. They are courts of justice. The discretionary decision of the court appealed from under Order 42 Rule 6, has not been assigned under that Order, the finality in the sense of the rule on *res judicata*. That is why, and I believe it to be so, Order 42 Rule 6 of CPR has been tailored the way it is. I consider it a misconception to think that whenever there has been a judicial pronouncement on a matter, the only channel open to the aggrieved party is an appeal or application for the setting aside of the order or review. The law may provide for other methods of relief depending on the objective the law wants to achieve. See the case of **WILLIE V MUCHUKI & 2 OTHERS [2004] 2 KLR 357** on the court's observation that the doctrine of *res judicata* does not apply in succession cases which supports the

argument that this doctrine does not operate without borders in an *erga omnes* connotation to all corpus of law. Order 42 Rule 6 of the CPR provides for the manner of moving the court for stay pending appeal which is perfectly legal. I therefore find that the application before me is not *res judicata*, and the argument by Mr. Omondi thus fails.

[30] After finding that the instant application is properly before the court, I will proceed to examine the merits of the application.

Applicable law

[31] The granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is granted at the discretion of the court when sufficient cause has been established by the applicant, on whom the incidence of the legal burden of proof lies. See the Halsbury's Law of England, vol.17, paragraph 14:

14. Incidence of the legal burden …in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.

[32] Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:

a) Substantial loss may result to the applicant unless the order is made,
b) The application has been made without unreasonable delay, and

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

[33] These conditions are the essence of Order 42 Rule 6 CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in **Mukuma V Abuoga (1988) KLR 645** reinforced this position. Each of the condition is examined below to see whether the circumstances of this case neatly fit the scales.

a) Substantial loss occurring

[34] In law, the fact that the process of execution is likely to be put in motion, by itself, is not a ground for granting stay of execution. The Applicant must show that substantial loss will occur if the execution is not stayed. But what does substantial loss entail? This court in the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO** stated 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...

[35] The Court of Appeal reinforced the centrality of substantial loss in the case of ***Mukuma V Abuoga*** where it termed substantial loss as being the cornerstone of the discretion by the High Court in the granting stay of execution under Order 42 of the CPR, when it stated that;

"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

Of course, a frivolous appeal cannot be rendered nugatory. The only caution however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR only on the chances of the success of the appeal. It must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test I have set out above.

[36] The Applicants in their Memorandum of Appeal have queried the amount of damages as being excessive and the issues raised are not frivolous. The question is; whether the Applicants have demonstrated that substantial loss will occur unless an order for stay of execution is issued?

[37] The Respondent says the Applicant has not established that substantial loss will occur unless an order for stay is made. The Respondent argues that Gateway Insurance Company settled an earlier claim arising out of the same accident as this. The Respondent is of the view that it is the same insurance company which will pay this claim as shown by the cheque that was purportedly issued by Gateway Insurance Company. To the Respondent, it is not possible for the Applicant to suffer any loss. The court's rejoinder to this argument is short; that the Applicant is the party in the suit and therefore will suffer loss if any arose in this case. I reject that argument.

[38] The Applicant avers that substantial loss will result as his appeal, which has high chances of success will be rendered nugatory if the decretal sum is paid out to the Respondent. The Applicant argues that if the decretal sum is paid to the Respondent, he is unlikely to repay as he is a man of straw. This part of the argument is what has attracted rather exhilarating submissions on Article 27 of the Constitution. The issue has a fundamental bearing on the main cause and its consideration is not merely collateral or one that will drift the court from judicious consideration of the main cause. I will first tackle that aspect on Article 27 of the Constitution, and then I will resume with the analysis thereto and fit it into the arguments on substantial loss. The two are connected. This approach is guided by the ***Constitution of Kenya (Supervisory Jurisdiction and Protection of fundamental rights and freedoms of the Individual) High Court Practice and Procedure Rules, 2006,*** particularly Rule 23, and the general practice where such issues of a constitutional nature whenever they arise, should be dealt with by the court within the main cause.

ARTICLE 27 OF THE CONSTITUTION

The argument of discrimination

[39] What I find to be quite of a monumental jurisprudential value in the interpretation of Article 27 of the Constitution, is the argument by Mr. Omondi that; it is no longer tenable, in view of Article 27, to argue in an application of this nature that the Respondent is poor and cannot refund the decretal sum. That according to him constitutes discrimination. I understood him to be saying that such argument would mean that, in an application for stay pending appeal, a poor person will be denied the fruits of a judgment because of his inability to refund whereas a financially able person will be allowed to enjoy the benefits because he can refund. I think that is where Mr. Omondi believes discrimination would lie.

