REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

COMMERCIAL CASE NO. 196 OF 2012

LAWRENCE MUKORA MUNIU T/A DYNAMITE

CIVIL & ELECTRIC CONTRACTORS.....PLAINTIFF/DECREE HOLDER

VS

KAMANDURA TARAMBANA WATER DEVELOPMENT SOCIETY

(SUED THROUGH ITS OFFICIALS DAVID NGUGI (CHAIRMAN)

GEORGE NGUGI (VICE CHAIRMAN)

ARTHUR NJIRIRI (SECRETARY)

RAHAB MUMBI (TREASURER).....RESPONDENT

AND

PETER N. NGUGI.....1ST OBJECTOR/APPLICANT

JAMES W. NYANJUA.....2ND OBJECTOR/APPLICANT

RULING

1. On **8th** February 2021, this court dismissed the objectors' application dated **5th** November 2020 objecting to the attachment and sale of the goods proclaimed pursuant to this court's decree against the defendant. Aggrieved by the said ruling, the objectors filed a Notice of Appeal dated **8th** February 2021.

2. Vide an application dated **17th** February 2021 the subject of this ruling, the objectors pray for leave to appeal against the said decision. They also pray for stay of execution of the said orders pending the hearing and final determination of the intended appeal against the said orders. Additionally, they pray that pending the hearing and final determination of the intended appeal, the execution and all proceedings to enforce the Judgment and decree dated **2nd** February, 2016 against the objectors be stayed. Prayers **(1)** and **(5)** are spent. Lastly, the objectors pray for costs of the application and the auctioneer's costs to be provided for.

3. The application is founded on the grounds that the judgement delivered on **2nd** February, 2016 is a nullity as the honourable court did not have the jurisdiction to enter the same since the proper parties had not been brought before it. The applicant states that the rights and liabilities of the members of a society is joint liability, yet the plaintiffs are executing the judgement against the objectors only. They state that unless stay is issued, they stand to suffer irreparably and the intended appeal which has high chances of success will be rendered nugatory. Further, they state that the application has been timeously filed and unless the stay is issued their goods are bound to be carted away anytime.

4. The Plaintiff/decree-holder filed grounds of opposition dated **16th** April 2021 in opposition to the application stating that there is no competent appeal filed to warrant stay of execution; that the applicants lack the *locus standi* to appeal against the judgment; that this court is *functus officio*; and that the application is incompetent and an abuse of the court process.

5. M/s Wambua, the applicant's counsel rehashed the grounds enumerated in the application which are essentially a replica of the grounds cited in support of the application which yielded the ruling now sought to be appealed against. It will add no value to rehash them here. She urged the court to grant the stay sought pending determination of the intended appeal. She argued that if the application is not allowed, the appeal will be rendered nugatory. Further, she argued that the appeal has high chances of success. As for the leave sought, counsel submitted that the ruling was delivered electronically, hence, it was not possible for her to apply for leave at the time of the delivery of the ruling.

6. Mr. Njuguna, the Plaintiff's/Decree-holders counsel did not oppose the prayer for leave. However, he opposed the prayers for stay on

grounds that the orders sought to be appealed against is a dismissal and it is not capable of being executed. He argued that it would be superfluous to grant stay in the circumstances.

7. Additionally, counsel submitted that prayer **(4)** seeks stay of the decree issued on **2nd** February 2016 yet the applicant is not a party to the said decree, hence the application is incompetent. He argued that under Order **42** there must be an appeal pending, and, that the applicant must demonstrate substantial loss. He submitted that the applicants have not demonstrated that they will suffer substantial loss. Further, he submitted that the application must be brought without delay and also the applicant is required to provide security for the due performance of the decree. He submitted that the applicants have been acting in cohorts with the defendants, and that they have filed **6** applications to frustrate the decree. He urged the court to dismiss the application with costs.

