



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E220 OF 2021

GITHENYA GATHUKI.....1ST APPELLANT/APPLICANT

JOSEPH KIBICHO.....2ND APPELLANT/APPLICANT

-VERSUS-

MBITI MUTEMI.....RESPONDENT

RULING

1. The motion dated 24th May, 2021 by **Githenya Gathuki** and **Joseph Kibicho** (hereafter the Applicants) seeks an order to stay execution of the judgment delivered in **CMCC No. 11248 of 2018** on 23rd April, 2021 in favour of **Mbiti Mutemi** (the Respondent), pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rule 4, 6 & 7, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules *inter alia*. On grounds, among others that, being dissatisfied with the judgment, the Applicants have preferred an appeal and may suffer substantial loss if the prayers are denied..

2. The motion is supported by an affidavit sworn by **Joyce Chichi**, who describes herself as counsel practicing in the firm of **Kimondo Gachoka & Company Advocates**, who are seized of the conduct of the matter on behalf of the Applicants. She deposes that if stay of execution pending appeal is not granted, the Respondent will proceed to levy execution at any time thus causing what she terms as “*irreparable loss and damage*” to the Applicants and rendering the appeal nugatory. The deponent further expresses the Applicants’ willingness to provide a bank guarantee for the entire decretal sum as security for the due performance of the decree.

3. The motion was opposed by way of a replying affidavit sworn by **Caroline Kibiwott**, counsel for the Respondent. Counsel asserted that the motion has not satisfied the requirements for granting of an order to stay execution pending appeal; that the Applicants have not demonstrated how they will suffer substantial loss if stay of execution is denied; and that the appeal does not disclose any arguable grounds with a chance of success. The deponent views the application as dilatory and intended to deny the Respondent the fruits of his judgment. Counsel urged the court to demand that adequate security be furnished by the Applicants if it found the motion merited.

4. The motion was canvassed through written submissions. On behalf of the Applicants, counsel submitted that the subject matter of appeal is a money decree that is substantial; that if execution proceeds the appeal will be rendered nugatory and the Applicants will suffer substantial loss. Reliance was placed on the cases of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** and **RWW v EKW [2019] eKLR**. She reiterated the Applicants’ readiness to provide security in the form of a bank guarantee. Authorities cited include **Absalom Dova v Tabro Transporters [2013] eKLR**, **Gianfranco Manethi & Another v Africa Merchant Assurance Company Limited [2019] eKLR**, and **Focin Motorcycles Co. Limited v Ann Wambui Wangui & Another [2018]**.

5. The Respondent anchored his submissions on the provisions of Order 42 Rule 6, counsel arguing that the onus was on the Applicants to satisfy the conditions therein. Concerning substantial loss, counsel asserted that it is not sufficient for the Applicants to make bare statements but they were obligated to demonstrate the likelihood and manner in which they stood to suffer substantial loss if stay is not granted. The Respondent relied on several decisions, including **Machira t/a Machira & Co. Advocates v East African Standard (No.2) (2002) KLR 63** and **Kenya Shell Ltd v Kibiru & Another, Civil Appeal No. 97 of 1986**. It was asserted that the Respondent will be most prejudiced if the motion is allowed.

6. He cited the case of **Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR** among others to assert that the delay in filing the present motion was inordinate and the motion was merely a dilatory tactic to thwart lawful execution proceedings. The Respondent took issue with the Applicant’s offer of a bank guarantee as security, stating that such security will deny him interest and may eventually be dishonored. He relied on the decisions in **Mwaura Karuga t/a Limit Enterprise v Kenya Bus Services Ltd**

& 4 Others [2015] eKLR and Bernard Kigada & Another v Tom Ochieng Odeny [2021] eKLR. The Respondent's conclusion was that the motion dated 24th May, 2021 has not risen to the threshold envisaged in Order 42 Rule 6 of the Civil Procedure Rules and ought to be dismissed.

7. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that 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.**

8. The Applicants prayer for stay of execution pending appeal, is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides 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”.

9. The cornerstone consideration in the exercise of the discretion is whether the Applicants have 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.”

10. 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 **Platt 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. 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 two courts... (emphasis added)”

11. 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. 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.” (Emphasis added)

12. 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.”

13. The Applicants have claimed that they are likely to suffer substantial loss and their appeal rendered nugatory if stay of execution pending appeal is not granted. The Respondent countered quite correctly that the Applicants have not demonstrated their claim. The Applicants are duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants. They have not discharged this duty. As stated in the **Shell** case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money.

14. It is not enough for the Applicants to assert that the decretal sum is substantial and that they will suffer substantial loss without evidence of how that will arise. The subject decree is in the region of Sh.400,000/-and the Respondent was entitled to commence the lawful process of execution. Substantial loss in its various forms, is the cornerstone of the jurisdiction for granting stay. That is what must be prevented. Therefore, without this evidence, it is difficult to see why the execution process should be stayed. In the court’s view, the Applicants have failed to demonstrate substantial loss and, on that account, the motion must fail. The motion dated 24th May 2021 is accordingly dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 4TH DAY OF NOVEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Ms. Wanjala for the Applicants

Simiyu h/b for Ms. Chirchir for the Respondent

C/A: Carol