REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. E16 OF 2020

KUBAMBA SACCO.....1ST APPELLANT/APPLICANT

JASON MACHARIA MWANGI.....2ND APPELLANT/APPLICANT

-VERSUS-

MAKAU MWILI.....RESPONDENT

RULING

1. By a Motion on Notice dated 26TH March, 2021, the Applicants herein substantially seek stay of execution of the judgement/decree obtained herein (sic) pending the hearing and determination of this appeal.

2. The said application was supported by the affidavit sworn by **Jason Macharia Mwangi,** on 26th March, 2021. According to the deponent, judgement was entered against him on 27th January, 2021 for the principal sum of Kshs 245,750/- with special damages of Kshs 5,750/-, costs and interests. According to him, the said award is excessive yet the appeal has a high chance of success.

3. According to the deponent, the application has been presented without inordinate delay and he is ready, willing and able to furnish such reasonable security within such times as the court may direct. It was deposed that the Respondent is a person of unknown means hence the Applicant is apprehensive that if the decretal sum is paid out, this appeal will be rendered an academic exercise.

4. It was disclosed that the Applicant is willing to provide a Bank Guarantee as security for stay of execution pending appeal.

5. In response, the Respondent relied on the replying affidavit sworn by himself in which he indicated that since he is a person of means, he is capable of paying the decretal amount should the appeal be successful. It was his proposal that the Applicant ought to be directed to release half of the decretal amount to him and deposit the remaining half in a joint interest earning account. It was noted that the annexed Bank Guarantee issued in November 2020 is only valid for 1 year yet the appeal will not have been concluded by November this year.

6. The Respondent expressed doubts about the chances of success of the appeal and contended that this application is merely meant to frustrate his efforts of reaping the fruits of his judgement.

Determination

7. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

8. Order 42 rule 6(1) and (2) of the ***Civil Procedure Rules*** provides as follows:

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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. 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. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is ait over to him.

10. 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. 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.

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

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

13. I therefore agree with the opinion expressed 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.''

14. It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* would remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be the case if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another** (supra).

15. In this case, the ground upon which the application is based is that the Respondent is a person of unknown means. However, the mere fact that the Respondent's means are unknown to the Applicant does not necessarily mean that if the appeal succeeds, he will not be able to refund the decretal sum. It is upon the Applicant to positively and satisfactorily prove that the consequences of releasing the decretal sum to the Respondent, would be that the same would be out of reach of the Applicant and would be irrecoverable or at least very difficult to recover in the event of the successful appeal.

16. On his part the Respondent averred that he is a person of means. Being a business person. He, however did not disclose the nature of his business.

17. Be as it may, since both parties are economical with the truth but it is clear that the appeal is directed at the quantum of the award, the order that commends itself to me is that there shall be a stay of execution of the subject decree pending the hearing and determination of this appeal on condition that the Applicants release to the Respondent half the decretal sum and furnishes a Bank Guarantee for the balance specific to this matter pending the hearing and determination of this appeal. The said conditions to be complied with within 30 days and in default the application shall be deemed to have been dismissed with costs.

18. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ochoki for the Applicant

CA Susan