



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2371 OF 1987

THOMAS MULUNDU MUSEE.....PLAINTIFF/RESPONDENT

VERSUS

JULIUS PAUL KIVALI.....1ST DEFENDANT/APPLICANT

KITUI GINNERIES LTD.....2ND DEFENDANT/APPLICANT

RULING

A. The Application and the Depositions

The Defendants' application by Notice of Motion dated 8th June, 2004 and brought under Order XLI rule 4, Order XLVIII rule 3 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act (Cap. 21), was filed on 8th June, 2004. The main prayers in this application are as follows:

1. that, there be a stay of execution of the Judgement of this Court of 21st September, 1989 pending the hearing and determination of the intended appeal;
2. that, the warrants of attachment and sale of the Defendants/Applicants property in execution of the Decree given by this Court on 20th May, 2004 be declared irregular and void *ab initio* and in the circumstances the same be struck out *ex debito justitiae*.

What grounds support this application? The grounds are elaborately set out as follows:

- (a) that, the Defendants/Applicants intend to appeal against the entire Judgement of the Honourable Mr. Justice Butler-Sloss given on 21st September, 1989 and have already filed a Notice of Appeal and made a request for typed and certified copies of the proceedings and the Judgement;
- (b) that, a decree pursuant to the judgement was drawn on 10th December, 2003;
- (c) that, a warrant of attachment and sale of the Defendants/Applicants' property has been granted and the decree-holder is proceeding with execution by the appointment of an auctioneer who has already proclaimed the Defendants/Applicants' goods;
- (d) that, the Defendants/Applicants dispute the process of execution of the decree as -

- the judgement was conditional;

- the Plaintiff's right of recovery based on the judgement is now time-barred under the Limitation of Actions Act;

(e) that the Defendants/Applicants dispute the amount of interest that has accrued, in view of the conditional judgement given;

(f) that, this application has been brought without any undue or unreasonable delay;

(g) that, the Defendants/Applicants stand to suffer substantial and irreparable harm and loss should the execution be allowed to proceed;

(h) that, the Defendants/Applicants have an arguable appeal and should execution be left to proceed, the appeal would be rendered nugatory;

(i) that the Defendants/Applicants are able and willing to give an undertaking to furnish security for the Plaintiff's costs.

The evidence to support the application is set out in the affidavit of Emily Omondi the legal affairs manager of Kenindia Assurance Co., the Defendants' insurers. She states that she is conversant with the facts of the case, thanks to the fact that she has the custody of the records and documents relating to the matter. She avers that the suit was filed around 10th June, 1987 by the Plaintiff as personal representative of the deceased, Stephen Muna Musee, claiming damages under the Law Reform Act and the Fatal Accidents Act for loss and dependency. Defence against the suit was conducted by the firm of Pramod Patel, Advocate, on the instructions of Kenindia Assurance Co. Ltd, as the insurers of the second Defendant, and pursuant to the contract of insurance between Kenindia Assurance Co. Ltd and the second Defendant. The deponent averred that Mr. Justice Buttler-Sloss had entered a conditional Judgement in favour of the Plaintiff, in the sum of Kshs.860,635/= (all-inclusive) on 21st September, 1989. On 10th December, 2003 the decree pursuant to the said conditional judgement was issued. She deposed that it was a pre-condition of the judgement and decree that the judgement entered shall not be enforceable by the Plaintiff against the Defendants unless and until the Plaintiff as executor proves the will of the deceased (if the deceased had died testate), or gives proof of his appointment as the administrator of the estate of the deceased if he had died intestate.

The deponent averred that the Defendants were dissatisfied with the said judgement, and so they instructed Pramod Patel, Advocate to lodge an appeal against the whole of the judgement. The said Advocate promptly thereafter lodged a Notice of Appeal, and applied for typed and certified proceedings and judgement, to enable him to lodge the appeal. The deponent believes information obtained from Mr. Pramod Patel, that to-date the Court has not yet supplied to him the typed and certified copies of the proceedings and judgement, despite reminders to the Registry; and consequently it has not been possible to file the appeal.

