IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.294 OF 2010

POLYPIPES LIMITED.....1ST APPLICANT/APPELLANT

PREMIER FLOUR MILLS LTD.....2ND APPLICANT/APPELLANT

VERSUS

MARGARET KILUSI KYOLI (legal representative to the Estate of PETER KILONZO KALECHE(DECEASED).....RESPONDENT

RULING

The court below entered judgment in favour of the respondent in this application and against the applicants in the sum of Kshs.1,885,059/= on 22nd October, 2010 plus costs and interest. The applicants were dissatisfied and have preferred an appeal to challenge the finding on liability and the award of quantum.

In the meantime, the applicants have brought the present application to stay execution pending the hearing and determination of the appeal herein. The application is premised on the usual grounds; that the applicants will suffer substantial loss as the respondent is a legal representative of the estate of the deceased and that should the decretal sum be paid over to her, she will distribute it to the dependants and the applicants will face difficulty in recovering it in the event the appeal were to succeed; that the decretal sum is substantial. Secondly, the applicants have averred that the application has been brought timeously and finally that there are ready to abide by any order as to security as may be ordered by the court.

In the grounds of opposition, counsel for the respondent has deposed that the application is bad in law, fatally incompetent as is premised on an incompetent and inadmissible affidavit evidence; that the application lacks merit; that the applicants have not complied with the orders of the court to deposit the

decretal sum in an interest-earning account.

I have considered these arguments and the authorities cited by both counsel. When the application was heard *exparte,* the court (Emukule, J) granted it on condition that the decretal sum be deposited in an interest-earning account in the names of counsel for both sides. It is conceded that that order has not been complied with, the contention being the bank in which the sum is to be deposited.

It is my considered view that the orders of Emukule, J did not decide the application finally; that it was interim pending *interpartes* hearing. It follows that I must consider whether the applicants have satisfied the conditions for the granting of the orders sought herein in terms of **order 41 rule 4** of the revoked **Civil Procedure Rules** (now **order 42 rule 6(1)** of the **2010 Rules**).

The applicants through their counsel have deposed that they are apprehensive that the respondent may not be able to restitute the decretal sum which is substantial, in the event of the appeal being successful for the reason that the same may be distributed to the beneficiaries.

From the grounds of opposition and the authorities relied on by counsel for the respondent, the above averment has been challenged on two points, namely that they have been sworn by the applicants' advocate and not the applicants themselves and secondly that no evidence of substantial loss has been demonstrated. It has been stated time without numbers that what the court must safeguard in an application for stay of execution is the loss to both parties.

The respondent has a judgment for Kshs.1,885,059/= which is due to her from the applicants. The applicants on the other hand are aggrieved by the finding and the award and have challenged it on appeal as allowed by law. Both interests must be balanced. The applicants are apprehensive that the respondent is incapable of making a refund.

The Court of Appeal in **ABN AMRO Bank, N.V**. Vs. **Le Monde Foods Limited** Civil Application No. NAI.15 of 2002 emphasized that once the applicant in an application for stay expresses doubt as to the respondent's ability to refund the decretal sum, the burden shifts to the respondent to rebut that assertion. The court stated:

"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 if it is paid out to him and the pending appeal were to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on."

See also **Kenya Posts and Telecommunication Corporation** Vs. **Paul Gachanga Ndarua**, Civil Application No. NAI.367 of 2001. The respondent has not discharged the evidential burden shifted to her.

Regarding the affidavit sworn by counsel for the applicants, all the paragraphs, except paragraphs 9 and 10 are matters arising from the pleadings and trial in the court below. Paragraphs 9 and 10 relate to the willingness and/or readiness of the applicants to provide security as may be ordered.

From the subsequent events after the orders of Emukule, J, it has been demonstrated that indeed the

applicants are ready to deposit the decretal sum. Counsel has been vindicated. Secondly, counsel deposed that the averment was based on the information whose source he disclosed as a Mr. Martin, the legal officer of the insurer of the applicants. The contention as I have stated earlier has been the bank. Whereas the applicants wish to deposit the sum in the Bank of Baroda on account of the interest rates, counsel for the respondent has simply said she is not happy with the Bank.

As the Court of Appeal explained in the case of **Vishram Ravji Halal and Another** Vs. **Thornton and Turpin (1963) Limited**, Civil Application No. NAI.15 of 1990:

"What is important is that enough security is provided to ensure that should the appeal fail the respondent will get its money without undue delay."

Without anything adverse against the Bank of Baroda, it is ordered that the decertal sum shall be deposited there within 7 days of this order in the joint names of both counsel failing which execution shall issue without further orders.

Costs will be costs in the appeal.

Dated, Delivered and Signed at Nakuru this 15th day of March, 2011.

W. OUKO

JUDGE