REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCA NO. 56 OF 2020

AMIT PINAKIN PATEL.....APPELLANT

VERSUS

PARESH KUMAR MAWJI PATEL.....RESPONDENT

RULING:

The applicant by a Notice of Motion dated 28th September, 2020 and filed in court on the same date, seeks orders that:

a) This matter be certified as urgent and the service of this application be dispensed with in the first instance.

b) There be temporary stay of execution of warrants of attachment of moveable property of Kshs. 26,331,775.00 dated 18th September, 2020 and issued in **ELDORET CMCC NO. 483 OF 2017 PARESHKUMAR MAWJI PATEL VS AMIT PINAKIN PATEL** and consequential proclamation of attachment of moveable property dated 19th September, 2020 pending hearing and determination of the application herein.

c) That there be stay of execution of the court's judgement issued on 19th June, 2020 and any other proceedings in **ELDORET CMCC NO. 483 OF 2017 PARESHKUMAR MAWJI PATEL VS AMIT PINAKIN PATEL** pending hearing and determination of this appeal.

d) The warrants of attachment issued on 18th September, 2020 and the consequential proclamation notice dated 19th September, 2020 be hereby set aside.

e) Cost for this application be provided for.

The application is supported by grounds on the face of the motion and an affidavit in support of one Amit Pinakin Patel. The stated grounds are couched in the following terms:

1. The Honourable Court delivered its judgement on 19th June, 2020 in **ELDORET CMCC NO.483 OF 2017** in favour of the respondent as against the appellant in the following terms:

- Judgment was entered for Kshs. 13,000,000.00
- Cost of the suit
- Interest at court rates from 25/6/2012 until payment is done in full

2. The applicant being aggrieved by the said judgment has appealed in the matter hence the rise of this application.

3. The applicant had filed an application dated 9th July, 2020 but immediately after filing the file went missing and he made various follow ups to no avail.

4. Further the said application has never been heard and/ or dealt with in any way.

5. The appellant has an arguable appeal with very high chances of success as evidenced by the memorandum of appeal.

6. The respondent has commenced execution proceedings and unless the orders sought are granted, the said appeal shall be rendered nugatory and the defendant applicant shall suffer irreparable damage and loss.

7. It would be in the interest of justice that this application be allowed as prayed.

8. The plaintiff is a man of straw and if the decretal sum of Kshs. 13,000,000.00 is paid out to him the plaintiff will not be in a position to refund the same should the appeal succeed and therefore a substantial loss shall occur to the defendant/defendant.

9. That the respondent shall not be prejudiced in any way if the orders sought herein are granted.

10. The defendant/applicant is ready and willing to abide by any reasonable conditions of stay of execution that may be imposed by the Court.

11. This application is made timeously and in the sole interest of justice and fairness.

12. It is in the interest of justice that the execution of judgment in **ELDORET CMCC NO.483 OF 2017** be stayed to pave way for hearing and determination of the intended appeal.

13. This Honourable Court has the powers to grant the orders sought herein in the interest of justice.

The applicant did not file any written submissions.

The respondent in opposition to the said application filed grounds of opposition dated 5th October, 2020 in which he stated that;

1. The application is sub-judice.

2. The execution has already been done.

3. The respondent has sufficient means to reimburse the decretal sum as can be seen from the respondent's affidavit dated 29th July, 2020 which forms part of the court record and which the respondent substantially adopts in response to the Notice of Motion dated 28th September, 2020.

4. Should the court deem fit to grant the stay orders, then it should require the applicant to deposit the decretal sum in a joint account in the names of the advocates on record within 21 days and settle the execution costs already incurred.

The respondent filed written submissions dated 9th November, 2020.

Before I delve into the issues raised in this instant application. I will first address the issue of whether this Honourable Court has the jurisdiction to entertain the applicant's application dated 28th September, 2020. Counsel for the respondent has submitted that this instant application offends the provisions of the Civil Procedure Rules, 2010 that mandatorily requires a party to file an application for stay pending appeal at the lower court before instituting such an application at the appellate court.

In the case of, **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by **Meoli, J** that:

"12. For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty…to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof…

[17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court's original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.

19. I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).

20. It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate

appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.

21. In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established."

From the foregoing it is therefore clear that whether an application for stay was granted or refused to be granted by the trial court, this court is at liberty to consider such an application and to make such orders thereon as it deems just. It is my finding that this court has the requisite jurisdiction to hear and determine this instant application.

The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.

An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent.

In this application the appellant's contention is that, if the stay is not granted then the appellant will have to pay the decretal sum of Kenya Shillings Thirteen Million (Kshs. 13,000,000.00) to the respondent. It is the appellant's further contention that respondent is not a man of means who is capable of repaying the judgment sum should the appeal succeeds and thus the appellant stands to suffer substantial loss.

The respondent on the other hand contends that the appellant has not established that there would be any substantial loss on their end if the stay is not granted.

On whether the appellant will suffer substantial loss, substantial loss would entail what was aptly discussed by **Kimaru, J** in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that…Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* **pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."**

The mere fact that the decree holder is not a man of means does not necessarily justify him being barred 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."

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 defendants any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others v. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.** The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal

was to succeed; but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum.

In Civil Application No. 238 of 2005; **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike** the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows;

> **"This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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 the lack of them. Once an applicant 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."**

What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this application the applicant contends that the respondent is a "man of straw" and if the decretal sum of Kshs. 13,000,000.00 is paid out to him, he will not be in a position to refund the same should the appeal succeed. The legal burden is placed on the applicant to lay the basis of this belief.

The respondent has in his affidavit stated that he has capacity to refund the decretal sum should the appeal succeed. He has gone further to annex a copy of the CR 12 to show that he is a Director of LAKHIR PLASTICS LIMITED and has produced the following documents to that effect; being the company's Statement of Account, the Company's Annual Report, Certificate of Deposit and lastly copies of search documents of various motor vehicles belonging to him.

The applicant herein has not disclosed his grounds for believing that the respondent would not be able to refund the decretal sum herein. He has not disclosed his source of information that the respondent will be unable to refund the decretal sum if paid to him. In my view it is not sufficient to simply make a baseless allegation that the respondent will not be able to refund the decretal sum if paid to him. The Court considers that the respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise. It is upon the applicant who seeks to deprive the respondent, the successful party, from enjoying his fruits of judgement, to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief. In this instant application, the applicant has not shown how he is likely to suffer substantial loss, apart from mentioning in passing that the respondent is a "man of straw" who is not able to refund the decretal sum should the appeal succeed.

On whether or not the application was brought without undue delay, I am satisfied that there was no delay since the Memorandum of Appeal was filed within time. I however, note that the applicant alleges to have filed an initial application dated 9th July, 2020 seeking stay orders but the said file was misplaced and could not be traced. Consequently, the applicant filed this instant application on 28th September, 2020 about 3 months later. I do not find this delay to be inordinate given the circumstances of this case.

In considering whether a money decree or a liquidated claim if paid would render the success of an appeal nugatory, the Court of appeal in the case of **Kenya Hotel Properties Ltd vs. Willesden Properties Ltd** Civil Application number NAI 322 of 2006 (UR) 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 of law was not being established at all."*

In the result it is the finding of this court that the Appellant's Application dated 28th September, 2020 has not met the threshold of order 42 rule 6(2) of the Civil Procedure Rules. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY, 2021.

S. M GITHINJI

JUDGE

In the presence of:-

Mr. Maina for the plaintiff.

Mr. Aloo for the appellant.

Gladys - Court Assistant