



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E049 OF 2021**

**ELIJAH NOAH.....1<sup>ST</sup> APPLICANT/APPELLANT**

**JUSTIN MOKONIA.....2<sup>ND</sup> APPLICANT/APPELLANT**

**VERSUS**

**JAMES LUBANGA ASKOYO.....RESPONDENT**

**RULING**

1. The motion dated 8<sup>th</sup> February 2021 by **Elijah Noah** and **Justin Mokonia** (hereafter the Applicants) seeks an order to stay execution of the judgment delivered in favour of **James Lubanga Askoyo** (hereafter the Respondent) in **Milimani CMCC No. 3974 of 2019**, pending the hearing and determination of the appeal herein. The motion is expressed to be brought under Order 42 Rules 4 and 6 of the Civil Procedure Rules, inter alia. The grounds on the face of the motion are amplified in the supporting affidavit of **Elijah Noah**. To the effect that the Applicants are aggrieved by the ruling of the lower court delivered on 29<sup>th</sup> January, 2021 and have preferred an appeal; that the Respondent has proceeded to extract warrants of attachment and to proclaim the Applicants' movable property; that unless stay of execution is granted, the Applicants will suffer loss if the decretal sums were paid out to the Respondent as he has neither disclosed nor furnished the court with any evidence concerning his financial standing or ability to refund the decretal sum if the appeal is successful; that the motion has been made in good faith and will not occasion prejudice to the Respondent as the Applicants are willing to deposit security for the due performance of the decree.

2. **Fozah Onyimbo**, counsel for the Respondent swore the affidavit opposing the motion. Counsel asserts therein that the Applicants have not approached the court with clean hands and; that motion is an afterthought aimed at delaying the execution process; that the Applicants have not demonstrated substantial loss if the orders sought are not granted whereas on his part, the Respondent, has suffered great hardship following the amputation of his leg and consequent loss of employment; and that the continued delay in the matter denies the Respondent the enjoyment of the fruits of the judgment. That in the event the court is inclined to allow the motion it ought to compel the Applicant to provide security for the due performance of the decree.

3. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicants counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. While placing reliance on the decision in **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR** counsel submitted that the court ought to exercise its discretion in finding that the Applicants have an arguable appeal before the court. He further relied on the cases of **Edward Kamau & Anor v Hannah Mukui Gichuki & Anor [2015] eKLR** **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** and **Tarbo Transporters Ltd v Absalom Dova Lumbasi (2012) eKLR** to submit that the Applicants had discharged their legal burden to establish substantial loss, while the Respondent had not tendered any evidence of his means to refund the decretal sum on successful appeal. Counsel went on to submit that the motion was timeously filed and calling to aid the decision in **Selestical Limited v Global Rock Development (2015) eKLR** counsel reiterated the Applicants' willingness to furnish security in the form of a bank guarantee or comply with any other condition that the court may deem fit. The court was thus urged to allow the motion as prayed.

4. As a preliminary issue while citing the provisions of Order 42 Rule 2 of the Civil Procedure Rules, counsel for the Respondent submitted that failure to attach a certified copy of the order being appealed was fatal to the Applicants' motion. On the question of substantial loss, counsel relying on **Patel v East Africa Cargo Services Limited (1974) EA 75**, **Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR**, **Kenya Shell Limited v Benjamin Karuga Kibiru (1986) KLR 410** and **Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema [2012] eKLR** submits that the motion is merely a delaying tactic intent on denying the Respondent the fruits of his judgment as the Applicants have not demonstrated how they would suffer substantial loss if stay is not granted. Counsel equally proceeded to submit that the Applicants did not move the court expeditiously. Lastly, concerning security, counsel urged that in balancing the competing interests of the parties, the court ought to make an order for suitable security for the due performance of the decree. He cited

several authorities, including **Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others [2012] eKLR** and **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR**. The court was thus urged to dismiss the motion.

5. The court has considered the material canvassed in respect of the motion. Before addressing the substantive prayer in the motion, it is pertinent to address the preliminary issue raised by the Respondent on the competency of the motion on account of the Applicants' failure to attach a copy of the order being appealed. Order 42 Rule 2 of the Civil Procedure Rules states:

**“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”**

6. What is presently for determination is a motion seeking stay pending appeal by dint of the provision of Order 42 Rule 6 of the Civil Procedure Rules. The provision stipulates the requirements for a party seeking to move the court for an order to stay execution pending appeal. At this stage no directions have been taken with respect to the appeal, nor has the appeal been presented for hearing before this court. Suffice to state that the provisions of Order 42 Rule 13(4) and Section 79B of the Civil Procedure Rules are yet to take effect in which event the provisions of Order 42 Rule 2 would be applicable. As such it is the court's view that the Respondent's preliminary issue is prematurely raised.

7. Moving on to the substantive prayer in the motion, it is pertinent that at this stage, the Court is not concerned with the merits of the appeal. It is also trite that the power of the court to stay the execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417**.

8. The prayer for stay of execution pending appeal is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.**

**(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 Applicants 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 Applicants”.**

9. The first question to be determined is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] e KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the **Shell** case are especially pertinent. These are that:

**“1. ....**

**2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**

**3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**

**4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”**

10. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The **Ag JA** (as he then was) stated inter alia that;

**“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants 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...(emphasis added)”**

11. The learned Judge continued to observe that: -

**“It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicants, it would be a rare case when an appeal would be rendered nugatory by some other event. 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.”**  
(Emphasis added)

12. Earlier on, **Hancox JA** in his ruling observed that;

**“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”**

**As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”**

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997.**

13. The Applicant has maintained that the appeal will be rendered nugatory if stay is not granted as the decretal sum is substantial and if paid over, there is a likelihood that the Respondent may be unable to refund it in the event of a successful appeal. On the part of the Respondent, counsel countered that the Applicants have not demonstrated substantial loss if the orders sought are denied. As stated in the **Shell** case, substantial loss is the cornerstone of the court’s jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules and is what must be prevented, else the successful appeal might be rendered nugatory. It is enough that the Applicants have expressed apprehension concerning the Respondent’s ability to refund the decretal sum on successful appeal.

14. In the **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Anor. (2006) eKLR**, the Court of Appeal stated that:

**“This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

15. The judgment in the lower court was for a sum of **Kshs 2,913,403/-** with costs and interest. This is a substantial sum as rightly asserted by the Applicants. Upon the Applicants expressing apprehension about the Respondent’s capacity to repay, should their appeal succeed, the burden shifted upon him to controvert the assertion by proving his means. He has not and it therefore seems likely that the Applicants will suffer substantial loss and the appeal rendered nugatory if stay is not granted.

16. The Applicants have expressed willingness to provide security. The court must balance the competing interests of the parties so as not to prejudice the matter pending appeal and the words stated in **Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** and others, are apt:

**“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....**

**It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”**

17. Save for asserting that the memorandum of appeal was not served on him, the Respondent has not disputed that the appeal and motion were timeously filed. This failure can be rectified by issuance of an order to the effect that the memorandum of appeal be served upon the Respondent within 7 days of this ruling. In view of all the foregoing, the motion is otherwise merited and allowed on condition that the Applicants do within 45 days hereof deposit the entire decretal sum into an interest earning account in the joint names of the parties’ advocates. Costs will abide the outcome of the appeal. It is so ordered.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2022.**

**C.MEOLI**

**JUDGE**

**IN THE PRESENCE OF:**

**FOR THE APPLICANTS:N/A**

**FOR THE RESPONDENT: MS. FOZAH**

**C/A: CAROL**