



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E070 OF 2021

DANROS (K) LIMITED.....1ST APPLICANT

SHADRACK KANYUURI MWITHIMBU.....2ND APPLICANT

VERSUS

MURTAZA ADAAMJEE.....RESPONDENT

RULING

1. The motion dated 9th February 2021 by **Danros (K) Limited** and **Shadrack Kanyuuri Mwithimbu** (hereafter the Applicants) seeks to stay execution of the judgment delivered in favour of **Murtaza Adaamjee** (hereafter the Respondent) on 22nd January, 2021 in **Milimani CMCC No. 3850 of 2019** pending the determination of the appeal herein. The motion is expressed to be brought under Order 42 Rules 6 and Order 51 Rule 1 of the Civil Procedure Rules and is based on grounds, among others, that being dissatisfied by the judgment in **Milimani CMCC No. 3850 of 2019** the Applicants have preferred an appeal which has a high chance of success and they are apprehensive that they will suffer substantial loss and the appeal rendered nugatory as the Respondent is unlikely to reimburse the decretal amount should the appeal succeed .

2. The motion is supported by an affidavit sworn by **Kairu Timothy Waweru**, who describes himself as counsel practicing in the firm of **M/S Mbai Waweru Advocates**, having conduct of the matter on behalf of the Applicants. He deposes that the Applicants being aggrieved by the judgment of the subordinate court have preferred ; that the Respondent has proceeded to extract the decree in readiness to execute and that unless stay is granted, it will be extremely difficult, if the appeal succeeds, for the Applicants to recover the decretal sum from the Respondent who is a stranger to them and whose financial position is unknown. In conclusion counsel expressed the Applicants' willingness to abide by any condition of stay and that no prejudice will be suffered by the Respondent if the motion is allowed.

3. The motion was opposed through the replying affidavit of the Respondent. He deposes that the motion is incompetent and ought to be struck out; that there is a valid judgment in his favour whose fruits he ought to be allowed to enjoy; and that the Applicants operate a giant logistics business as such payment of the decretal sum will not create a state of affairs that will irreparably affect them. Further, the Respondent counters the Applicants' assertion on irreparable loss by deposing that he runs a successful private architectural firm well able to reimburse the decretal sum in the event the appeal succeeds. He views the appeal as one without any reasonable chance of success and asserts that it will not be rendered nugatory if stay of execution is not granted.

4. The motion was canvassed through written submissions. The Applicants anchored their submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Regarding substantial loss, counsel submitted that the decretal sum is a substantial amount, and the Respondent has not sufficiently demonstrated his financial ability and as such, denial of stay will render the appeal nugatory. Counsel went on to submit that the appeal and motion were filed without undue delay and reiterated the that Applicants' willingness to give security by payment of the decretal amount to be held in a joint interest earning account. Several decisions were cited including **Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR**, **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR** and **National Water Conservation & Pipeline Corporation v Ngatunyi Enterprises Limited [2016] eKLR** in support of the motion.

5. On his part, the Respondent's advocate citing the provisions of Order 19 Rule 3(1) and 6 of the Civil Procedure Rules took the position that the contents of Paragraph 9 and 10 of the Applicants' supporting affidavit ought to be struck out as the deponent failed to disclose the source and basis of information deposed therein. He relied on among others, the cases of **Volcan Holdings Limited v Festus Kazungu Maita [2020] eKLR** and **Express Kenya Limited and Another v Charles Kipkoeh Leting [2006] eKLR**.

6. As regards the merits of the motion, counsel relying on **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** and **John Gachanja Mundia v Francis Muriira alia Francis Muthika & Another [2016] eKLR** submitted that the Applicants have not

demonstrated the likelihood of substantial loss and or how the appeal will be rendered nugatory if execution proceeds. He contended that the onus of proving substantial loss lies with the Applicants and the burden could only shift upon the Respondent if the Applicants had discharged their burden. And that the deponent to the supporting affidavit having failed to disclose the source of the relevant averments and or authority to commit the Applicants as deposed in the contested paragraphs, the occasion calling for the Respondent's rebuttal had not arisen; and as to security, none had been offered. He asserted that the motion is without merit and ought to be dismissed with costs.

7. The court has considered the material canvassed in respect of the motion. 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 judiciously. The decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417**.

8. 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”.

9. The first question to be determined is whether the Applicant has 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.”

10. 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. 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... (emphasis added)”

11. 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)

12. 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.**

13. The application herein was supported by the affidavit sworn by counsel for the Applicants and not by the Applicants themselves. On the key issues of substantial loss and security, counsel deposed at paragraph 9 and 10 therein that the Respondent is a stranger to the Applicants, that his means are unknown, and the Applicants are unlikely to recover any sums paid in satisfaction of the decree should the appeal succeed, thus rendering the appeal nugatory. He further expressed the Applicants’ willingness to offer security. Counsel for the Respondent has correctly argued that these depositions run afoul of the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules as the source and grounds thereof are not disclosed.

14. The Applicants have no answer to this objection and appeared to proceed on the assumption that the pertinent affidavit material is competent and adequate. It is not; counsel cannot properly make claims such as found at paragraphs 9 and 10 of the supporting affidavit without disclosing the source or grounds thereof. Moreso when these depositions go to the heart of the motion at hand. It is difficult to understand why the Applicants did not find it necessary to swear their own affidavit in support of the motion. This court upholds the objection raised by the Respondent concerning paragraphs 9 and 10 of the supporting affidavit and will strike them out.

15. An application under Order 42 Rule 6 Of the Civil Procedure Rules stands or falls on the key considerations of substantial loss and security. As stated in the **Shell** case, substantial loss is the cornerstone of the jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules and the decree holder should not be kept away from the fruits of his judgment without just cause. In the **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.”

16. Upon paragraphs 9 and 10 of the supporting affidavit herein being struck out, the Applicants’ motion stands bereft of crucial evidence of substantial loss and the burden cannot be said to have shifted upon the Respondent to prove his means in such circumstances. As stated in the **Shell** case, without evidence of substantial loss, it is difficult to see why the a decree holder should be kept out of his money. Equally, without a competent pledge of security by the Applicants for the eventual performance of the decree, no order of stay can be forthcoming. In the circumstances, the Court finds that the motion for stay is without merit and must fail. The motion 9th February 2021 is dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 15TH DAY OF DECEMBER 2021

C. MEOLI

JUDGE

IN THE PRESENCE OF:

MS. LUCHEMO FOR THE APPLICANTS

MR. OMUGA FOR THE RESPONDENT

C/A: CAROL