8. As mentioned above, the Plaintiff's/Respondent's counsel did not oppose the prayer for leave. However, it is important to mention that the right to appeal is not automatic. This position received recognition by the Supreme Court in several decisions. In *Nyutu Aqrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[1] the Apex court stated that a right of appeal is not automatic but is a creation of statute and the jurisdiction to grant leave to appeal is only excised where the right of appeal exists. Thus, an applicant for leave must show that the intended appeal raises substantial questions of law to be decided by the appellate court and that the intended appellant has a *bona fide* and arguable case. The applicant must demonstrate the issues raised or involved are of general principle(s) which are to be decided for the first time or where the question(s) is one upon which further argument and a decision of the superior court would be to the public advantage.

9. The applicants have not brought themselves within the above tests to warrant the leave sought. The record is awash with previous application premised on similar grounds and instead of preferring an appeal against the said rulings, the applicants keep on filing other applications citing similar grounds. In the impugned ruling, I had observed:-

> "9. As the record shows, on ***6th*** September 2018, the court issued orders of attachment and sale of the movable property of the office bearers of the Judgement Debtor, namely; David Ngugi, George Ngugi, Arthur Njiriri and Rahab Mumbi were issued. However, vide Notice of Motion dated 9th October 2018, Mr. David Ngugi, a former official of the Judgment Debtor applied to review the said ruling citing change of office bearers and arguing that the previous office bearers were not responsible to settle the debt. The said application was allowed on **22nd** October 2018 and the court directed that the "the Decree holder is at liberty to issue notice against the persons competent to answer…" The import of this finding is that it affirmed that the Notice to Show Cause could be issued against the current officials of the society who happen to be the objectors. Curiously, M/s Wambua who represented the former officials in court never appealed against the said ruling.
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> 10. The Notice to Show Cause was subsequently issued against the current officials, who are the objectors in the instant application. On **27th** September 2019, the record shows that M/s Wambua vehemently opposed the Notice to Show Cause, ironically citing the same grounds she propounded before me. More important is the fact that the Deputy Registrar rendered a detailed ruling on **11nd** November 2019 holding inter alia that the Judgment Debtor is an incorporated body and it can only be sued through its officials. She also found that the officials are personally liable and dismissed M/s Wambua argument that section 52 of the Societies Act shielded the officials from persona liability. Curiously, M/s Wambua never appealed against the said ruling nor did she address the import of the two rulings to her application now before me.
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> 11.The Decree Holder obtained attachment warrants on the strength of which they proclaimed the objector's goods triggering the instant objection proceedings. More disturbing is the fact that fully aware of the above two rulings, M/S Wambua filed the instant application describing the attachment as illegal yet she is aware the court cleared dismissed her objection to the Notice to Show Cause in the aforesaid rulings. She only maintained that the objectors were not parties to the case, and that, the order requiring to officials to settle the debt was erroneous.
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> 12. Much as M/s Wambua's arguments are appealing, they collapse on several fronts. First, as stated above, a reading of the court file reveals that on **22nd** October 2018, the court allowed the Judgment Debtors' application for review and directed that the decree be executed against the current office bearers of the society. The objectors happen to be the current officials.
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> 13.Second, the two rulings still stand. They have not been appealed against or reviewed. Objection proceedings are not an appeal or review. The court cannot be expected to review or overturn the said rulings by way of objection proceedings. Before me is not an appeal against the said decision, but an application by the same people objecting to the attachment, yet the court has already decreed that the officials do settle the debt. Simply put, having failed to lodge an appeal against the said rulings, the objectors are using the back door to evade the wrath of a ruling they opted to live with.
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> 14. Fourth, it is basic law that a court order *remains binding and enjoys the force of law until it is reviewed or set aside on appeal. A party is obliged to obey a court order even where he believes its illegal unless he challenges it successfully on appeal or review.*
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> 15.Fifth, the argument that the objectors were not parties to the suit is an affront to the said rulings. In any event, the arguments propounded before me are graphically similar to the arguments raised before the Deputy Registrar. They are simply re-arguing the same grounds propounded before the Deputy Registrar. The objectors have attempted to craft objection proceedings into grounds of appeal which is unacceptable.
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> 16.Sixth, it is not enough to claim the order was issued erroneously or it is illegal. A court order can only be challenged by way of an appeal or review. The argument that the attachment is illegal is legally frail because the attachment enjoys the backing of a court order which has not been reviewed, appealed against or set aside.
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> 17.What emerges from my discussion and findings above is that the objectors' assault on the attachment on grounds that it is illegal

collapses. The attempt to use objection proceedings to evade the wrath of two court rulings is mischievous and clever attempt to frustrate the Decree holder. This finding disposes the Objector's application dated **5th** November 2020."

