REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 169 OF 2018

MOHMED DAGANE FALIR aka ALI DAGANE……..……..APPELLANT

VERSUS

ALFONCE MUTUKU MULI……..…….1ST RESPONDENT

REAL TILAK ENTERPRISES……..……..…2ND RESPONDENT

RULING

1. On 16th June, 2020, I delivered a judgement in this appeal in which I allowed the appeal and entered judgement in favour of the appellant on liability at 100%. I then proceeded to award the Appellant General damages for pain and suffering in the sum of Kshs. 500,000/=, Cost of future medical treatment in the sum of Kshs. 700,000/= and Special damages in the sum of Kshs. 1,632,700/=. The said amounts totalled Kshs 2,832,700/=. I directed that while general damages would attract interest at court rates from the date of judgement in the lower court, the other two awards would attract interest at the same rate from the date of filing suit till payment in full.

2. By an application dated 23rd June, 2020 the Appellant sought that the said Judgement be reviewed and the Appellant/Applicant, being the successful party be awarded costs of the Appeal and the Lower Court and further that the costs of the Application be provided for. On 17 th November, 2020, I found that the Appellant was entitled to costs but agreed with the Respondent that the Appellant did not fully succeed in the appeal. Accordingly, I awarded half costs of this appeal and full costs of the lower court to the Appellant.

3. By a Motion dated 30th April, 2021, the Respondent now seeks an order for stay of execution of both the judgement and the subsequent ruling pending the hearing and determination of "the appeal filed herein" (sic) as well as a provision for the costs of the said application.

4. The application is supported by an affidavit sworn by **Sharon N. Mukania**, a legal officer at GA Insurance Limited, the Respondent's insurer who according to the deponent, is liable to satisfy the decretal amount herein.

5. According to the deponent, being aggrieved by the judgement herein, she instructed their firm of advocates on record to appeal against the said judgement and she has been informed that a Notice of Appeal was filed on 26th June, 2020 and that a request for copies of typed proceedings and judgement was made on the same day. However, the said copies have not been received in order to facilitate the filing of the record of appeal.

6. It was further deposed that on 17th November, 2020, this Court awarded the Appellants half the costs of the appeal and full costs of the subordinate court. However, the stay of 30 days granted on that day lapsed on 17th December, 2020 hence exposing the Respondent to execution process. It was disclosed that the Appellant has already sought to have the decree extracted and has filed party and party bill of costs whose ruling was scheduled for delivery on 20th May, 2021 after which the Appellant would be at liberty to execute against the Respondent.

7. It was averred that the insurer who is obliged to pay the decretal amount on behalf of the Respondent has a reasonable and justifiable apprehension that it would be unable to recover the same from the Appellant whose details of assets and/or income are unknown in the event that a stay of execution is not granted and the Respondents are successful in the Appeal. According to the deponent, the insurer will suffer substantial loss in the event that the orders sought for herein are not granted and furthermore the appeal will be rendered nugatory. It was disclosed that the insurer, on behalf of the Respondents is ready and willing to deposit the decretal amount in an interest-bearing account or

provide such security as the court may deem fit.

8. In response to the Application, the Appellant herein swore a replying affidavit on 17th May, 2021 in which he averred that he was involved in the accident herein on 2nd September, 2012 and has been waiting for over twenty years now for his compensation and as such, any further delay would be prejudicial to him. As a result of the accident, he was badly injured and maimed and rendered jobless and forced to retreat to his rural home at Garissa where he is now based.

9. He lamented that the Respondents'/Applicants' have never taken any steps to follow up on the Appeal and they do not have any intentions of doing so as they have not shown any steps taken in following up the proceedings herein for filing of their Appeal when it is evident that the file is readily available. Further, the Respondents'/Applicants' have never filed and or served a Memorandum of Appeal and as such, there is no substantial appeal filed by the Respondents'/Applicants' as alleged in their grounds of this Application.

10. It was further averred that the Respondents/Applicants herein have taken inordinately long time of at least (7) months to file the Application herein as provided for by the law and as such, the same should not be allowed since the delay is inexcusable and a deliberate effort to deny him the fruits of the Judgement. He lamented that he has given the Respondents/Applicants herein ample time from 17th December, 2020 when stay of execution lapsed to settle the decretal amount but they have not taken any steps to indulge his advocate on any form of settlement and or consent only to file this Application five months down the line when there is no threat of execution.