[40] Then M/S Swaleh in response to Mr. Omondi's argument adds a real twist to this issue when she submitted, and rightly so, that Article 27 of the Constitution offers equal protection and benefit of the law to all parties including the appellant.

[41] When I first confronted these arguments, I shared an intuitive doubt, whether it is legally alright to base the occurrence of substantial loss on the inability of the Respondent to make a refund. But on reflection, I discovered it is a much wider issue, which if successful, will have a huge bearing on the main application. It therefore makes sense to consider it in a more public-spirited approach within the provisions of the Constitution.

[42] Unfortunately, not much was argued on this aspect, and no judicial authorities that were laid before the court on the issue for a comprehensive evaluation. Nonetheless, it is the duty of the judge to ascertain the law even if he does it on his own industry. This is in accordance with the words of the Honorable Justices of the Court of Appeal in the case of **METHODIST CHURCH IN KENYA TRUSTEES REGISTERED & ANOTHER V REV. JEREMIAH MUKU & ANOTHER [2012] e KLR** that observed;

''In reaching the decision the High Court was guided by several decisions…which came to his attention through his own industry. A judge cannot be faulted for ascertaining the law.''

[43] What the court should examine is whether the argument by the Applicant translates into differential treatment that constitutes discrimination under Article 27 of the Constitution?

What constitutes discrimination?

[44] This question encompasses two issues. One, of interpretation. The other, of an inquiry as to the existence of relevant discrimination in the circumstances of this case.

The problem of interpretation

[45] Concerns have been raised that assigning a specific or neutral interpretation of the concept of discrimination may end up trivializing it or restricting its scope. This difficulty of interpretation has lingered on hitherto on and is seen in almost all cases based on a claim of prohibited discrimination. It is even reflected in the way Article 27 of the Constitution is couched. The Article seems to prohibit discrimination *on any ground,* but then it gives an array of prohibited grounds after the word *including.* Article 27 (5) of the Constitution, again talks of… *any of the grounds specified or contemplated in clause (4).* The array of open ended words simply shows that there can never be a single strict or neutral interpretation of this concept, and its category is not heretically closed. It will all depend on the context in which discrimination is alleged to have arisen.

Contemporary approaches

[46] A quick scan on some contemporary approaches used in analyzing claims of discrimination will justify the approach I will adopt herein. Some jurisdictions like Canada look at discrimination as a distinction that is disadvantageous in that it perpetuates historic disadvantage, or is predicated on prejudicial stereotypes as is reflected in the approach by the Supreme Court of Canada in *Withler v Canada (Attorney-General)* 2011 SCC 12, [2011] 1 SCR 396. The Canadian Charter of Rights and Freedoms that was being considered in the case has some similarities with Article 27(1) of our Constitution. Except, it has given the particular grounds that are prohibited in relation to the enjoyment of the right to equal protection and benefit under the law which explains the approach the Canadian Supreme Court took in interpreting that section 15(1). Article 27 of our Constitution is cast differently and that makes the approach in Canada unlikely neat fit for Kenya situation.

[46] In other jurisdictions, for instance the United Kingdom, the decisions by the courts reflected the approach that the enumerated grounds of discrimination should be given a ranking of importance as not all possible grounds of discrimination are equally potent. Some are considered immutable grounds such as age and gender. See, Lord Walker in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.

[47] Yet other nations apply different approaches from those adopted by the Supreme Court of Canada or by the United Kingdom, especially, when the range of prohibited grounds is potentially open-ended, a different rationale arises for defining common characteristics that will be required to qualify the form of differentiation in issue as prohibited discrimination. Look at New Zealand and South Africa; but even then different approaches are applied by different judges like in the decision of the Court of Appeal for New Zealand in *Quilter v Attorney-General [1998] 1NZLR 523 (CA)*. Interestingly, although the entire bench was unanimous in the outcome, the reasoning in the separate judgments of the judges reflected very different approaches as to what would constitute discrimination.

Discrimination in Article 27 of the Constitution

[48] With this contemporary advantage, the court is well grounded to adopt an appropriate test in assessing whether the complaint by the Respondent herein constitutes discrimination under Article 27 of the Constitution. The way Article 27(1) of the Constitution is styled, lays a generalized right thus;

Every person is equal before and has the right to the equal protection and equal benefit of the law

[49] The right is not attached to any particular prohibited grounds which, is materially different from the position in Canada. The prohibited grounds in Article 27 of the Constitution are enumerated separately and are left in such wide open ended manner. The language used does not also create any ranking of importance. The approach adopted in Article 27 of the Constitution is more in accord with the Bill of Rights and its basis is found in the general provisions in the Constitution that the rights and freedoms in the Bill of Rights do not exclude other rights and freedoms not in the Bill of Rights, but recognized or conferred by law. See Article 19(3) (b) of the Constitution.

