REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E105 OF 2021

SUSAN NJERI MUIGAI t/a SUPERTAG GENERAL CONTRACTORS.....1ST APPLICANT

JOSEPH NJEHIA THIONGO.....2ND APPLICANT

VERSUS

AMBER UNIVERSAL SECURITY BV (AUS) & PRUST HOLDINGS BV.....RESPONDENT

RULING

1. The motion dated 22nd March 2021 is by Susan **Njeri Muigai t/a Supertag General Contractors** and **Joseph Njehia Thiongo** (hereafter the Applicants). The motion seeks an order to stay execution of the summary judgment entered in favour of **Amber Universal Security BV (Aus) & Prust Holdings BV** (the Respondent) on 24th February 2021 in **Milimani CMCC No. 757 of 2019**, pending hearing and determination of the appeal filed herein. The motion is anchored on the provisions of Order 42 Rules 6 (2) of the Civil Procedure Rules. On grounds, among others, that being dissatisfied by the ruling and in **Milimani CMCC No. 757 of 2019** the Applicants have preferred an appeal and are apprehensive that if the decretal sum is released to the Respondent, the Applicants will be unable to recoup the same upon a successful appeal, thus rendering the appeal nugatory.

2. Joseph Njehia Thiongo the 2nd Applicant swore the supporting and further affidavits dated 22nd March, 2021 and 10th April, 2021 respectively. To the effect that the Applicants were aggrieved by the ruling and order in **Milimani CMCC No. 757 of 2019** of 24th February, 2021 and have preferred an appeal. He asserts that the Applicants have an arguable appeal but are apprehensive that they are likely to suffer substantial loss if stay of execution is not granted. Because, the Respondent will be unable to refund the decretal sum if paid out; that the Respondent's means are unknown; that the Respondent is a foreign company based outside the jurisdiction of the court which may make it difficult to secure the refund of the decretal sum. It is further deposed the Respondent has threatened to execute the decretal sum by taking out warrants of attachment and proclamation notice; that the amounts involved are colossal and the Applicants *"may not raise at the moment"* leading to full execution of the decree by attachment and/or imprisonment. The deponent expressed the Applicants' willingness to abide by any requirements imposed by the court as condition for stay of execution, including security by deposit of title to prime property in his name.

3. The motion was opposed by way of a replying affidavit deposed by **Tom Mirimba**, who described himself as the Financial Director with the Respondent Company, thus conversant with the dispute. He deposed that the Applicants have not demonstrated any loss, substantial or otherwise, that they stand to suffer if the orders sought are denied; that the Respondent is possessed of sufficient means to refund the decretal sum in the event the appeal is successful as evidenced by attached bank statements and unsecured loan of Kshs. 16,000,000/- made to the Applicants in 2016; and that the Applicants have not made any tangible proposal on security for the due performance of the decree. The deponent contended that the Applicants' right to appeal should be balanced with the Respondent's right to enjoy the fruits of successful litigation. He asserted that the Applicants do not deserve the exercise court's discretion in their favour and their motion which he views as dilatory ought to be dismissed with costs.

4. The motion was canvassed by way of written submissions as directed on 22nd April 2021. Counsel for the Applicants commenced his submissions by citing the case of **Absalom Dova v Tarbo Transporters [2013] eKLR** as to the discretionary nature of the court's jurisdiction under Order 42 Rule 6(2) of the Civil Procedure Rules. He submitted that the decretal sum is a colossal and that owing to the prevailing economic conditions on account of the Covid-19 pandemic, it would be an arduous task for the Applicants to raise the amount in the decree without jeopardizing the Applicants' financial position and adversely affecting the business. He stated that the Applicants were willing to offer security in the form of a title in respect of a prime property of value equivalent to the decree.

5. Reiterating that the Respondent is a foreign firm operating in the Netherlands whose assets or whereabouts are unknown, counsel asserted

that if execution proceeds, the Applicants will be unable to recover the decretal sums should the appeal succeed and will thus suffer substantial loss. He relied on the cases of **Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR** and Shawaz **T.M Ltd v John Ndirangu Kimeu (2004) eKLR** and stated that the application was timeously filed. He concluded by asserting that the Applicants have fulfilled the requirements for the grant of an order to stay execution.

6. Counsel for the Respondent submitted that the Applicants' right of appeal should be balanced against the Respondent's entitlement to the fruits of their judgment and that there ought to be sufficient cause shown to justify denial of the latter. For this proposition he cited **Antoine Ndiaye v African Virtual University Nairobi [2015] eKLR**, **Machira v East African Standard [2020] KLR 63** and **Luxus Wood (K) Limited v Patrick A. Kamadi [2016] eKLR** and asserted that the Applicants have not sufficiently demonstrated and or adduced evidence of substantial loss, beyond bald statements. That on its part the Respondent has through its annexures demonstrated ability to refund any monies paid in satisfaction of the decree in the event of the appeal succeeding.

