



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E074 OF 2021**

**SAID SALIMU AMUR.....APPELLANT**

**-VERSUS-**

**SAID DENA MWARINGA.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated **22 June 2021** was filed herein by the appellant pursuant to **Sections 3A, 79G and 95** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6** and **Order 51 Rules 1 and 3** of the **Civil Procedure Rules 2020**. The appellant thereby sought orders that:

- [a] the application be certified as urgent and be heard *ex parte* in the first instance; (spent)
- [b] pending the hearing and determination of the application and the appeal, the Court be pleased to order stay of execution of the judgment and decree delivered on **27 May 2021** by Hon. Lesootia Saitabau, Principal Magistrate, in Mombasa Principal Magistrate's Court; (partly spent)
- [c] The application be heard *inter partes* on such date and time as the Court may direct; (spent)
- [d] the Court be pleased to issue any other orders that it may deem fit, just and expedient in the interests of justice.
- [e] the costs of the application be in the cause.

[2] The application was supported by the affidavit of **Mr. Masolia Loveto**, annexed thereto and on the grounds that Judgment was delivered on **27 May 2021** in which the appellant was found 100% liable in the sum of **Kshs. 206,000**; and that being aggrieved by that decision, the appellant has opted to appeal, contending that the award is excessive. **Mr. Masolia** further averred that the appellant is reasonably apprehensive that the respondent, as the decree holder, may proceed and levy execution against him as the stay order issued by the lower court has since lapsed. He contended that the Judgment is for a substantial amount and that the appellant is apprehensive that if the respondent executes and is paid, he may deal with the funds in a manner prejudicial to the appellant; thereby rendering the appeal nugatory. At paragraph 11 of the Supporting Affidavit, **Mr. Masolia** stated that the appellant's insurer is ready, willing and able to furnish the Court with a Bank Guarantee from **DTB Bank** as security once the order is made. He annexed to his affidavit a copy of the Guarantee for **Kshs. 30,000/=** dated **November 6, 2020**, among other documents, to concretize his averments.

[3] The respondent opposed the application. In his Replying Affidavit sworn on **1 July 2021**, the respondent denied that he is a man of straw as presumed by the appellant. He deposed that the appellant was under obligation to demonstrate that he stands to suffer substantial loss; which, in his view, was not done. He pointed out that the appellant's right to appeal has to be balanced against his right to the fruits of his judgment; and that in this instance, the balance tilts in his favour. He however proposed, in the alternative and without prejudice to the foregoing that, if the Court is inclined to grant the stay sought, then it be done on the following terms:

- [a] at least half of the decretal sum, that is **Kshs. 161,632/50**, be released to him through his advocates on record;
- [b] the appellant be required to photocopy the proceedings and prepare and serve a record of appeal within 30 days of the decision of the Court;
- [c] the balance of the decretal sum be placed in a joint account held in the names his advocate and the appellant's advocate; and
- [d] the Record of Appeal be readied for admission or rejection of the appeal within 40 days of the Court's decision.

[4] The application was canvassed by way of written submissions, pursuant to the directions given herein on **7 July 2021**. To that end, **Mr. Masolia** for the appellant filed his written submissions on **15 October 2021**. He conceded that the appellant's right to appeal has to be balanced against the equally weighty right of the respondent to enjoy the fruits of the judgment delivered in his favour; and that there must be a just cause for depriving the respondent of that right. He set out the guiding principles in such applications at paragraph 8 of his written submissions thus:

- [a] Whether the appeal has merit and a high chance of success;
- [b] Whether substantial loss would emerge from refusal to grant stay;
- [c] Whether the appellant is ready and willing to furnish security;
- [d] Whether the application has been made without unreasonable delay.

[5] **Mr. Masolia** relied on **Rao Jaivirsinthinji T/A Darbar Wholesalers & 3 Others vs. Prudential Drycleaners Ltd** [2004] eKLR for the holding that the Court's discretion in this regard is unfettered; and should be exercised freely to avoid injustice or hardship being occasioned to either of the litigants. Counsel pointed out that, as matters stand, the appellant is exposed to the risk of execution should the orders sought not be granted. In his view that would amount to an injustice; and therefore ought to be averted. He added that, to date, the respondent has not demonstrated how he earns a living in order to give the Court the confidence that, if paid, he will be in a position to refund the decretal sum.

[6] **Mr. Masolia** further pointed out that the appellant is ready and willing to furnish security in the form of a Bank Guarantee through his insurer, **Directline Assurance Company Limited**. In his view, a Bank Guarantee is a more stable and fiscally healthy mode of securing the decretal sums herein; and has the added effect of balancing the interests of both parties. He made reference, in this regard to **Marco Tools & Explosives Ltd vs. Mamujee Brothers Ltd** [1988] KLR 730. He also urged the Court to find that the application was filed without unreasonable delay, having been filed 27 days after delivery of judgment. Counsel consequently prayed that the application be allowed as and the orders sought therein granted as prayed.