10. As the above excerpt shows, the rulings made on **22nd** October 2018 and **11th** November 2019 still stand. The objectors never appealed against the said rulings. Any appeal against the impugned ruling in the instant application even if successful will still leave the above rulings intact.

11. Additionally, other than the sound pronouncement by the Supreme Court, in granting leave, the court has to balance the competing interests of the applicant with those of the respondent, as was stated in *M/S Portreitz Maternity v James Karanga Kabia*:-[2]

> "That right of appeal must be balanced against *an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."*

12. Grant or refusing to grant leave is a matter of exercise of judicial discretion. I am aware that whenever the court is invested with the discretion to do certain act as mandated by the statute, the same has to be exercised judiciously and not in an arbitrary manner and capricious manner. The classic definition of `discretion' by Lord Mansfield in *R. v Wilkesn*[3] is that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular'. In exercise of discretion, the court cannot ignore the provisions of the Constitution or the law. In fact, discretion follows the law.

13. The King's Bench in *Rookey's Case* [4] stated as follows: -

> "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

14. In addition, the discretionary powers of the court are constrained by the objectives of the Constitution, the statute and binding precedents. I need not rehash the Supreme Court decisions cited above. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances.[5] There is nothing arbitrary or capricious about exercising a discretion in order to give effect to a constitutional or statutory provision or adhering to binding judicial precedent. The circumstances of this case compel me to decline the prayer for leave notwithstanding the absence of objection by the defendant's counsel. I opt in stead to give due difference to the jurisprudence laid down by the Apex Court.

15. The applicants seek to stay the judgment dated **2nd** February 2016. This prayer was carefully sneaked into this application. The applicants are objectors. They can only seek orders issued pursuant to their objection proceedings and no more. The objection proceedings are their only link with the judgment. They cannot purport to stay the judgment outside the objection proceedings. The said prayer fails.

16. Notwithstanding my above conclusions, it is important to bear in mind the applicable tests which an applicant in an application of this nature must surmount. Order **42** Rule **6 (1) & (2)** of the Civil Procedure Rules, 2010 provides: -

> 1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
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> 2. No order of stay shall be made under sub rule (1) unless-
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> > a. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
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> > 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.

17. For starters, no appeal been filed. The applicant only filed a Notice of appeal. A reading of Order **42** Rule **6 (2)** of the Civil Procedure Rules, 2010 shows that the corner stone of the jurisdiction of the court under the said Rule is three-fold. *One,* that substantial loss would result to the applicant unless a stay of execution is granted.[6] *Two,* that the application has been made without unreasonable delay. *Three,* that 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. In *James Wangalwa & Another v Agnes Naliaka Cheseto*[7] it was stated: -

> "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... 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. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein v Chesoni**,[8] ...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"

18. In *Equity Bank Ltd v Taiga Adams Company Ltd*,[9] the court held: -

> "…. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."

19. Additionally, in *Elena D. Korir v Kenyatta University*[10] the court had this to say: -

> "the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd[11] where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely**:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.**
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> In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[12](2013) as follows:-
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> > "In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other".**

20. The best definition of substantial loss was enunciated in *Bansidhar v Pribhu Dayal*[13] which held that substantial loss should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances. The applicant should go a step further to lay the basis upon which the court can make a finding that it will suffer substantial loss. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted. It is not merely enough to repeat the words of the Civil Procedure Act and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure.[14] It is not sufficient for the applicant to claim that his operations will be adversely affected if it satisfies the decree.

21. An applicant is required to place before the court sufficient evidential support, establishing substantial loss. The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.[15] 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 and different from that."[16] The applicant did not address this pertinent ground nor do I find any from the material before me. On this ground, the applicant's application fails.