Broad approach

[50] I would therefore prefer to adopt a broad approach that looks at the conduct complained of within the constitutional structure of the nation, the internationally accepted best practices and the circumstances of the case without trying to circumscribe at the outset any particular ground alleged to have been offended. That kind of assessment is not a justification but an evaluation of the context in which the differentiation occurs, which accords more with the spirit and purpose of the Bill of Rights.

[51] In the kind of case before me, it is better to start conceptually with a more widely-defined right as set out in Article 27 of the Constitution, then *define the subject matter of, and, the basis for the alleged discrimination* [Tipping J in the case of *Quilter v Attorney-General*]. South Africa has also adopted the broad approach in dealing with provisions on equality before the law and protection of the law. See the decision of the Constitutional Court of South Africa in**, CASE CCT 8/97 THE CITY COUNCIL OF PRETORIA versus J WALKER** that the two limbs of, the right to equality before the law and the right to equal protection of the law, are,... ***concerned more particularly with entitling everybody, at the very least, to <u>equal treatment by our courts</u>...and that all persons are subject to law impartially applied and administered-***LANGA DP [***Underlining mine for emphasis***].

What is clear from the contemporary jurisdictions is that in cases on discrimination, context is everything and would vary not only from country to country, but also from case to case. So a case specific enquiry must be undertaken.

Case-specific inquiry: search for materiality or sufficiency of the disadvantageous treatment

[52] Is the complaint herein of such materiality or sufficiency of the disadvantageous treatment or, “discriminatory impact” as to constitute discrimination for purposes of Article 27 of the Constitution? From the outset, the difference in financial or economic ability among the different people is a real life situation that exists everywhere in the world, which is not really a legal question [except where commercial or industrial disputes emerge or a right has been or is threatened to be denied or violated], but one that finds alleviation within the social, economic and political policies of society. Ascertaining the condition of being poor is also not in itself discriminatory. Otherwise all social, economic, political or legal initiatives used to ascertain the economic or financial situation of a person or section of society for policy or legislative or legal redress will become unconstitutional. For instance surveys conducted for poverty eradication policies, inquiries for purposes of execution, bankruptcy proceedings, mortgagees or chargee's inquiries as to a person's financial credit worth and so on will be deemed to be discriminatory *per se*.

[53] I too, with regard to this issue, make a similar observation like SACHS J did in the South African case above. Accordingly, we may be spreading Article 27 of the Constitution far too thin to achieve its purpose if each and every argument that is perceived to be discriminatory is to be treated as prohibited differential treatment even those that happens to coincide with ordinary life situations like the way poverty is to humans. A well-focused construction of Article 27 is directed at laws and practices that perpetuate prohibited forms of discrimination rather than a crude reduction of every argument on an intrinsically difficult social issue such as poverty.

[54] I consider that little would be gained, if the concept of discrimination was entirely unqualified, as that would raise the prospect of theoretical, innocuous or *de minimus* disadvantages qualifying as prohibited discrimination, and that indeed would risk trivializing the right protected under Article 27 of

the Constitution. At least violation of a right needs to be established by the person alleging discrimination.

The test

[55] The notion of disadvantage is established on the basis that the beneficiary party was treated less favorably than a judgment holder should, which constituted a disadvantage in a real and substantive way. Applying this test I have settled on, mere argument by the Applicant that the Respondent is poor and cannot refund the decretal sum, is not materially disadvantageous to the Applicant. It must be shown that the differentiation was applied to the detriment of the Respondent or some real disadvantage resulted or some right was infringed. Although, the claim of inability to make a refund does draw attention to the status of the beneficiary of a decree, it is not in a context that could realistically be said to stigmatize the decree-holder or occasion exclusion on account of inability.

[57] The circumstances of this case are such that the court is the one to render itself on the issue before it, and by its judgment will accord the Respondent equality before the law, equal protection and benefit of the law. That orientation is based on the fact that the right to equality before the law and the right to equal protection of the law, are… ***concerned more particularly with entitling everybody, at the very least, to equal treatment*** **by our courts*****...and that all persons are subject to law impartially applied and administered*** [emphasis supplied]**.**

Rights of parties herein; a matter of balancing

[58] I now turn back to the argument by M/S Swaleh for the Applicant that Article 27 offers protection to all parties including the Applicant. I think that is the threshold on which the ratio of this judgment on the issue of Article 27 rests.

