REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. E39 OF 2021

GEORGE KAHURA WATUKU.....APPELANT

-VS-

SCHOLASTICA GATHINJA MWANGI.....RESPONDENT

RULING

1. By a Motion on Notice dated 24th May, 2021, the applicant herein seeks orders that the court stays the execution of the judgement in Kangundo SPMCC No. 203 of 2019 pending the hearing and determination of this appeal.

2. The application was supported by an affidavit sworn by **Kevin Ngure**, the Deputy Claims Manager at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KCH 851L at whose instance the above cited suit was defended. According to the deponent, he swore the supporting affidavit by virtue of their rights of subrogation under the relevant policy of insurance and the common law rights to defend, settle and prosecute any claims in the insured's name.

3. According to the applicant, judgement was delivered in the said case on 27th July, 2020 in the sum of Kshs 184,550/- against the Applicant in which the Applicant was held 100% liable plus costs and interests.

4. According to the deponent, aggrieved by the said decision, they instructed their advocates on record to appeal against the said judgement.

5. In the Applicant's view, the intended appeal is merited, arguable and raises pertinent points of law thus has overwhelming chances of success.

6. It was further deposed that the applicants are apprehensive that if paid over to the Respondents, the appeal if successful would not be recovered since the Respondent has not furnished the court with evidence of her financial standing.

7. The applicants undertook to furnish reasonable security by way of a Bank Guarantee.

8. In response to the Application, the Respondent filed grounds of opposition which, in summary, were that the Applicant has not satisfied the conditions for grant of stay pending appeal.

Determination

9. I have considered the application, the supporting affidavit and the grounds of opposition to the application and the submissions filed.

10. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> ***"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.***
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> ***(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."

11. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

12. In my view even if it were shown that the respondent is a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

13. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

14. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

15. I therefore agree with the opinion expressed in **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''

16. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

17. In this case apart from a bare allegation, the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. Where the sum involved is colossal the Court may well take notice of the fact that the payment of such large amount may cripple the activities of the Applicant and may well discourage it from pursuing its appeal. In this case the amount involved is not more than Kshs 200,000.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers. The Applicant seems to be of the view that in such application, once they make bare allegations that the Respondent's means are unknown the burden shifts to the Respondent to disclose her means. While that may apply to situations where the award is prima facie large, in cases such as this one where the amount awarded is not that large, such a bare averment will not do. The Respondent being the successful party is in the driving seat and therefore to remove her from the seat, satisfactory basis must be laid by the Applicant.

18. Accordingly, I find that the Applicant has failed proved that substantial loss may result to him unless the order is made. The Motion fails and is dismissed with costs.

19. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

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