REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 27 OF 2018

JOSEPH KARIUKI T/A JOFOCO CONTRACTORS.....APPELLANT/APPLICANT

VERSUS

P. MBOGO KARANJA (CHAIRMAN).....1ST RESPONDENT

SIMON KIRUGURA (SECRETARY).....2ND RESPONDENT

ANASTACIA NJURA (TREASURER).....3RD RESPONDENT

RULING

A. Introduction

1. Before me is an application dated 31.08.2020 and which was brought under certificate of urgency and wherein the applicant seeks for orders of stay of execution of the orders issued on 14.11.2019 pending the hearing and determination of the Appeal No. 32 of 2020 at the Court of Appeal in Nyeri.

2. The applicant's case is that the respondents are in the process of applying for execution of the orders issued by this Court on 14.11.2019 whereas the appellant has already instituted an appeal to the Court of Appeal at Nyeri being Appeal No. 32 of 2020 and as such the need for stay of execution of the said orders. He avers that if the same are not stayed, the respondent will proceed to execute and thus rendering the appeal nugatory.

3. The application is opposed by the respondents herein vide the replying affidavit sworn by the 1st respondent and wherein he basically deposed that the application ought to be dismissed as it is fatally defective and that the applicant has not demonstrated the irreparable loss he stands to suffer as the respondents have been wrongly enjoined in the suit and therefore have no capacity to be sued and also that he has failed to enjoin the right party and thus he is to blame. Further that the application is just but an afterthought.

4. The application was canvassed by way of written submissions wherein each of the parties urged the court to find in their favour.

5. I have considered the said application, the response thereto and the rival written submissions.

6. The principles upon which the court may stay execution of orders appealed from, are settled. The Applicant must approach the court timeously and demonstrate the likelihood that he will suffer substantial loss if the order is denied. He must also furnish security for the due performance of the decree in the event the appeal does not succeed. These are the requirements stipulated in Order 42 Rule 6(2) of the Civil Procedure Rules 2010. However, it is trite that such orders can only be made where there is pending appeal. The operating words therefore are "*pending appeal*." **Order 42 Rule 6(4)** provides that: -

> **"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given".**

I have perused the court record and indeed there is a notice of appeal filed on 21.11.2019. As such, there is a pending appeal.

7. As to the likelihood that the applicant will suffer substantial loss, the applicant deposed that the appeal will be rendered nugatory if the application herein is not allowed and as such, he will suffer irreparable loss. In ***James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR**, the Learned Judge held as follows in relation to substantial loss; -

> **"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."**

8. The Court of Appeal in **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** which was cited with approval by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** held that:

> **"This court has said before and it would bear repeating that while the legal duty is on an applicant 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 an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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 also **ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 Of 2002 [NRB]**)*.

9. In **Kenya Hotel Properties Limited V Willesden Investments Limited [2007] eKLR,** the Court of Appeal held that: -

> **"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all."**

The court proceeded to hold that: -

> **"……It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind. We do agree with Mr. Nowrojee that to convince the Court to follow the decision in Reliance Bank case (supra), the applicant needs to do more than merely saying that it would experience hardship were it to be compelled to pay the decretal amount. The applicant needs to "put on the table" its financial position and how the same would be affected. Of course, we do not need to emphasize that this approach of weighing position of parties as was done in Oraro's case (supra) is only available in cases where the decretal amount is acceptably large in the circumstances of the case…….(**emphasis mine**).."**

10. I am guided by the above authorities. However, in the instant application, the applicant neither proved any substantial loss that he stands to suffer or even that the respondents herein are not in a position to refund the decretal sum in the event that the appeal succeeds. He did not even make any deposition to that effect.

11. As to the condition that the applicant must provide security, the applicant did not offer any security and there is nothing deposed to that effect. However, it is trite that the issue of security is discretionary and it is upon the court to determine the same. In **Butt vs. Rent Restriction Tribunal [1982] KLR 417,** the Court of Appeal held as thus: -

> **"……..5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

12. However, it is clear that this court can order security to be provided *suo moto* but in the instant case the applicant having failed to prove that he will suffer substantial loss, this court does not have the jurisdiction to proceed and determine the other conditions or order provision of security. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"** which connotes that all three (3) conditions must be met simultaneously. The applicant must meet all the tenets – requirements of- Order 42 Rule 6 of the Civil Procedure Rules. Failure to satisfy any one of the tenets stipulated in that rule is fatal to the application. (See **Equity Bank Limited –vs- Taiga Adams Company Limited [2006] eKLR).**

13. It is trite law that a winning party should not be denied his lawfully acquired judgment unless there are compelling reasons to do so. The applicant herein has not convinced the court that he is deserving of the orders sought.

14. In the premises, the application herein has no merit and it is hereby dismissed with costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

....for Applicant

....for Respondent