The deponent believes the opinion of Pramod Patel, Advocate, and of the Defendants' Advocates now on record, M/s. Migos-Ogamba & Co. Advocates, that the Defendants have a strong and arguable appeal with high chances of success, the strength of which lies on the following premises:

- the Plaintiff had filed the suit without first having obtained grant of letters of administration;
- the Plaintiff had no capacity to file suit;
- the trial judge erred in arriving at a conditional judgement;
- the conditional judgement could not cure the Plaintiff's lack of capacity to file suit;
- the trial judge erred in taking the full income of the deceased as the multiplicand and without

applying the usual reduction of one-third;

- the trial judge erred in finding that loss to the estate of the deceased could be presumed in the absence of evidence;
- the trial judge erred in giving a conditional judgement and yet ordered that interest was payable from the date of judgement.

The deponent averred that on or around 20th May, 2004, the Deputy Registrar issued a warrant of attachment and a warrant of sale of the Defendant's property to N.M. Kingoti t/a Max Auctioneers in Machakos. The deponent deposed that the judgement-debtors would suffer irreparable loss if the said warrants of attachment and sale are allowed to be executed by N.M. Kingoti t/a Max Auctioneers who have proceeded to proclaim the Judgement-debtor's property.

There was a response to the supporting affidavit, in the replying affidavit of Thomas Mulundu Musee dated 1st September, 2004 and filed on the same day. The main elements in this replying affidavit may be recorded here. The first substantive paragraph of the replying affidavit (para.3) is, with respect, a most inappropriate one, as it merely encapsulates the controversial contentions of his Advocate, matters which ought to be presented by the Advocate himself in the form of submissions on issues of law. Such matter includes: challenging the **locus standi** of the Defendants; impugning Orders of the Court obtained by the Defendants on 28th May, 2004 and 8th June, 2004; making claims about the conditions which had been attached to the Judgement contested by the Defendants, etc. Paragraph 4 of the replying affidavit falls into the same error, by asserting that the Defendant's case "has no chance of success in the appeal". Most of the paragraphs of the Plaintiff's affidavit are equally objectionable. Paragraph 7, for instance, insists that "the application is unmeritorious"; and paragraph 8 states: "That the Notice of Motion dated 8th June, 2003 is unmeritorious and should be dismissed with costs." Now although the deponent states in the last paragraph (para.9) of the replying affidavit "THAT what is deponed herein is true to the best of my knowledge..." it is most doubtful that the contentions he makes are truly within his knowledge. An affidavit made by a lay person ought to deal mainly with factual matters within the knowledge of the deponent; and a deponent cannot arrogate to himself the essential matters of legal argument which will, in any case, be much more ably presented in the submissions of counsel, during the hearings. This is a fundamental question as to the validity and credibility of a lay person's affidavit.

B. Submissions for the Defendants/Applicants

Mr. Ogwen for the Defendants/Applicants began his submissions with a consideration of the question whether the Applicants had met the requirements of grant of stay pending appeal. He submitted that the Applicants would suffer substantial loss if the appeal were to succeed after payment to the Respondent has already been effected. He stated that it was unlikely that the Respondent would be able, in that event, to payback the relevant sum of money which is in excess of Kshs.2 million, whereas the Applicant had given security against any loss such as might be suffered by the Respondent in the event that the appeal was unsuccessful.

Mr. Ogwen submitted that the Applicants had not been guilty of delay in moving the Court; they came on record on 28th May, 2004 following the proclamation on the Applicants' property by the Respondent's agents on 20th May, 2004; and on 8th June, 2004 they filed the present application.

Counsel prayed for the Court's discretion to be exercised in favour of the Applicants, and cited several authorities in aid. In **Butt v. Rent Restriction Tribunal** [1982] 417, the Court of Appeal (Madan, J.A. at pp.419-20) remarked as follows:

"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the

proceedings.

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory...”

In ***Carter & Sons Ltd. v. Deposit Protection Fund Board and Others***, Civil Appeal No. 291 of 1997, in a similar matter, the Court of Appeal relied on the following passage from ***Vishram Ravji Halai & Another v. Thornton & Turpin (1963) Ltd***, Civil Application No. Nai 15 of 1990:

“The superior court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the Applicant must furnish security. The application must, of course, be made without unreasonable delay.”

C. Submissions for the Plaintiff/Respondent

Mr. Kilonzo for the Plaintiff/Respondent submitted that the application entailed an impropriety, as under Order XLVIII rule 5(2) any question regarding defects in the relevant decree could only come as an appeal from the Registrar – but that process, counsel contended, had not been followed. He contended, in the circumstances, that the application was premature.

