REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 62 OF 2019

PREMIER INDUSTRIES LIMTED.....APPELLANT

VERSUS

STEPHEN KILONZO MATILIKU.....RESPONDENT

RULING

1. Premier Industries Limited (hereafter the Applicant) has applied through the motion dated 11th February 2019 for orders to stay of execution of the judgment and decree issued on 13th June 2016 in **Milimani CMCC No. 6128 of 2010,** pending hearing and determination of their appeal herein. The motion is expressed to be brought primarily under Order 42 rules 6(1), (2) & (6), and Order 51 Rule 1 and 7 of the Civil Procedure Rules. On grounds *inter alia* that being dissatisfied with the judgment of the lower court, the Applicant has lodged an appeal and that if the orders sought are not granted, the Respondent will execute against the Applicant thereby rendering the appeal nugatory.

2. The motion is supported by the affidavit of **Sundip Nemchand Shah**, described as a director of the Applicant. The affidavit amplifies the grounds on the face of the motion, and it is further deposed that the Applicants were insured by **Concord Insurance Company Limited;** that pursuant to the subsisting moratorium against payments by Concord Insurance Company Limited to policy holders and creditors, the Applicant is protected against execution. The deponent asserts that the pending appeal was arguable and if stay of execution is denied, it would be rendered nugatory.

3. The motion was opposed by way of a replying affidavit sworn by **Stephen Kilonzo Matiliku** (hereafter the Respondent). The gist of the Respondent's affidavit is taken up with argumentative matter relating to the motion and appeal which are unsuited for an affidavit. The deponent views the motion as unmeritorious and urges that it be dismissed with costs.

4. The motion was canvassed by way of written submissions. In its submissions, the Applicant cited the cases of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** and **Peter Rugu Gikanga & Another v Weston Gitonga & 10 Others [2014] eKLR** among others to support its arguments. It was submitted that the Applicant stands to suffer substantial loss if the orders sought herein are not granted, that in the event of a successful appeal the Applicant will be unable to recover any goods sold in execution or payments made to the Respondent whose means are unknown. Counsel submitted the Applicant moved with expediency in filing the instant application and was willing to furnish security as the court may direct. A part of the submissions addresses the merits of the appeal under the heading entitled *"Sufficient Cause"*

5. On the part of the Respondent, counsel anchored his submissions on the locus classicus on principles governing this kind of motion, namely, **Shell Kenya Limited v Kibiru (1986) KLR 410**. He argued that the motion is not merited as it has not met the threshold required under Order 42 Rule 6 of the Civil Procedure Rules for the key reason that the Applicant has not demonstrated in the affidavit supporting the motion that substantial loss that may result if stay is not granted; that the attempt to demonstrate substantial loss in submissions is to no avail, this being a factual issue that ought to have been deposed to in the Applicant's affidavit. The Respondent supported this submission by reference to the case of **Godfrey Wainaina Kinyanjui & Another v Joseph Mwikya Musaa [2020] eKLR**.

6. It was further submitted the Applicant has not demonstrated willingness to provide security through express depositions in its affidavit in support of the motion. Finally, counsel submitted the Applicant's submissions on the arguability of the appeal and sufficient cause were outside the scope of considerations under Order 42 Rule 6 of the Civil Procedure Rules. He urged that the motion be dismissed.

7. The court has considered the material canvassed in respect of the motion by both parties. First, as correctly argued by the Respondent, at this stage the Court is not concerned with the merits or otherwise of the appeal as the applicable considerations in Order 42 Rule 6(2) do not

include such a requirement. 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 instant motion is premised on the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provide 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".**

8. The cornerstone of the Court's jurisdiction under this Rule is substantial loss and the court must determine whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay is denied. Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of **Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410** cited by the Respondent. 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.**
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> **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."**

9. 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)**"**

10. 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).

11. 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."

12. By its affidavit in support of the motion the Applicant did not demonstrate how it stands to suffer substantial loss, beyond bare depositions and sought to do so in submissions. The matter of substantial loss being one of fact should be deposed to in the affidavit of the applicant. The duty to substantiate such loss lies with the Applicant in the first instance. By failing to depose in its affidavit to the matter of the Respondent's inability to refund any monies paid to him, and irregularly raising them in submissions, the Applicant denied the Respondent an opportunity to rebut the assertion. In the 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."

See also **Kenya Hotel Properties Limited vs. Willesden Properties Limited**, **Civil Application No. 322 of 2006 (UR 178/2006**)

13. The decree in this case is a money decree in the sum of Kshs.299,000/- odd. The Applicant has not averred that it will experience difficulty in satisfying the decree or that any monies paid to the Respondent may not be recovered in the event of the appeal succeeding. As stated in the **Shell** case, 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. The court therefore agrees with the Respondent's submission that the Applicant has failed to demonstrate substantial loss and hence the possibility that the appeal will be rendered nugatory if stay is denied. Similarly, the Applicant has not pledged security for the eventual performance of the decree and appears to place the responsibility for satisfying the decree entirely with his insurance company said to be currently under statutory management. The requirement for the offer and/or pledge of security by an applicant is intended to balance the competing interests of the parties pending appeal and is not a mere formality.

14. 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** explained the rationale behind the requirement for security by stating that:

"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…". (Emphasis added)

15. In view of the foregoing, the Court is of the considered view that even though the Applicant filed its motion timeously, the motion has not risen to the requisite threshold under Order 42 Rule 6 (2) of the Civil Procedure Rules. Accordingly, the motion dated 11th February 2019 must fail 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 Applicant: Mr Muriithi

For the Respondent: N/A

C/A: Carol