22. The other ground is whether the appeal if successful will be rendered nugatory, I find guidance in *Hassan Guyo Wakalo vs Straman EA Ltd* which held: -[17]

> "… the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

23. I find nothing to suggest that the application meets the above test.

24. The other ground is whether the appeal has good chances of success. No appeal has been filed yet. Even if an appeal had been filed, the mere fact that an appeal has a good chance of success is not sufficient to obtain a stay unless an applicant satisfies the court that if successful, the appeal would be nugatory. I find support in *Chang-Tave v Chang-Tave*[18] which held that u*nder the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the court that he will be ruined without a stay of execution. This requirement finds emphasis in Atkins v. Great Western Railway Co*[19] *where court held thus as a general rule, the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds.*

25. Lastly, an applicant is enjoined to provide security.[20] There was no attempt to address this test nor did the applicant offer security. The offer for security must come from the applicant as a price for stay. (See *Carter & Sons Ltd. v Deposit Protection Fund Board & 2 Others.*[21]) In *Equity Bank Ltd v Taiga Adams Company Ltd*[22]it was held: -

> "…of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing *that of all the four, not one or some, must be met before this court can grant an order of stay…"* This proposition of the law was applied in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.*[23]

26. Order **42** Rule **6 (2)** is explicit that no order for stay of execution shall be made unless the conditions in paragraphs **(a)** & **(b)** of the said

provision are complied with. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[24]

27. In conclusion, preferring an appeal does not operate as stay of the decree or order appealed against. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

28. A stay is the exception rather than the general rule. The party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. In exercising its discretion, the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. The court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.[25]

29. The proper approach is to make the order which best accords with the interest of justice.[26] If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.[27] Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.[28] This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.[29]

30. The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.[30]

31. The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances which render it inequitable for him to enjoy the benefit of his victory.[31] The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are when execution would: -[32] ***(a).*** *Destroy the subject matter of the proceedings.* ***(b).*** *Foist upon the court a situation of complete helplessness.* ***(c).*** *Render nugatory any order or orders of the appeal Court.* ***(d).*** *Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal.* ***(e).*** *Provide a situation in which even if the appellant succeeds in his appeal there could be no return to the status quo.*

32. Considering the circumstances of this case and the law as discussed above, it is my finding that the applicants do not merit any of the orders sought. Accordingly, the application dated **17th** February 2021 is fit for dismissal. The upshot is that I dismiss the said application with costs to the Plaintiff/Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 5TH DAY OF JULY, 2021

JOHN M. MATIVO

JUDGE

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[1] {2019} e KLR.

[2] Civil Appeal No. 63 OF 1997.

[3] 1770 (98) ER 327.

[4] [77 ER 209; (1597) 5 Co.Rep.99].

[5]See *Norbis v Norbis* [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.

[6] See Gikonyo J in HCC No. 28 of 2014, *Trans world & Accessories (K) Ltd v Commissioner of Investigations & Enforcement*

[7] HC Misc. No. 42 of 2012, {2012} e KLR

[8] {2002} 1 KLR 867

[9] {2006} e KLR

[10] {2012} e KLR

[11] {1993} KLR 365

[12] {2013} e KLR

[13] AIR 1954 Raj 1, Learned Judge Dave

[14] Ibid.

[15] See *Anandi Prashad v. Govinda Bapu,* AIR 1934 Nag 160 (D), Judge Vivian Bose A. J. C.

[16] Ibid.

[17] {2013} e KLR

[18]*{2003} SLR 74, the Supreme Court*

[19] *{1886} 2 T.L.R 400.*

[20] See *Republic vs Commissioner for Investigations & Enforcement,* Misc. App no 51 of 2015 (NBI),

[21] Civil Appeal No. 291 of 1997

[22] Supra

[23] Supra note 14

[24] Ibid

[25]{2011} EWHC 3544 (Fam)

[26]*Philips LJ in Linotype-Hell Finance Limited v Baker* [1992] 4 All ER 887, at page 3

[27] Ibid

[28] Ibid

[29] Ibid

[30]Onzulobe v Commissioner for Special Duties Anambra State (1990) 7 NWLR (pt 161) 252.

[31] Fawehinmi vs. Akilu (1990) 1 NWLR (Pt. 127) 450 @ 460.

[32] UNIPORT vs. Kraus Thompson Organization Ltd. (1999) 11 NWLR