11. It was his view that this Application herein lacks merit as the Respondents'/Applicants' have not shown any substantial loss they may suffer if they pay the decretal sum and thus this Application is incompetent and an abuse of the court process as they have not met the prerequisites for grant of Orders sought.

12. The Appellant disclosed that he is a livestock farmer rearing over three hundred sheep and goats and over two hundred heads of cattle and also owns a mobile phone shop and Mpesa in Garrisa Town and thus will be able to refund the decretal sum in the unlikely event that the Applicants succeed on Appeal.

13. The Appellant complained that he was badly injured in the accident and the decretal sum will go a long way in helping in his rehabilitation to good health.

14. He therefore prayed that the Respondents'/ Applicants' Application dated 30th April, 2021 be dismissed with costs as the Application is an afterthought, is bad faith and aimed at wasting this Court's precious judicial time.

Determination

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

16. As pointed out above, the affidavit in support of the application is sworn by one **Sharon N. Mukania**, who introduced herself as a legal officer at GA Insurance Limited, the Respondent's insurer liable to satisfy the decretal amount herein. She further deposed that being aggrieved by the judgement herein, she instructed their firm of advocates on record to appeal against the said judgement. In other words, from the supporting affidavit, it is not the Respondent who is aggrieved by the judgement but the deponent, **Sharon N. Mukania**. That, in itself, would render the application incompetent since the person aggrieved by the judgement is not the party who has given the Notice of Appeal and does not aver that she is swearing on information furnished to her by the intended appellant.

17. That notwithstanding, 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."***

18. 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.

19. 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.**

20. 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."**

21. I therefore appreciate the sentiments expressed by the High Court in **John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another [2016] eKLR** that:

> **"There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the Constitution as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief."**

22. The first issue to be decided is whether there exists a substantial loss. I associate myself with **Ogolla, J** in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331** in which he held that:

> **"Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.''**

23. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** the court expressed itself as hereunder:

> **"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 under Order 42 Rule 6 of the CPR. 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 ... 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."**

24. 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."

25. It is therefore my view that 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. 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.

26. 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."

27. Substantial loss may be equated to the principle of negation of the success of the intended appeal. Dealing with the latter, it was held in the case of **Kenya Airports Authority vs. Mitu-Bell Welfare Society & Another (2014) eKLR** that:

"The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases."

28. 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.**

29. It was therefore held in the case of **Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR**, thus:

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination."

30. 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.''

31. 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).

32. If the applicant surmounts that hurdle, then pursuant to section 112 of the ***Evidence Act***, the evidential burden shifts to the Respondent to prove otherwise. The law, therefore, appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

33. **That was the position in the case of <u>Stanley Karanja Wainaina & Another vs. Ridon Ayangu Mutubwa Nairobi H.C.C.A. 427/2015</u>** where it was stated that:

> **"…It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation…"**

34. **A similar position was upheld in <u>National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another (UR) C.A. 238/2005</u> where the Court of Appeal restated 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 an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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…"**

35. In this case, the basis upon which it is contended that the Respondents stands to suffer substantial loss is, according to the Respondent, that the details of the Appellant's assets and/or income are unknown. The respondent has, however, deposed on oath that that he is a livestock farmer rearing over three hundred sheep and goats and over two hundred heads of cattle and also owns a mobile phone shop and Mpesa Shop in Garrisa Town. Even if it was shown that the Appellant is poor, as held above, poverty is not a ground for denial of a person's right to enjoy the fruits of his success. In this case the Appellant has proved that he is not is not a dishonourable miscreant without any form of income. I therefore find that the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question. It is true that where the sum involved is huge and the decree holder fails to place before the court his assets or source of income, the Court may well find that he has failed to discharge the evidentiary burden. However, where, as in this case the decree holder swears on oath that he is a person of means, the Court cannot deny him the enjoyment of the fruits of his judgement particularly where the judgement debtor's apprehensions are based on lack of information regarding the decree holder's means and where the decree holder has placed before the court his means.

36. Accordingly, I am unable to find that the Applicants have proved that substantial loss may result to the applicants unless the order is made.

37. Consequently, I find no merit in this application which fails and is hereby dismissed with costs to the Respondents.

38. It is so ordered.

Read, signed and delivered at Machakos this 9th day of November, 2021.

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of:</u>

Miss Obwori for the Respondent/Applicant

CA Susan