REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 37 OF 2016

KWAMBOKA DAPHNEY.....APPELLANT

VERSUS

KITHINJI JOY.....1ST RESPONDENT

RICHARD TANUI KIBET.....2ND RESPONDENT

RULING

1. By the motion dated 3rd March 2020 **Kithinji Joy** and **Richard Tanui Kibet** (the Applicants) seek an order of stay execution of the judgment delivered in **Nairobi HCCA No. 37 of 2016** pending the hearing and determination of their appeal in the Court of Appeal. The Applicants were the Respondents in the appeal determined by the High Court on 5th December 2019, while **Kwamboka Daphne** (hereafter the Respondent) was the successful Appellant. The motion is expressed to be brought *inter alia* under Section 66 of the Civil Procedure Act and Order 42 Rule 6 (2) of the Civil Procedure Rules. On grounds that the Applicants have filed appeal against the decision of the High Court and if execution were to proceed it would render the appeal nugatory.

2. The motion is supported by the affidavit of the Applicants' counsel **Jackson Omwenga**, who deposes that he has conduct of the matter on behalf of the Applicants and is thus competent to swear the affidavit. Counsel in his affidavit amplifies the grounds on the face of the motion, to the effect that the Applicants being aggrieved by the judgment of the superior court instructed counsel to file an appeal. It was further deposed that if execution were to proceed it would render the appeal nugatory. He expressed the Applicants' willingness to furnish security as the court may deem fit.

3. The motion was opposed by way of grounds of opposition dated 14th November 2020. By the said grounds, the Respondent views the motion as an afterthought and an abuse of the court process, aimed at denying the Respondent the fruits of successful litigation. It is deposed further that the Applicants have not demonstrated that they will suffer substantial loss unless stay is granted; that the Applicant is guilty of delay in bringing the motion and no sufficient explanation has been advanced; and that the motion does not meet the mandatory requirements of Order 42 Rule 6(2) of the Civil Procedure Rules. Finally, that the motion is fatally defective on account of the affidavit in support of the same having been sworn by the Applicants' counsel.

4. On 11th February 2021 parties agreed to canvass the motion by way of written submissions. The parties duly complied. By their written submissions, and relying on the decision in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** the Applicants asserted that they stood to suffer substantial loss if stay of execution is not granted, based on the fact that the Respondent never attended court to testify, and as such the decretal sum would pass to a stranger with no chance of recovery in the event of a successful appeal. It was further submitted that the motion and notice of appeal were filed timeously. Placing reliance on the decisions in **Vishram Ravji Halai & Another v Thornton & Turpin (1953) Ltd Nairobi Civil Application No. 15 of 1990** and **Nairobi Deluxe Service Ltd v Erick Onyango Ndege Nairobi Civil Application No. 64 of 1992** counsel submitted the Applicants were willing to furnish security as the court may direct.

5. On the part of the Respondent, counsel argued that the motion is not merited as it has not met the requisite threshold under Order 42 Rule 6 of the Civil Procedure Rules for the reasons that the Applicants in their affidavit in support of the motion had not demonstrated what substantial loss that may result if stay is not granted; that the Applicants are guilty of delay and have failed to give reasonable explanation for the same and; that the Applicants have failed to demonstrate willingness to provide security. Counsel relied on several authorities including **Mombasa H.C. Misc. Application No. 348 of 2012 Zilpher Achieng Kepher v Mega Wealth International Limited & 2 Others**, and **G.N Muema P/A (**sic**) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**. Counsel also argued that the motion is wanting in form and merit as the affidavit in support offends the provisions of Rule 8 of the Advocates (Practice) Rules.

6. The court has considered the material canvassed in respect of the motion by both parties. By the grounds of opposition, the Respondent raised an objection to the effect that the motion was incompetent on account of counsel having sworn the affidavit in support which contains contested facts and not having authority to depose the same. The matter was further addressed in the Respondent's written submissions. On

their part, the Applicants did not address themselves to the objections. This matter needs to be addressed as a preliminary issue.

