



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E091 OF 2021**

**NKOROI BUNDI KELVIN.....APPLICANT/APPELLANT**

**VERSUS**

**WILSON RUNYAMBO.....RESPONDENT**

**RULING**

1. The motion dated 4<sup>th</sup> March 2021 by **Nkoroi Bundi Kelvin** (hereafter the Applicant) seeks to stay execution of the judgment delivered on 29<sup>th</sup> January, 2021 in **Milimani CMCC No. 1722 of 2019** pending the hearing and determination of the appeal and leave to deposit an insurance bond or a bank guarantee as security in lieu of cash deposit, if stay is granted. The motion is expressed to be brought under Order 42 Rules 6 and Order 51 Rule 1 of the Civil Procedure Rules. On grounds, among others, that being dissatisfied by the judgment in **Milimani CMCC No. 1722 of 2019** the Applicant has preferred an appeal which is arguable but may be rendered nugatory if successful should stay be denied.

2. The affidavit in support of the motion is sworn by **Moses Mwariri**, who describes himself a Legal Officer with Madison Insurance Company Limited the Applicant's insurers. The deponent amplifies the grounds on the face of the motion and further deposes that the Applicant will suffer substantial loss if stay of execution is not granted as the decretal sum is substantial; that the Respondent's means are unknown and it is unlikely that any sums paid out to him will be recovered in the event of a successful appeal. He expresses willingness on the part of the Applicant to furnish security in the form of a bank guarantee for the due performance of the decree.

3. The motion was opposed by the replying affidavit of **Wilson Runyambo**, (hereafter the Respondent) asserting that the Applicant has failed to demonstrate how he stands to suffer substantial loss if stay is not granted. Referring to the Applicant's pledge of security he proposes that half of the decretal sum be released to him, and the balance thereof be deposited in court as a condition for the order of stay of execution pending appeal.

4. The parties canvassed the motion via written submissions as directed on 9<sup>th</sup> May 2021. The Applicant submitted through his counsel that the motion was timeously filed. Concerning substantial loss, he reiterated the Applicant's apprehension, and citing the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** asserted that whereas the decretal sum is a substantial, the Respondent's means are unknown, and he has not demonstrated the financial capacity to repay any sums paid out to him in the event of a successful appeal. He reiterated the Applicant's offer to furnish security. He cited several authorities including **Kenya Power & Lighting Co. Ltd v Khan Nassir Rustam [2013] eKLR**, and **Magnate Ventures v Simon Mutua Muatha & Another [2018] eKLR** in support of his submissions.

5. On the part of the Respondent, counsel cited **Grace Wangui Ngenye v Capital Group Limited [2019] eKLR** to argue that the Applicant has not demonstrated how denial of stay orders would result in substantial loss. He urged that if stay is grant, the Applicant ought to provide some form of security for due performance of the decree.

6. 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**.

7. 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”.

8. 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.”

9. 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 4<sup>th</sup> 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)”

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 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)

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.”

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

12. The Applicant has maintained that the appeal will be rendered nugatory if stay is not granted as the decretal sum is substantial and if paid over, there is a likelihood that the Respondent may not have the means make refunds in the event of a successful appeal. On his part the

Respondent countered that the Applicants ought to demonstrate their assertions. 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 is what must be prevented, else the successful appeal might be rendered nugatory. It is enough that the Applicant has expressed apprehension concerning the Respondent's ability to refund the decretal sum on successful appeal.

13. In the **National Industrial Credit Bank Ltd Case** (supra) 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.”**

14. The judgment in the lower court was for a sum of **Kshs 993,550/-** with costs and interest. This is a substantial sum as rightly asserted by the Applicant. Upon the Applicant expressing apprehension about the Respondent's capacity to repay, the burden shifted on him to controvert the assertion by proving his means. He has not and it therefore seems likely that the Applicant will suffer substantial loss and the appeal rendered nugatory if stay is not granted.

15. The Applicant has expressed willingness to provide security however requesting leave of the court to furnish a bank guarantee in lieu of cash. The court must balance the competing interests of the parties so as not to prejudice the matter pending appeal and 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 disadvantage 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.....”**

16. In view of all the foregoing, this court will allow the prayer for stay of execution in the motion dated 4<sup>th</sup> March 2021, on condition that the Applicant deposits the sum of Shs. 500,000/- (Five Hundred Thousand) into an interest earning account in the joint names of the parties' advocates within 45 days of today's date. Costs will abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 2<sup>ND</sup> DAY OF DECEMBER 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: N/A**

**For the Respondent: Mr Wachira**

**C/A: Carol**