Counsel then questioned the propriety of the supporting affidavit – on the grounds that whereas Mr. Ogweno represented the Defendant, the deponent came from Kenindia Assurance Co. which was not a party, especially as the deponent made no averment that she was duly authorised to swear the affidavit. However, I can see that the first paragraph of the affidavit thus avers:

“THAT, I am the legal manager of Kenindia Assurance Co. Ltd. the insurers of the Defendants herein and duly authorised as such to swear this affidavit.”

In the circumstances I was unable to see the point of legal significance in the objection by counsel.

Mr. Kilonzo submitted that this application ought not to be granted. He submitted that no evidence had been tendered of any substantial loss which the Applicants risked suffering, and thus the requirement of Order XLI rule 4 had not been satisfied. He challenged the contention of counsel for the Applicants, that a loss of as much as Kshs.2 million was likely, as this had not come through the depositions. Counsel further submitted that the Applicants were not entitled to the exercise of the Court’s discretion in their favour, on the ground that after judgement was given the Applicant had taken no action at all until the process of execution started. To reinforce this submission, Mr. Kilonzo relied on earlier correspondence bearing on the merits of the Applicants’ prayers. On 25th September, 1989 Mr. Pramod Patel filed a Notice of Appeal on behalf of the Applicants herein. The Notice reads:

“TAKE NOTICE that JULIUS PAUL KIVALI and KITUI GINNERIES LIMTIED the Defendants herein being dissatisfied with the judgement of the Honourable Mr. Justice Butler-Sloss delivered on the 21st day of September, 1989 intends to appeal to the Court of Appeal against the whole of the said judgement.”

Earlier on, on **23rd September, 1989** Mr. Pramod Patel had written to the Deputy Registrar of the High Court as follows:

“I ... would appreciate [it] if you will let me have certified copies of the proceedings and judgement. These are required for the purposes of an intended appeal.

A similar letter was written by Mr. Pramod Patel on **16th August 1990** to the Deputy Registrar. This letter

probably carries an inaccuracy as to dates. It reads:

“I refer to ... my letter of **23rd September, 1990** [1989?].

“Kindly let me have the certified copies of the proceedings and judgement to enable me to act further.”

I take it that this follow-up letter on certified copies of the proceedings, for the purpose of lodging an appeal, was written some 11 months following the first request. Then some three months later, on **9th November, 1990**, Mr. Pramod Patel again wrote to the Deputy Registrar, as follows: “I refer to my letter of 16th August, 1990 and would appreciate your urgent response.” A similar request to the Deputy Registrar was dispatched on **11th April, 1991** some five months later. A similar letter was sent out again on **4th October, 1991** some six months later. Slightly over six months later, on **21st April, 1992** a similar letter was again sent to the Deputy Registrar. The next such inquiry came some four years later, with Mr. Pramod Patel’s letter to the Deputy Registrar of **13th February, 1996**. Mr. Pramod Patel wrote a follow-up letter about two-and-a-half months later, on **26th April, 1996**. There was a similar follow-up some two years later, with Mr. Pramod Patel’s letter of **22nd June, 1998**. But it turns out that, on 21st August, 1997 the Deputy Registrar wrote to Mr. Pramod Patel requesting him to collect the typed copies of the proceedings which were then ready. This letter was also copied to M/s. Kilonzo & Co. Advocates.

It seems that Mr. Pramod Patel did not collect the typed proceedings which he had been asking for since **23rd September, 1989** and if he did, then he did not use them as he had intended, for the purpose of lodging an appeal against the judgement of the Court delivered on **21st September, 1989** for, exactly 14 years from the date of that Judgement, and exactly six years since the Deputy Registrar had the proceedings ready, the Applicants’ Advocates, M/s. Migos-Ogamba & Co. Advocates who had now taken over from Mr. Pramod Patel, on **20th August, 2004** wrote to the Deputy Registrar in the following terms:

“We refer to [previous correspondence] in this matter.

“Kindly furnish us with the certified copies of proceedings and judgement to enable us [to] proceed with our appeal.”