7. The Court having considered the Applicants' submissions and the affidavit supporting the motion takes the following view of the matter. In the contested affidavit, counsel deposes that he has conduct of the matter therefore competent to swear the affidavit. Rule 9 of the Advocates (Practice) Rules states:

> ***"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:***
>
> ***Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."***

Further Order 19 Rule 3(1) of the Civil Procedure Rules states that:

> **"(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove."**

8. As correctly submitted by the Respondent Rule 9 of the Advocates (Practice) Rules and Order 19 Rule 3(1) of the Civil Procedure Rules limit counsel to deposing on non-contentions facts well within his knowledge, on behalf of his client. The rationale behind both Rules is to bar and shield the advocate from entering the fray between his client and adverse parties. See **Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174 and Simon Isaac Ngugi v Overseas Courier Services (K) Ltd (1998) eKLR.** Having considered the contents of the contested affidavit, the only likely contentious issue would comprise the contents of paragraph 6, but other matters deposed therein appear to be formal facts reasonably expected to be within counsel's knowledge.

9. Besides, the Respondent did not swear an affidavit to contest any of the facts in the affidavit, including matters in paragraph 6 of the supporting affidavit. The record of the matter shows that at all material times, the firm of **Jackson Omwenga & Co. Advocates** has acted for the Applicants. It can be reasonably construed that the Applicants' counsel has instructions and is competent to depose the affidavit on behalf of the Applicants but on non-contentious facts well within his knowledge.

10. The Court of Appeal in **Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR** citing its decision in **Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015**, expressed the principle as follows:

> **"As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters**." (Emphasis added).

11. Considering all the foregoing, this Court while upholding the exhortation that counsels ought to eschew swearing affidavits on behalf of their clients, is however not persuaded in the circumstances of this case that the affidavit of counsel is defective and for striking out.

12. Now moving onto the merits and demerits of the motion, 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 [1982] KLR 417.** The Applicants' prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides in part 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".**

13. The first and determinative question in this matter 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."**

14. 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. <u>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…(</u>**emphasis added**<u>).</u>"**

15. 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. <u>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</u>."** (Emphasis added).

16. 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."**

17. The Applicants in their motion did not specifically elaborate what substantial loss would be suffered by them if stay of execution is denied but in submissions, their counsel asserted the likelihood of not recouping the decretal sum, if paid out to Respondent. On the part of the Respondent, counsel argued that the motion did not specifically address how substantial loss will occur if stay of execution is not granted. It is not enough to make a bare deposition that a party will suffer substantial loss rendering the appeal nugatory. The party must demonstrate how the loss is likely to be suffered.

18. The subject matter is a money decree. As the superior court observed in the **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR** and **Shell** cases when the judgment involves a money decree, the onus is upon the applicant to prove substantial loss either through difficulty in satisfying the decree or loss occasioned by the inability by the adverse party to refund any monies paid out on account of the decree, if the appeal succeeds. Substantial loss is the cornerstone of the Court's exercise of its jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules. In the instant matter the Applicants failed to substantiate their allegation concerning substantial loss as would ultimately render the appeal nugatory. As stated in the **Shell** case, where 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**.** By irregularly raising the issue of the Respondent's inability to refund the decretal sum in submissions, the Applicants' counsel denied the Respondents the opportunity to rebut the assertion with evidence to the contrary. Consequently, it is the court's view that the Applicants have failed to demonstrate that substantial loss may eventually render the appeal nugatory.

19. In view of the foregoing, nothing more needs to be said, save to observe that while pledging security, the Applicants have failed to explain the delay, albeit not inordinate, in filing the instant Application which came some three months since the judgment of this Court. I think I have said enough to demonstrate that the motion dated 3rd March 2020 is without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 22ND DAY OF JULY 2021

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr Omwenga

For the Respondent: Mr Manda

C/A; Carol