[7] On his part, **Mr. Kazungu**, learned counsel for the respondent relied on his written submissions filed on **18 August 2021**. He pointed out that, in an application of this nature, the rights of both parties must be put on the weighing scale for the Court to determine which party would suffer the most prejudice. Counsel further submitted that, since the appeal is limited to quantum, the interests of both parties would be well-served by an order for the immediate payment of half of the decretal sum to the appellant. He relied on **Samuel Kimutai Korir (suing as the personal legal representative of the Estate of Chelangat Selivia, deceased) vs. Nyanchwa Adventist Secondary School & Another** [2017] eKLR, **Tarbo Transporters Ltd vs. Absalom Dova Lumbasi** [2012] eKLR; **Amal Hauliers Limited vs. Abdulnasir Bukar Hassan** [2017] eKLR and **Antoine Ndiaye vs. African Virtual University** [2015] eKLR in support of his submissions and prayed that the appellant be granted conditional stay of execution in the terms proposed by him.

[8] Needless to say that the respondent, having been successful in his litigation, is entitled to the fruits of his judgment. Thus, it is useful therefore to bear in mind the apt expressions made in **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2)** [2002] KLR 63, that:

**"The ordinary principle is that a successful party is entitled to the fruits of his judgment or 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."**

[9] Nevertheless, **Order 42 Rule 6** of the **Civil Procedure Rules** recognizes that:

**"No appeal or second appeal shall operate as a stay of execution or proceedings 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..."**

[10] In the premises, in application for stay of execution of decree or order pending appeal, an applicant is under obligation to satisfy the conditions set out in **Rule 6(2) of Order 42** aforementioned, namely:

- [a] that substantial loss may result to the applicant unless the order is made;
- [b] that the application has been made without unreasonable delay.
- [c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[11] In terms of substantial loss, the appellant endeavoured to demonstrate that there is in existence a decree for **Kshs. 206,000/=** passed in

**Mombasa PMCC No. 283 of 2020**; and that, being aggrieved by the decision of the lower court, he has filed the instant appeal. There is also credible proof that, as of **28 May 2021**, the respondent was poised to levy execution in realization of the decretal sum. Letters to that effect from the respondent's advocates were annexed to the appellant's Supporting Affidavit as Annexure-2. There is therefore a clear demonstration by the appellant that his application is well-founded.

[12] In terms of substantial loss, **Mr. Masolia** averred, at paragraph 10 of the Supporting Affidavit, that the judgment is of a substantial amount and that the appellant is justifiably apprehensive that if the respondent is paid he may deal with the same in a manner prejudicial to the appellant; and therefore that the appellant might not be able ever to recover the decretal sum from the respondent. In view of that posturing, the burden of proof shifted to the respondent to prove that he is not a man of straw as asserted by him. The respondent however proceeded on the misguided belief that the onus was on the appellant to demonstrate that he is unable to refund the decretal sum, and therefore missed the opportunity to allay the appellant's apprehensions as to his ability to pay back the decretal sum in the event of a successful appeal. Thus, at paragraph 5 of his Replying Affidavit, the respondent deposed that:

**"...the Appellant herein has NOT enquired from me if I am able to refund the decretal sum and the allegations that I am not able to refund the decretal sum are false and are NOT supported by any evidence."**

[13] In **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** [2006] eKLR, the Court of Appeal made it clear 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 a respondent or the lack of them. Once an applicant 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."**

[14] Moreover, it matters not that the decree sought to be stayed is a money decree. In **Kenya Hotel Properties Ltd vs. Willesden Properties Ltd** the Court of Appeal held that:

**"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."**

[15] I am therefore satisfied that the apprehensions of the appellant that he stands to suffer substantial loss are warranted; the respondent having failed to demonstrate that he will be in a position to refund the decretal sum should he be required to so in the event of the appeal succeeding. On whether the application was brought without unreasonable delay, the documents on the file show that the appeal was filed timeously on **7 June 2021**; and that the application itself was filed on **22 June 2021** before the expiry of the stay order issued by the lower court. Clearly therefore, the application was filed without unreasonable delay. In terms of security, the appellant has offered a valid Bank Guarantee issued by DTB Bank. Although dated **6 November 2020** the Guarantee is valid for all intents and purposes. It is noteworthy however that the Guaranty is set to expire on **30 November 2021**. In the premises, the better option, having weighed the competing interests of the parties hereto, is that the entire decretal sum be deposited in a joint interest earning account in the name of counsel for the parties, pending the hearing and determination of the appeal.

[16] It is in the light of the foregoing that I find merit in the appellant's application dated **22 June 2021**. The same is hereby allowed and orders granted as hereunder:

[a] That pending the hearing and determination of the appeal, an order of stay of execution of the judgment and decree delivered on **27 May 2021** by **Hon. Lesootia Saitabau**, Principal Magistrate, at **Mombasa Chief Magistrate's Court in Civil Case No. 283 of 2020** be and is hereby issued on condition that the entire decretal sum be deposited in a joint interest earning account in the name of counsel on record. The same to be done within one month (30 days) from the date hereof; failing which the order of stay will automatically lapse.

[b] That the costs of the subject application be costs in the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF NOVEMBER 2021.**

.....

**OLGA SEWE**

**JUDGE**