I take it that the **previous correspondence** referred to in the letter from M/s. Migos-Ogamba & Co. Advocates in their said letter to the Deputy Registrar is the series of letters I have set out earlier. From that correspondence, it is clear that the typed proceedings required for appeal were notified to be ready on **21st August, 1997**. I have not seen any deposition on the question as to how M/s. Migos-Ogamba & Co. Advocates came by the said past correspondence, but missed out on the important communication from the Deputy Registrar, dated **21st August, 1997**. Therefore, I will attach no significance to the fact that M/s. Migos-Ogamba & Co. Advocates only so belatedly, on **20th August, 2004** sought the typed proceedings to enable them to lodge an appeal.

Mr. Kilonzo submitted that it was, in any case, not possible for the Applicants to file a competent appeal, as it was a good deal more than the time limit of 60 days, during which an appeal ought to have been lodged.

Mr. Kilonzo introduced several authorities to support his submissions. One of these is **Indar Singh Gill Ltd. v. Njoroge Gichara**, Civil suit No. 2411 of 1990. The relevant passages in this ruling by the Honourable Mr. Justice G.S. Pall (as he then was) are as follows:

(i) “O.XLI r. 4 under which this application has been brought authorises the Court appealed from to order ‘for sufficient cause’ stay of execution of its own order or decree pending determination of the intended appeal but under O.XLI r. 4(2) no order for stay should be made unless...the Court is satisfied that substantial loss may occur to [the] Applicant unless that order is made and that the application has been made without unreasonable delay ... and such security as the Court orders for the due performance of the ultimate decree or Order has been given by the Applicant.”

(ii) “In a discretionary matter like this the Court should take into account all the surrounding circumstances including [the] merits of the intended appeal.”

The next authority relied upon by counsel for the Respondent was **Kenya Shell Ltd. v. Benjamin Karuga Kibiru & Another**, Civil Application No. Nai 97 of 1986. In this case the Court of Appeal held that -

“An intended appeal does not automatically operate as a stay. The application for ... stay made before the High Court failed because the first of the conditions set out in Order XLI 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 the 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.”

Mr. Kilonzo had challenged the competence of the Applicants’ appeal, and now he submitted that, there being no competent appeal, there would be no basis upon which “stay of execution pending appeal” could be sought. I think the logic of this submission cannot be doubted; except that the competence or incompetence of an intended appeal is itself a litigious question in respect of which the valid position can only be declared by the Court. It follows that whenever counsel assert that an appeal is incompetent, that is only an opinion, and that by itself will not dispose of the matter. The time must come when the Court declares that such incompetence exists; and when once this is done, it must then follow that the basis of the application for stay is removed, and such stay cannot be granted. There is, however, a further complication in this matter. Although the Court appealed from may declare that the proposed appeal is incompetent, such a declaration can only bear finality if it came from the Court to which the appeal is lodged. It would not be right, therefore, for this Court to declare that an appeal is incompetent, and then use that position as a basis for dismissing *in limine* an application for stay of execution pending appeal. I believe, though, that the Court appealed from is entitled to take into account the submissions of counsel for the Respondent on the issue of incompetence, to make up its own mind on probabilities regarding the competence of the appeal, and to take into account the requirements of Order XLI, as a basis for allowing or refusing the application for stay. It all boils down to the great importance of judicial discretion, in determining whether or not stay of execution pending appeal is to be granted.

Mr. Kilonzo referred me to quite relevant considerations of this very point, by the East African Court of Appeal, in **Ujagar Singh v. Runda Coffee Estates, Ltd [1966] E.A. 263**. In the words of Sir Clement de Lestang, Ag. V-P (p.266):

*“There are, I think, three other reasons why the word ‘appeal’ must be given a wide meaning The first is this - Order XLI, r. 4 of the Rules of the High Court provides that no appeal shall operate as a stay of execution except in so far as the court appealed from may order and whether a stay is granted or not by the court, the court to which the appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may seem just ... That rule contemplates that **an appeal must be in being** before an application for stay can be entertained by the court appealed from. **An appeal either exists or it does not**. It cannot exist in so far as the court appealed from is concerned but not in regard to the court of appeal. It is customary for applications for stay to be made, to the court appealed from at any rate, as soon as the notice of appeal is given. If this practice is right (which I have no reason to doubt) and there is accordingly an appeal for the purpose at least of enabling the court appealed from to entertain an application for stay, there must equally be an appeal for a similar purpose in regard to the court of appeal.”*

As I have already noted, the Applicants’ Notice of Appeal was filed on 25th September, 1989. However, the prosecution of the appeal would not have been possible before 21st August, 1997 when the typed proceedings were made available by the Deputy Registrar; that is almost seven years to the date when the Defendants’ application was filed (on 8th June, 2004). Is there still an appeal before the Court of Appeal, even if we adopt, in the spirit of the decision in **Ujagar Singh v. Runda Coffee Estates Ltd**, a broad meaning of the word “appeal”? From the facts alone, I would have been inclined to the position that the appeal was not in existence. I would have expected counsel for the Applicants to place before the Court

depositions showing that the appeal was still alive.