[59] 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. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.

[60] In carrying out the exercise, the focus is on the reconciliation of the two rights, which is not a question of discrimination as espoused by the Court of Appeal in **SWANYA LTD V DAIMA BANK LTD CIVIL APPLICATION NO 45 OF 2001** that;

Whilst it is true that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, if successful, is not rendered nugatory but is however in the discretion of the court to grant or refuse a stay.

See also the cases of **PORTRITZ MATERNITY V JAMES KARANJA HCA NO. 63 OF 1997** and **REDLAND ENTERPRISES LIMITED V PREMIER SAVINGS & FINANCE LIMITED [2002] 2 KLR 139** on the need to balance the two equally weighty rights. The foregone, underpins an evaluation of circumstances of the instant application rather than making any justifications or otherwise for discrimination.

The question of substantial loss resumed

[62] Accordingly whilst I reject the narrower scope of the Respondent's argument, the Applicant should be seeking to show how the inability of the Respondent to refund the decretal sums, will translate into substantial loss. That connection is the more plausible ground that their appeal, if successful, will just be but a pious aspiration, a barren result. That way, the inability of the Respondent to refund is considered as a factor that produces the undesirable results on the right of appeal of the Appellant and not a comparison

with other persons or class of persons. Each case is determined on its merit, and so the fact of inability or ability to refund is a matter of evidentiary necessity and not a question of differential treatment.

[63] 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 record shows 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. See the case of **ICDC V DABER ENTERPRISES LTD, COURT OF APPEAL CIVIL APPLICATION NO NAI 223 OF 1999.** Evidential burden should not be confused with legal burden of proof. The former in civil cases, rests on the person alleging whereas the latter arises when *prima facie* evidence has been established against a party who would fail without further evidence. In this case, the Applicant has submitted that the Respondent is a driver employed by Butali Sugar Company, and this is on record having been part of the evidence in chief of the Respondent. The Respondent has not denied that he is a driver employed by Butali Sugar Company or that this is what he told the trial court. As such, his income may not be sufficient as to constitute ability to refund the entire decretal sum of money if paid to him. I observe that the amount herein is Kshs 439, 020/. I am guided by the case of **JOHN MARTIN NDIRANGU & ANOTHER GITARI CYRUS MURAGURI COURT OF APPEAL CIVIL APPLICATION NO NAI 27 OF 1999.**

[64] On that basis, and the overall appreciation of the circumstances of the case, I find that the Applicant will suffer substantial loss if an order of stay of execution is not granted.

The just thing to do: security for performance of the decree

[65] I observe that liability was agreed by consent of the parties. The only aspect of the case that is in dispute is the quantum of damages. Both parties' rights must be safeguarded. Avert; substantial loss from befalling the Applicant; and a total trodden over the Respondent's *prima facie* right to the fruits of his judgment. In the circumstances, I order that half of the decretal sum to be paid to the Respondent, and the other half to be deposited in a joint account in the names of the advocates within 30 days from the date of this ruling. This is sufficient security for the performance of the decree herein in accordance with Order 42 Rule 6 of the CPR.

CONCLUSION AND THE SPECIFIC ORDERS MADE

[66] In the circumstances of this case, the Applicant will suffer substantial loss unless an order of stay of execution is issued. The Applicant came to court for orders in good time, and has made a proposal which the court deems sufficient to satisfy the performance of the decree herein.

[67] The outcome of my analysis of the alleged discrimination arising from reference to the Respondent as a man of straw is that, it does not amount to discrimination under Article 27 of the Constitution. This is in accordance with the constitutional structure of Kenya, the best contemporary practices and the circumstances of the case. I was wary of drawing analogies with the other prohibited grounds in Article 27 because of the different context in which analyses of the alleged discrimination herein falls; of competing rights with open ended presumption of equality.

[68] Therefore, the following orders are made;

a. There shall be stay of execution of the decree in the case appealed from pending the hearing and determination of this appeal.

b. The one half of the decretal sum to be paid to the Respondent, and the other half to be deposited in a joint account in the names of the advocates for both parties, within 30 days from the date of this ruling.

c. Each party shall bear its costs.

Dated, signed and delivered in open court at Bungoma this 12th day of November 2012

F. GIKONYO,
JUDGE
12.11.2012
In the presence of:
Mercy Alusa - court clerk
Mukholi for Swaleh for Applicant
Respondent absent
Court – Ruling read in open court
Mukholi - I apply for a copy of the ruling

Court – Mukholi to be furnished with a copy of ruling after the correction of the few errors are effected.

F. GIKONYO
JUDGE

12.11.2012