



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E36 OF 2021

INDUS TRADING LIMITED.....1ST APPELLANT
JOSEPH MULE MAKOVE.....2ND APPELLANT
VERSUS
CHARLES ARICHA.....RESPONDENT

RULING

1. By a Motion on Notice dated 13th April, 2021, the applicants herein substantially seek stay of execution of the judgement delivered in Machakos Chief Magistrate's Court Civil Suit No. 79 of 2020 pending the hearing and determination of this appeal.
2. The said application is supported by the affidavit sworn by **Joseph Mulei Makove**, the 2nd Applicant herein. According to the deponent, on 18th March, 2021, judgement was delivered against the Applicants in the sum of Kshs 180,000/- general damages and Kshs 5,550/- special damages plus costs and interests. In the Applicants' view the said award was excessive in terms of the quantum awarded hence this appeal has high chances of success.
3. It was deposed that the Respondent is a person of unknown means hence the apprehension that if the decretal sum is paid out the appeal would be rendered nugatory and an academic exercise, yet the appeal raises pertinent issues with high chances of success. The Applicants averred that unless the stay is granted, they stand to suffer irreparable loss and damage yet their insurer is ready and willing to provide a Bank Guarantee as security for stay of execution during the pendency of tis appeal.
4. In opposing the application, the Respondent swore an affidavit in which he deposed that he is a man of substance working as a police officer earning Kshs 48,910/- hence is capable pf repaying the decretal sum in the event that the appeal succeeds. Based on legal advice, he stated that appeals in monetary decrees are never rendered nugatory as one can sue for recovery. He however suggested that in the event that this Court is persuaded to grant the satay, it should order that half the decretal sum be paid.
5. The Applicants in their submissions relied on **Bake 'N' Bite (Nrb) Limited vs. Daniel Mutisya Mwalonzi [2015] eKLR** for the position that in such application, the Applicant is not required to prove that he has an arguable appeal. They also relied on **Esther Wamaitha Njuria & 2 Others vs. Safaricom Limited [2014] eKLR** as regards the principles applicable in applications requiring the exercise of discretion. As for principles guiding stay of execution pending appeal, they relied on **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**.
6. On the issue of substantial loss, it was reiterated that the Applicants were ready and willing to issue a banker's guarantee. While acknowledging that the Respondent had exhibited a payslip evidencing his capability to refund the decretal sum, the Applicants noted that the Respondents take home was only Kshs 18,563.10 which was inadequate to support his family and also pay back half the decretal sum. Based on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, it was submitted that the Respondent is the only one who can specifically show that she has the means to repay the decretal sum if the appeal succeeds. According to the Applicant the amount awarded is substantial and in the event that the Respondent is unable to refund the same and the appeal succeeds the said success would be rendered nugatory and the Applicants would be exposed to irreparable damage.
7. It was submitted that there was no inordinate delay in making the application and that the Applicants were willing to furnish security. It was therefore submitted that the Applicants had fulfilled all the necessary conditions for the grant of the orders sought hence the same ought to be granted.
8. On behalf of the Respondent it was submitted, while reiterating the contents of the replying affidavit, that there is no appeal with chances of success since the award made by the trial court of special damages of Kshs. 5,550/- and general damages of Kshs. 180,000/- is not inordinately high and the appeal does not challenge the finding on liability. The Court was therefore urged to find that there is no appeal with chances of success and this being a money claim, the appeal cannot be rendered nugatory for one can sue for refund.

9. As regards substantial loss, it was submitted that it is the duty of the applicant to show that it will suffer substantial loss if stay is not granted and that material particulars of loss must be shown by way of an affidavit by the applicant. According to the Respondent, it is not enough for one to only state that loss will be suffered. The applicant in this matter has not sworn an affidavit to show whether he will suffer substantial loss if stay is not granted. He has also not sworn an affidavit to show that he knows the respondent and is a man of straw who cannot repay the decretal sum in issue.

10. The affidavit in support, according to the Respondent, is sworn by a deputy claims manager of an insurance company, who is not a party to the suit and who stands to suffer no loss if stay is not granted. He has also not stated that he knows the respondent and cannot refund the decretal sum if the appeal succeeds. The Respondent, on the other hand, has demonstrated by way of a Pay slip from the employer showing that he is not of straw for he is working and can repay back the decretal sum in the event the appeal succeeds. When an issue of money decrees is involved, it was submitted, the court should balance the interest of both parties and not to shut down a successful litigant from enjoying the fruits of its rightful obtained judgment. The Court was urged to find that the applicant has totally failed to establish substantial loss based on cited authorities.

11. It was further submitted that since the respondent was shown that the applicant has failed to satisfy the conditions for stay to warrant the court to exercise its discretion in his favour and since this appeal is only on quantum and not liability, at the end of the day, the respondent will be entitled to part of his judgement in the event the appeal on quantum succeeds. To avoid frustrating a successful litigant from enjoying the fruits of its judgment, the Court was urged to exercise its discretion as it balances the interest of the both parties and order half of the decretal sum to be paid to the respondent.

In the result, the Court was urged to dismiss this application with costs.

Determination

12. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

13. 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.

(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.”

14. 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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

15. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. In **Stephen Boro Gittha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, Nyamu, JA on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.

17. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court)

the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

18. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589*. This was the position of **Warsame, J** (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

19. On the first principle, **Platt, Ag.JA** (as he then was) in *Kenya Shell Limited vs. Kibiru [1986] KLR 410*, at page 416 expressed himself as follows:

“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 corner stone of both jurisdictions for granting a 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”.

20. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

21. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

22. 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.”

23. 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.**

24. 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. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

25. 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 my view even if it were shown that the respondent is a man 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. Suffice to say 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.

26. In an application for stay the Court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined place the parties on equal footing. Since the overriding objective aims, *inter alia*, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of execution pending appeal. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.**

27. 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.”

28. 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 a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another** (supra); **Mukuma vs. Abuoga [1988] KLR 645.**

29. As was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

“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.”

30. 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).

31. 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 vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

32. 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 185,550.00. It has not been alleged that the payment of the said sum may adversely affect the financial position of the Applicants or their insurers.

33. The Respondent has disclosed that he is not a man of straw. While he may be having financial liabilities that eat into his gross income, that ought not to be taken against him. He is a successful litigant and is entitled to enjoy the fruits of his judgement. Accordingly, I am not satisfied that a substantial loss may result to the applicants unless the order is made.

34. Accordingly, as the Applicants have failed to satisfy me on that issue, this application fails and is dismissed with costs to the Respondent.

35. It is so ordered.

Read, signed and delivered virtually at Machakos this 12th day of July, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ouko for Miss Mukami for the Applicant

CA Geoffrey