Counsel for the Applicants had expressed doubt that the Respondent would be able to make such payment as they might be obliged to render to the Applicant, in the event the appeal succeeded. Counsel had sought to rely on this Court's decision in *Frederick Egurica v. Marshalls (E.A.) Ltd*, Civil Case No. 1964 of 199. But now Mr. Kilonzo for the Respondents has drawn my attention to a passage in that ruling by the Honourable Mr. Justice Onyango Otieno (as he then was):

“It is the Applicant's duty in such an application to show that the Respondent is a man of straw.”

Mr. Kilonzo submitted that, in the instant application, the Applicants have not shown that the Respondent was a man of straw who should not be allowed to execute his decree pending the hearing of an appeal brought by the Defendants.

D. Submissions in Reply, for the Defendants/Applicants

Mr. Ogweno for the Defendants was not in agreement with counsel for the Respondent, regarding the propriety of the supporting affidavit annexed to the application. He contended that the Defendants, as aggrieved parties, were entitled to file the application, and that there was no impropriety in respect of the supporting affidavit.

Counsel further submitted that the only consideration that should guide the Court, in exercising its discretion in this application, was whether there was a Notice of Appeal; and, as things stood, no order striking out the Notice of Appeal had been produced, and if it had not been struck out, then it must be valid – and so there *was*, indeed, an appeal. Mr. Ogweno urged that the Court be not bothered about the erratic career of the typed copy of Court proceedings, from the time the Notice of Appeal was filed on 25th September, 1989 to the present, but instead confine itself to Order XLI rule 4 which provides for the exercise of discretion to grant stay of execution pending appeal.

E. Final Analysis and Orders

It is quite clear that this is an old matter which, for no apparent cause, had not been finalised over the last more-than a dozen years. That fact by itself shows that the litigious questions now taking the form of the Notice of Motion application by the Defendants so belatedly, on 8th June, 2004 have not had much significance to either of the parties, over the prolonged period elapsed. The best concession in relation to the elapsed time, brings us to some seven years during which the Defendants who had long ago expressed the intent to appeal, sat pretty, taking no action even as the typed proceedings for the preparation of the record of appeal were truly ready and available. It is the classic example of *laches* – defined in *Black's Law Dictionary*, 7th ed. as “*Unreasonable delay or negligence in pursuing a right or claim – almost always an equitable one - in a way that prejudices the party against whom relief is sought.*”

Counsel for the Applicants raised the technical point that no Order has been issued which strikes out their Notice of Appeal of 25th September, 1989. This default position would appear to give validity to the claim that an appeal exists. However, even if I were to accept that contention, this could not lead one to a positive affirmation that the Defendants have a good case for grant of stay of execution of the Court Orders made on 21st September, 1989.

I have given consideration to the legal issues which the Defendants wish the Court of Appeal to consider; and in my view a number of them have a good basis in law. However, given the 14 or so years that have elapsed since the learned Judge made his orders which are now being impugned, many changes on the ground have in all probability taken place, so that the questions to be canvassed on appeal may have become substantially theoretical. Litigation is not a luxury, and it nearly always seeks to resolve disputes of a practical significance. Guided by this common experience, I am unable to apply my discretion in favour of the application.

I will, therefore, make the following Orders:

1. That, the Defendants' prayer for a stay of execution of the judgement of this Court of 21st September, 1989 pending the hearing and determination of the intended appeal, is refused.
2. That, the Defendants' prayer that warrants of attachment and sale, in execution of the decree, given on 20th May, 2004 be declared irregular and void and struck out, is also refused.
3. That, the Defendants/Applicants shall bear the costs of this application.

DATED and **DELIVERED** at Nairobi this 22nd day of October, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Defendants/Applicants: Mr. Ogweno, instructed by M/s. Migos-Ogamba & Co. Advocates

For the Plaintiffs/Respondents: Mr. Kilonzo, instructed by M/s. Kilonzo & Co. Advocates