REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[*Coram: F. Azangalala, J*]

CIVIL APPEAL NO. 125 OF 2011

BETWEEN

SIRGOI HOLDINGS LIMITED...1ST APPELLANT
DAVID KIPCHOGE CHEPKWONY..2ND APPELLANT

AND

MARTHA BETTY KAMUNU...RESPONDENT

RULING

The application before me is dated 11th October, 2011 and was filed on 12th of the same month. It is by the appellants **Sirgoi Holdings Limited** and **David Kipchoge Chepkwony** who were the defendant on the Lower Court. The application is expressed to be brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The applicants seek one primary order that there be a stay of execution of the judgment and decree in Eldoret Chief Magistrate's Court Civil Suit No. 253 of 2008 pending the hearing and determination of the appeal herein. The application is based upon the following main grounds:- that the applicants have an arguable appeal; that unless stay is granted the appeal will be rendered nugatory; that the applicant stands to suffer irreparable loss and damage unless stay is granted; that the application has been made without undue delay and that the applicants are ready and willing to deposit the decretal amount as security.

The application is supported by an affidavit sworn by **Elisha K. Murei** the Chairman of the Board of Directors of the 1st appellant in which affidavit the above grounds are elaborated. The application is opposed and the respondent has filed a replying affidavit in which he has averred, among other things, that the application is incompetent fatally defective and an abuse of the process of the court because a similar application was refused by the lower court; that the applicant has not demonstrated the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules and that the respondent is a person of means and capable of refunding the decretal sum in the event of a successful appeal.

The application was canvassed before me on 18th October, 2011 by **Mr. Martin** Learned Counsel for the appellants and **Mr. Njuguna** Learned Counsel for the respondent. Counsel reiterated their clients' stand-points taken in their respective affidavits and urged those positions before me.

I have considered the application, the affidavits and the submissions of counsel. I have also considered the authorities cited to me by counsel. Having done so I take the following view of the matter. Let me

first dispose of the objection raised on the basis of the competence of the application. The answer is in order 42 Rule 6 itself which is in the following terms:-

"6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such 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 therein 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." (underlining mine)

The plain language of the sub-rule is that refusal to grant stay by the lower court is not a bar to the presentation of another application for stay of execution to the court to which appeal has been lodged. In the premises, there is no doubt that this application is competent.

However, for an application to secure an order of stay pending an appeal, he is required to establish the conditions set out in order 42 Rule 6(1) and (2) of the Civil Procedure Rules. The following parameters must be demonstrated:-

(a) That there is sufficient cause to order stay of execution.

(b) That substantial loss may result to the applicants unless the order of stay is made.

(c) That the application has been made without unreasonable delay.

(d) That the applicants have given or offered security for the due performance of the decree as my ultimately be binding on them.

With regard to sufficient cause, I note that the applicants have already lodged their appeal on some 6 grounds of appeal including the grounds that the Learned Magistrate applied wrong principles of law and thus made among a wrong decision and that the Learned Magistrate shifted the burden of proof.

At this stage the court is not required to make definitive findings on the merits or demerits of the appeal. At the same time the court is not precluded from forming a prima facie opinion of the appeal. Having perused the appeal, I cannot state that the same is frivolous. There is therefore basis for lodging this application.

With regard to delay, I note that the decree appealed from was given on 27th June, 2011 and the lower court dismissed the applicant's application for stay on 10th October, 2011. This application was lodged on 12th October, 2011 which was a mere two days after the lower court's dismissal. In the premises I find that this application has been lodged without delay.

How about substantial loss. The onus is on the applicants to satisfy the court that they will suffer substantial loss unless the stay is granted. The substantial loss alleged is the difficulty in recovering the decretal amount in the event the appeal succeeds and the amount has paid. The respondent contends that she is a person of means and capable of refunding the decretal sums in the event the appeal succeeds. For proof of that averment, she referred to her replying affidavit in the lower court. I have perused that affidavit and I note that the respondent says she owns motor vehicle registration number KBH 202X and LR. No. Eldoret Municipality Block 23(Kingongo)/789. The value of those assets is given as Kshs. 1,240,000/-. In my view the only asset worth considering is the landed property. The motor vehicle is not in the respondent's name and even if it were, it would not be security for the due performance of the decree herein being an asset which can cease to exist in the twinkling of an eye. The landed property is valued at Kshs. 500,000/-. It is in the name of the respondent. In my view the respondent's ownership of the landed property demonstrates satisfactorily that she is a woman of means. I have also noted that the applicants did not challenge the respondent's averment that she has means to refund the decretal sums in

the event of success of the appeal. They did not file a further or supplementary affidavit to rebut the respondent's averments. The applicants must be taken to have accepted as true, the status of the respondent as given in her replying affidavit. It is therefore not the position that once the decretal amount is paid over to the respondent it will be beyond the reach and control of the appellants.

The applicants have therefore failed to satisfy one of the conditions set out in order 42 Rule 6(2) of the Civil Procedure Rules. That being the case, I have no discretion in the matter. The application therefore fails.

It is hereby dismissed with costs.

It is so ordered.

THIS 29TH DAY OF NOVEMBER, 2011.

F. AZANGALALA
JUDGE
Read in the presence of:-
Mr. Otieno for the Plaintiffs and
Mr. Barasa for the 1st Defendant.

F. AZANGALALA
JUDGE
29TH NOVEMBER, 2011