REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Appeal 971 of 2004

HON. DAVID MWENJE …….…… APPELLANT

VERSUS

JUBILEE INSURANCE CO. LTD …….……. RESPONDENT

RULING

In this application dated 11th February, 2005, made under Order 41 Rule 4 of the Civil Procedure Rules, the Appellant/Applicant seeks to stay execution of the Judgment of the lower court in Nairobi CMCC No 775 of 1999 made on 30th October, 2002 pending the hearing and determination of this Appeal.

From the limited information that I am able to discern at this time, mainly from the affidavit in support of the application, and the Memorandum of Appeal, an exparte judgment was entered against the Appellant on 30th October, 2002 because, as he states in paragraph 11 of his deposition, "my advocate abandoned the hearing". Whatever that means, it certainly is not sufficient to determine whether this appeal is an arguable one, whether it has any merit, and whether it has any basis in law. Be that as it may, as this application for stay is made under Order 41 Rule 4, I am not obliged to inquire into depth on the merits of this appeal, or whether it is arguable, and whether the proposed appeal would be rendered nugatory unless stay was granted, as the Court of Appeal would have been, if this application was made before it under Rule 5 (2) (b) of the Court of Appeal Rules.

What I am required to ascertain is whether the Applicant has complied with Order 41 Rule 4. That is the Rule that governs this application and its outcome. It is also the rule that "fetters" my discretion in this matter, as clearly my discretion is not absolute [See ***Visram Ramji Halai vs Thornton Turpin (1963) Limited {Civil Application No Nairobi 15 of 1990 (U R)}].***

Order 41 Rule 4 (2) of the Civil Procedure Rules states as follows:

"(2) No order for stay of execution shall be made under subrule (1) unless –

> ***(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) 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."***

For the Applicant to succeed in this application he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that he has filed this application without delay; and

that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy all the conditions through his deposition, and not through bold statements from the bar.

Now, let us examine if the Applicant has satisfied all the three conditions outlined above.

First, and not necessarily in that order, has this application been made without unreasonable delay?

According to the Applicant's affidavit the Judgment in this case was entered on 30th October, 2002, and the application to set aside that Judgment was made two years later, in November, 2004. There is absolutely no explanation or reasons for this rather inordinate delay. Although this delay is relevant, as it continues to vex the Respondent, and deny it the fruits of its Judgment, because this appeal is against the Orders made on 3rd November, 2004, I cannot hold the Applicant accountable for his previous delay. The relevant date for the purposes of this application is 3rd November, 2004 when the Order appealed against was delivered. The Memorandum of Appeal was filed on 10th November, 2004 – within seven days of that Order. **So, for the purposes of Order 41 Rule 4 (2) I must find that the Applicant has made this application for stay without unreasonable delay.**

Now, going to the issue of substantial loss. Has the Applicant demonstrated that he will suffer substantial loss if the Order for stay is not granted?

Having perused the application before this court in its entirety, I find that there is absolutely no mention, either in the body of the application, or more importantly, in the supporting affidavit, of "substantial loss". The applicant has not shown in any manner how he will suffer substantial loss if the order for stay is not made. Instead, he states that his "appeal has merit and high chances of success." That is quite irrelevant, and in any event I have no basis of ascertaining that with the limited information on file at this time.

The closest he comes to in demonstrating substantial loss is the averments contained in paragraphs 8 ad 9 of his affidavit which state as follows:

"8. That I am likely to suffer irreparable loss if execution is not stayed as the plaintiff has applied to attach a third of my salary allowances.

9. That the said allowances are meant for use in the constituency and for the benefit of constituents."

However, these matters, even if true, are not sufficient to demonstrate substantial loss. If his "allowances" are meant for another purpose, or if he believes that these are not attachable in law, he can certainly make an application to restrain the decree holder from attaching those sums. But that in itself is no ground to grant him stay of execution generally.

"Substantial loss" may be demonstrated in various forms, as Platt, J A observed in the leading Court of Appeal authority of ***Kenya Shell Ltd vs Benjamin Karuga Kibiru & Others (1982 – 88) I KAR 1018.*** He said as follows:

> ***"An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in Order 41, Rule 4 of the Civil Procedure Rules was not met.***
>
> ***There was no evidence of substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts."***

Although the application for stay in the ***Kenya Shell*** case was based on Rule 5 (2) (b) of the Court of Appeal Rules, Platt, J A observed that:

> ***"Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."***

Platt, J A held in that case that because there was no evidence of substantial loss and as such loss cannot be "inferred" he would not grant stay of execution."

Hancox, J A, in the same case observed as follows:

> ***"Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgment no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects".***

Here, at this Court, my brother Judge Mwera, came to same conclusion in ***Glencore Grain Ltd vs Kabansora Millers (H C Milimani 400 of 2002)*** when he observed that:

> ***"a stay order does not lie as a matter of course because one has appealed. One has to show likelihood of suffering substantial loss in case the order is refused."***

Similarly, in ***George Oraro vs KTN (HCCC 151 of 1992 – Nairobi)*** Aluoch, J was of the same view, when she observed:

> **"I find that George Oraro's averments in paragraph 4 of his replying affidavit not having been controverted, the same remain unchallenged which means that the position is that George Oraro, has substantial means to pay back if ordered to, any moneys that might be awarded to him by way of general damages against the defendant. If this be so, and I believe it is, then what loss is the defendant likely to suffer by the suit proceeding for hearing for assessment of damages. Thus coupled with the fact that the plaintiff is as of now "a successful litigant" once he has a judgment in his favour, makes me come to the conclusion that he the plaintiff should not be shut out from the fruits of his litigation, as the defendant will not suffer any prejudice in the circumstances of this case. I have come to this conclusion relying on Wilson vs Church, as applied in Benjamin Karuga."**

It is quite clear to me from the depositions filed that the applicant has not demonstrated to the satisfaction of this Court that he will suffer any substantial loss if the order of stay were not made. He has not shown, for example, that the Respondent would be unable to refund the moneys paid out in the event of a successful appeal. That burden is on him, not the respondent {See ***Jethwa vs Shah t/a Supreme Styles*** **(1989) KLR 198}**. On the other hand, the Respondent has deponed in paragraph 7 of its Replying affidavit, that:

> ***"We are an insurance company of good repute and would therefore be in a position to refund the defendant should he happen to win the appeal."***

This evidence has not been controverted. It not only remains unchallenged, but this Court will also take judicial notice of the fact that the Respondent is a large well established insurance company of good repute, and will indeed be able to repay the decretal amount in the event of a successful appeal. It has a money decree, which it obtained in 2002, and has already been denied the fruits of its Judgment for three years.

This court cannot continue denying it the same as the Applicant has not proved what substantial loss, if any, he will suffer if the Order for stay is not granted.

Accordingly, and for reasons outlined, I dismiss the Appellant/Applicant's application dated 11th

February, 2005 with costs to the Respondent. The interim order for stay herein is hereby vacated.

Dated and delivered at Nairobi this 6th day of April, 2005.

ALNASHIR VISRAM

JUDGE