



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E330 of 2020

CHARLES IRUNGU APPLICANT

-VERSUS-

ELIZABETH KALUNDA WAKANO.....RESPONDENT

RULING

1. Before the court for determination is a motion dated 4th December, 2020 seeking *inter alia* an order to stay execution of the judgment and decree in **Milimani CMCC No. 2005 of 2018** delivered on 30th October, 2020, **pending** the hearing and determination of the appeal filed herein. The motion is expressed to be brought *inter alia* under Order 42 Rule 4 & 6 and Order 51 Rule 1 of the Civil Procedure Rules. On grounds that being dissatisfied by the decision in **Milimani CMCC No. 2005 of 2018**, **Charles Irungu** (hereafter the Applicant) preferred the instant appeal and that he is apprehensive that the decree holder, **Rule 622030th 2005on dated 1Elizabeth Kalunda Wakano** (hereafter the Respondent) may proceed to levy execution and in which event the appeal would be rendered nugatory.
2. The motion is supported by an affidavit sworn by **Pauline Waruhiu** who describes herself as the Head of Claims and Legal at Directline Assurance Company Limited, who are the insurers of motor vehicle registration number **KAL 409G** in respect of which the claim in the lower court was brought.
3. The deponent amplifies the grounds on the face of the motion and asserts that the appeal has high chances of success, and that the Applicant is apprehensive in the event of a successful appeal it would not be in a position to recoup the decretal amount if paid out to the Respondent whose financial means are unknown. The deponent further expressed readiness to furnish security for the entire decretal sum for due performance of the decree.
4. The motion was opposed by way of a replying affidavit dated 22nd January, 2021 sworn by the Respondent. The Respondent took issue with the motion pointing out that the cause was old, and she therefore stood to suffer prejudice if stay of execution pending appeal was granted, as the same would only delay the matter further. In her view, the motion was an abuse of the court process. She deposed that if the court was inclined to allow the application, the court ought to impose the condition that Applicant provides some form of security.
5. On 2nd February, 2021 this court issued directions that the motion be canvassed by way of written submissions. The parties duly complied.
6. For the Applicant, it was submitted the application satisfies the conditions as set out in Order 42 Rule 6 of the Civil Procedure and ought to be allowed. Relying on the decision in **Kenya Revenue Authority v Sidney Keittany Changole & 3 Others [2015] eKLR**, counsel submitted that the Applicant had an arguable; that in the absence of an affidavit disclosing the Respondent's means, the Applicant was apprehensive that if stay was denied, the Respondent would not be in a position to refund the decretal sum paid out, in the event of the appeal resolving in his favour, thereby exposing him to substantial loss and rendering the appeal nugatory. For theses submissions, counsel relied on the cases of **Edward Kamau & Anor v Hannah Mukui Gichuki & Anor [2015] eKLR**; **National Industrial Credit Bank Ltd v Aquinas Francis Wasike, Civil Application No. 238 of 2005**; and **Tabro Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR**. It was also submitted that the motion was timeously filed. Finally, counsel while placing reliance in the case of **Selestical Limited v Global Rock Development [2015] eKLR** submitted the Applicant was willing to furnish reasonable security as the court may order.
7. On the part of the Respondent, it was argued that in order for stay to be granted the Applicant ought to meet the conditions as set out under Order 42 Rule 6 of the Civil Procedure Rules. Concerning substantial loss, counsel submitted the Applicant has not specifically identified what substantial loss he would suffer. He relied on **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** on this score. Secondly, citing **Antoine Ndiaye v African Virtual University [2015] eKLR** counsel submitted the legal burden does not shift to the Respondent to prove she is possessed of means to make refund. Finally, counsel submitted that since the Applicant had demonstrated willingness to provide security, the court should order the release to the Respondent of half the decretal sum and the balance thereof to be deposited in a joint interest account.
8. The court has considered the material canvassed in respect of the motion by both parties. The power of the court to grant stay of execution of a decree pending appeal is discretionary. However, the discretion should be exercised judiciously. See **Butt v Rent Restriction Tribunal**

9. The Applicant's 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 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”.

10. The first question is whether the Applicant has 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] 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.”

11. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th 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 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 the two courts...(emphasis added)”

12. 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 Applicant, 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).

13. 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.”

14. Counsel for the Applicant argued that the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds, as there is a likelihood that the Respondent will be unable to repay the decretal sum should the appeal succeed. The Respondent for her part asserted that the legal burden did not shift to her to prove her means to make refund and the Applicant had grossly failed to what substantial loss he is likely to suffer. With respect that is a misdirection.

15. In the oft-cited case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** the Court of Appeal stated 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 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

16. The judgment awarded by the trial court is for Kshs 543,550/- This is a substantial sum, and the Applicant has expressed apprehension that if it is paid out to the Respondent, she may be unable to make a refund, thus exposing the Applicant to substantial loss and rendering the appeal nugatory.

17. The Court is of the view that given the substantial amounts in the decree, and in the absence of proof of the Respondent's financial means, it may well be that if the decretal sum is paid out, the Applicant may be unable to recover the sums in the event of the appeal succeeding, thereby rendering the appeal nugatory. As stated in the Shell Case, substantial loss is what must be prevented.

18. On the issue of security, the Applicant has indicated willingness to deposit security for the eventual due performance of the decree. The words stated by the Court of Appeal in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR 621**, citing among others the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centers Limited [1984] 3 ALLER 198** are apt:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

19. Finally, on the question of timeliness, the lower court judgment was delivered on 30th October 2020 and the instant motion filed on 4th December, 2020. Therefore, the Applicant moved with some alacrity. **The Court is therefore satisfied that the prayer for stay of execution pending appeal is merited and is hereby granted on condition that the Applicant deposits a sum of Shs.3000,000/- (Three Hundred Thousand) into an interest earning account in the joint names of the parties' advocates within 30 days of today's date. Costs will abide by the outcome of the appeal.**

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 1ST DAY OF JULY 2021.

C.MEOLI

JUDGE

In the presence of:

Miss Sagini for Applicant

Miss Machira h/b for Mr Kebongo for the Respondent

C/A; Carol