REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E 42 OF 2021

BENARD MWOVE NZYUKO.....APPELLANT

- VERSUS -

PATRICK KALOKI.....1ST RESPONDENT

LILIAN KAMANTHE.....2ND RESPONDENT

RULING

1. By a Motion on Notice dated 14th June, 2021, the appellant/applicant herein seeks a stay of execution of the judgement delivered in Machakos CMCC No. 694 of 2019 and all its consequential orders pending the hearing and determination of this appeal.

2. The application was supported by an affidavit sworn by the Applicant himself on 14th July, 2021. According to the Applicant, the Respondents instituted a claim against him before the trial court seeking a refund Kshs 370,000.00 and judgement was delivered on 1st April, 2021. Aggrieved by the said decision he instructed his advocates to lodge an appeal and seek orders of stay hence the application dated 15th April, 2021 which he nolonger wishes to proceed with. Accordingly, he instructed his current advocates to withdraw the said application and file the instant application.

3. However, on 11th June, 2021, his goods were proclaimed in the execution of the said decree. He was therefore apprehensive that should the execution of the lower court's decree proceed, his goods would be sold to his detriment and he would thereby suffer substantial losses. It was his view that he has an arguable appeal with high chances of success and that the application was brought without unreasonable delay.

4. Opposing the application, the Respondents relied on the affidavit sworn by **Lilian Kamanthe**, the 2nd Respondent herein. According to her, the judgement sought to be stayed was partially entered by consent on 8th October, 29020 when judgement was entered against the Applicant for the Respondents in the sum of Kshs 250,000.00 leaving a balance of Kshs 120,000.00 which was to be determined by the court. To that extent, it was averred that a consent judgement is not subject of an appeal hence the stay sought is unwarranted.

5. The deponent deposed that she is working and a person of substance capable of repaying the decretal sum of Kshs 120,000/- in the event that the appeal succeeds and she exhibited her payslip. It was therefore her case that the Applicant has not satisfied the conditions for the grant of the discretionary relief of stay. It was further averred that this application is pegged on an incompetent appeal for want of compliance with Order 1 and 2 of the ***Civil Procedure Rules*** and sections 31 and 34 of the ***Advocates Act*** hence ought to be struck out.

6. On behalf of the Applicant it was submitted that the Respondents through their agents removed/proclaimed the Applicant's household goods and properties which assorted properties are essential to support the livelihood of the Applicant and if stay is not granted, the Respondents will proceed to attach and sell the proclaimed properties in the execution of the Judgment. That action will not only cause substantial loss to the Appellant/Applicant but also will render the Appeal nugatory.

7. It was submitted that this application has been brought without undue delay as the Proclamation of the Appellants goods was carried out on 11th June, 2021 and this application was filed on 14th June, 2021.

8. It was submitted that the decree sought to be executed by way of the attachment and sale of the Appellant's properties is inclusive of the

disputed amount and the proclaimed properties have not been apportioned for what amount the execution is being undertaken. Therefore, Respondents' move to execute and enforce the decree by way of seizure and attachment of the Applicant's Property would occasion irreparable harm that cannot be compensated by way of damages.

9. According to the Applicant, the attached pay slip of the 2nd Respondent does not depict the Respondent as a person of sufficient means to compensate the Applicant of the loss since her earnings of Kshs. 22, 670/= is not enough to even cater for her own basic needs given the current inflation rate and hardship circumstances. The Applicant undertook to tender any security and abide by any directions issued by the Court in this matter in furtherance of issuance of orders of stay.

10. *It was* therefore *submitted that* this application is meritorious and a clear-cut case for issuance of orders of stay, and in the interest of justice ought to be granted.

11. On behalf of the Respondent, it was submitted that since it is the duty of the applicant to show that it will suffer substantial loss if stay is not granted, material particulars of loss must be placed before the court by way of a sworn affidavit to show what loss the applicant will suffer. In this case, the affidavit by the applicant does not show what substantial loss will be suffered if stay is not granted. He has also not sworn an affidavit to show that he knows the respondent and she is a person of straw and cannot pay the decretal sum if the appeal succeeds. On the other hand, the respondent has demonstrated by way of an affidavit that she is working and annexed a payslip to show that she works and can repay the decretal sum in the event the appeal succeeds.

12. According to the Respondents, their suit was for refund of money given to the applicant and a consent judgement was entered. Therefore, this being a money decree, the court should balance the interest of both parties and not to shut down a successful litigant from enjoying the fruits of its rightfully obtained judgement and more specifically a consent judgement. The Court was urged to find that the applicant has failed to establish substantial loss.

13. To the Respondent, this appeal in so far as it arises from a money decree, it is a principle of law that appeals in money decrees are never rendered nugatory for one can sue for refund. It was reiterated that a consent judgement entered by the parties is not subject of an appeal and that the respondent is executing for that consent judgement and which is not appealed against.

14. It was further submitted that there are two notice of motion dated 14/6/2021 and 15/4/2021 by two different advocates seeking for same prayers of stay. The first notice of motion by **P.N Musila Advocate** was purportedly withdrawn by another advocate **Fred K. Musyimi Advocate** via a notice of withdrawal filed in court on 14/6/2021. It was however submitted that **Fred K. Musyimi Advocate** had no capacity to withdraw a pleading by his colleague since both of them are on record. It is only the drawer who filed that notice of motion had capacity so to do. This Court was therefore urged to strike out both applications.

Determination

15. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

16. The first issue is whether the application is incompetent in so far as it seeks to stay the execution of a consent judgement. It is true that a consent judgement was entered against the Applicant herein in the sum of Kshs 250,000/-. According to section 67(2) of the ***Civil Procedure Act***, no appeal lies from a decree passed by the court with the consent of parties. Accordingly, in so far as the sum of Kshs 250,000/- is concerned, no appeal lies against it and therefore no stay can be granted in respect thereof. However, according to the memorandum of appeal, this appeal is only against the decision made on 1st April, 2021. To that extent, the Applicant is within his right to lodge the appeal and seek the stay but only as against that decision.

17. As regards the withdrawal of the application dated 15th April, 2021, the Respondents appreciate that both advocates or on record for the Applicant. If that position is true, then nothing stops one of the advocates taking a step in the proceedings including the withdrawal of any proceedings since both of them are then deemed as agents of the Applicant.

18. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***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.***

19. 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" while 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.

20. 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.**

21. The same position was adopted by **Kimaru, J** in **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

> **"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. 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 all different from that…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 an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."**

22. 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."**

23. 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".**

24. 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."**

25. 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."**

26. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred 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."**

27. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

28. 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 since lack of means *per se* is not necessarily a ground for granting stay. 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. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

29. In this application however, the Applicant's basis for urging the Court to find that the application raises substantial loss is that his goods have been proclaimed. It is not for example deposed in the supporting affidavit that the Respondents' position is so precarious that they are unlikely to refund the decretal sum once the same is paid over to them. I agree with the position adopted 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.''**

30. That the Respondents intend to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondents are simply exercising a right which has been bestowed upon them by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant.

31. In this case, the 2nd Respondent has shown that she is in gainful employment. While she might not be earning much in the Applicant's view, she is clearly not a dishonourable miscreant without any form of income.

32. In the premises I find no merit in this application which I hereby dismiss with costs.

33. It is so ordered.

Read, signed and delivered at Machakos this 10th day of November, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr A. K. Mutua for the Respondent

Mr Nthiwa for Mr Musyimi for the Applicant

CA Susan