7. Further citing **Luxus Wood (K) Limited (**supra**)**, **Republic v The Commissioner for Investigations & Enforcement *Ex-parte* Wananchi Group Limited [2014] eKLR** and **Hellen Kiramana v PCEA Kikuyu Hospital [2016] eKLR** counsel argued as follows. First, that for an application for stay of execution to succeed, the applicant must fulfill the mandatory requirement for provision of security, and that it is not enough for such party to make bare assertions as the Applicants have done. Secondly, counsel reiterated that under the provisions of Order 42 Rule 6 the mere filing of an appeal whether meritorious or not, does not confer an automatic right to stay of execution. Counsel contended that the motion was intended to delay and or deny the Respondent of its fruits of successful litigation and should be dismissed with costs.

8. The court has considered the material canvassed in respect of the motion. First, the court notes that both parties have canvassed issues touching on the merits of the appeal. At this stage, the court is not concerned with the merits of the appeal. The power of the court to grant stay of execution of a decree pending appeal under Order 42 Rule 6 is discretionary. However, that discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417.**

9. The 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 Applicants 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 Applicants".**

10. The first question to be determined 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] e 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."**

11. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view sets 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 Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants 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</u>…(**emphasis added)**"**

12. 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 Applicants, 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]

13. 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."**

See also **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 OF 1997**.

14. The Applicants by their two affidavits appear to base the likelihood of substantial loss on two events, firstly, that the Respondent may be unable to refund the large sums in the decree if the appeal succeeds, and secondly that the Applicants' financial and business position will be adversely impacted by payments in satisfaction of the decree, if execution is allowed to proceed. Indeed, both events constitute substantial loss as envisaged in the Shell case. In my view however, the two stances taken appear contradictory and not tenable when pleaded simultaneously.

15. Be that as it may, the onus was upon the Applicants to substantiate these statements (see **Machira t/a Machira & Co. Advocates v East African Standard**.) No evidence of was tendered before this court concerning the financial standing of the Applicants, not even copies of bank statements. Bald assertions cannot suffice. Similarly, the asserted apprehension that the Respondent may not repay any sums paid to it was not demonstrated in any way, but in any event has been adequately rebutted by the Respondent's depositions and bank statement attached to the replying affidavit as annexure **"TM1".** 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 Applicants 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 Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants 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."**

16. The bank statement (annexure **TM1**) indicates substantial deposits and balances in the Respondent's bank account. This material has not been controverted. Secondly, the fact that the Respondent is a foreign business without more, cannot suffice as evidence of potential difficulty in the Applicant's recovery of any monies paid under the decree. The Applicants have not demonstrated how they are likely to be impeded in recovering any such monies by the fact that the Respondent firm is based in the Netherlands. After all, it appears from material on record that notwithstanding the fact, the parties have had business dealings over several years. A foreign company operating legally in this jurisdiction cannot be discriminated on that account; it is entitled to equal rights to property and protection and equal benefit of the law as any other legal company or business. (See Article 27 of the Constitution).

18. As stated in the **Shell** case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what must be prevented. Therefore, without this evidence, it is difficult to see how the appeal would be rendered nugatory or to justify keeping the Respondent from enjoying its fruits of the judgment. The decretal sum in this case is about Kshs 22 million. This is a substantial sum, but the Respondent has furnished material to demonstrate that it has the means to make a refund, if the appeal succeeds. The court is in the circumstances not persuaded that substantial loss has been demonstrated.

18. Equally, concerning the requirement for security, the Applicants appeared content to make bare pledges to provide a title to a *"prime property"*. Neither the location nor the details or copy of title documents to the property have been supplied by the Applicants. The court and the Respondent were therefore denied the opportunity to assess the seriousness of the pledge or the adequacy of the proposed unnamed security. By playing with their cards close to their chests, the Applicants effectively rendered hollow their acclaimed willingness to give security for the performance of the decree, which is substantial. No party ought to be allowed to trifle with the requirement for security in this manner. It seems that the Applicants desire the benefit of a stay order without delivering on the requirement for security for the performance of the decree. The competing rights of the Applicants to pursue their appeal must be balanced against the equal rights of the Respondent as a decree holder.

19. The words stated in **Nduhiu Gitahi & Another v Anna Wambui Warugongo [1988] 2 KAR,** citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** and others, are apt:

> **"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to .. advantage the Defendant while giving no legitimate advantage to the Plaintiff…… It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"**

20. For all the reasons above, the court finds that the motion dated 22nd March, 2021 is without merit. The motion is hereby dismissed with costs.

DELIVERED AND SIGNED ON THIS 18TH DAY OF NOVEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Mr Gakaria for the Applicants

Mr Kamwendwa for the Respondent

C/A: Carol