REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E169 OF 2021

BRITS FREIGHTERS LIMITED..APPLICANT/APPELLANT

VERSUS

HASMA AUTO SPARES LIMITED...RESPONDENT

RULING

1. The motion dated 31st March 2021 by **Brits Freighters Limited** (hereafter the Applicant) seeks an order to stay execution of the judgment delivered in favour of **Hasma Auto Spares Limited** (the Respondent) **Milimani CMCC No. 1712 of 2019** on the 3rd day of March, 2021 pending the hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 6 of the Civil Procedure Rules, inter alia. The grounds on the face of the motion are amplified in the supporting and further affidavits sworn by **Patrick Gatimu**, who describes himself as one of the directors with the Applicant. To the effect that the judgment of the lower court was delivered without notice to counsel and upon learning of the delivery, the Applicant had unsuccessfully attempted to move the lower court for orders of stay pending appeal ; that the Applicant expeditiously moved this court out of apprehension that the Applicant would suffer substantial loss and the appeal which raises serious issues would be rendered nugatory, if execution were to proceed; that the Applicant was willing to abide by any conditions the court might impose and that the Respondent will not suffer any prejudice if the court grants the orders sought.

2. The motion was opposed through a lengthy and repetitive replying affidavit deposed by **Abdi Muhumed Shaqlane**, who describes himself as the director of the Respondent. The deponent views this motion as an afterthought intended to cause further delay and denying the Respondent the fruits of its judgment. He points out that the Applicant had made a similar motion in the lower court. The deponent repeatedly asserts that the Applicant had failed to demonstrate substantial loss and that the Respondent would be prejudiced by the prolonged litigation in the matter. Finally, he deposes that beyond expressing willingness to abide by any condition imposed by the court, the Applicant had not offered proper security.

3. The motion was canvassed by way of written submissions. As regards the applicable principles, the Applicant's counsel anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and cited in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**. He further relied on the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** as cited in **Amal Hauliers Limited v Abdulnasir Abubakar Hassan [2017] eKLR** to submit that the Applicant had discharged its legal burden to establish substantial loss while the Respondent had not tendered any evidence of its means. He stated that the Applicant will suffer substantial loss and the appeal rendered nugatory should execution proceed and that the motion is genuinely intentioned for the protection of the Applicant's interests and exercise of its undoubted right of appeal.

4. Counsel for the Respondent, while placing reliance on the decision in **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** submitted that the Applicant had not demonstrated that it stands to suffer substantial loss if the order of stay is denied, whereas the Respondent is an established company capable of refunding the decretal sum, a fact not rebutted by the Applicant. Further, emphasizing that the decree herein is a money decree and citing several decisions including **Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua [2001] eKLR** and **ABN Amro Bank, N.K. V Le Monde Foods Limited Civil Application No. 15 of 2002**, counsel argued that the process of execution is not automatic proof of substantial loss and that a successful applicant must demonstrate substantial loss, which the Applicant herein has failed to do.

5. Finally, concerning security, counsel asserted that the Applicant herein has demonstrated willingness to furnish security for the due performance of the decree. He cited the decisions in **Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR**, **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR**, **Gitahi & Another v Warugongo [1988] KLR 621.** It was his contention that all three conditions envisaged in Order 42 Rule 6 must be met by a party seeking stay of execution.

6. 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 stay the execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417.**

7. The motion herein 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".**

8. The key consideration in the exercise of the court's discretion is whether the Applicant has demonstrated the likelihood of suffering substantial loss if stay were 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 therein are especially pertinent:

> **"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."**

9. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise. 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. <u>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… (</u>**<u>emphasis added)</u>**"**

10. 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. <u>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</u>."** (Emphasis added)

11. 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."

12. The Applicant's affidavit material asserts apprehension that if the court does not grant its prayers, they will suffer substantial loss and the appeal rendered nugatory. In submissions, the Applicant correctly stated the applicable principles, but its affidavit material falls short of demonstrating how they will suffer substantial loss; is it through hardship in satisfying the decree or the Respondent's inability to refund the decretal sum in the event of the appeal succeeding? Not a single averment in the two affidavits of the Applicant states that the Respondents are incapable of repaying the decretal sums, while an allusion to that effect was made in submissions.

13. The Respondent has correctly asserted that the Applicant has failed to demonstrate how it is likely to suffer substantial loss. Contrary to its assertions in submissions, the Applicant has not discharged this burden, even though it is true that the Respondent did not tender evidence of its means, beyond bare depositions. The burden only shifts to the Respondent upon the Applicant discharging its duty. In the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** 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 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."**

14. In this case, no deposition was made by the Applicant in the above terms so as to justify the shifting of the burden on the Respondent. 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. Without this evidence, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money.

15. A lawful process of execution, without more, cannot be cited as evidence of substantial loss; it is not enough for the Applicant to merely assert that it stands to suffer substantial loss if execution is allowed to take place. Further, the Applicant while taking issue with the Respondent's means has not made a specific pledge as to the security it would be offering; whether in the form of a cash deposit or a bank guarantee. The decree herein is in the sum of Kshs. 2,000,000/- odd and the Respondent cannot in the circumstances of the case be prevented from reaping the fruits of its judgment. There is no merit in the motion dated 31st March 2021 and it is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 9TH DAY OF DECEMBER 2021.

C.MEOLI

JUDGE

In the presence of:

Ms. Nyarango h/b for Mr Okatch for the Applicant

Ms. Sheundah/b for Mr. Osundwa for the Respondent

C/A: Carol