REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E013 OF 2021

TANUI ROBERT.....1ST APPLICANT

JONAH KIBET RONO.....2ND APPLICANT

VERSUS

JESSICA ADIKINYI AFWANDE.....RESPONDENT

RULING

1. The motion dated 4th March 2021 by **Tanui Robert** and **Jonah Kibet Rono** (hereafter the Applicants) seeks an order to stay execution of the judgment delivered on 29th December 2020 in **Milimani CMCC No. 282 of 2015** pending the determination of their appeal. The motion is expressed to be brought under Order 42 Rules 4 & 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. 282 of 2015** the Applicants have preferred an appeal which has a high chance of success and are apprehensive that if the Respondent is paid the decretal sum they may be unable to recover it from the decree holder **Jessica Adikinyi Afwande** (hereafter the Respondent) rendering the appeal nugatory.

2. The affidavit in support of the motion is sworn by **Pauline Wairuhiu**, who describes herself as head of claims at Direct line Assurance Company Limited who are the insurers of the accident motor vehicle in respect of which the lower court suit was brought. The deponent reiterates the grounds on the face of the motion and asserts that the Applicants have an arguable appeal with a high chance of success; that the decretal sum is substantia; that the Applicants have no knowledge of the Respondent's assets or his financial capacity to repay any monies paid in satisfaction of the decree; and that if stay is denied, they will suffer substantial loss. The deponent expresses the Applicants' willingness to provide security in the form of a bank guarantee for the due performance of the decree.

3. The motion was opposed through the replying affidavit of the Respondent. She swears that the Applicants have not established substantial loss and asserts that a lawful execution process is not evidence of such loss. She counters the Applicants' assertions regarding the merits of their appeal, and dismisses their offer of a bank guarantee as insufficient and urges that if the court grants the motion, it should require the Applicants to deposit the decretal sums into court or an interest earning account.

4. The motion was canvassed through written submissions. The Applicants anchored their submissions on the provisions of Order 42 Rule 6 and the right of appeal. Citing the case of **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR** counsel submitted that the Applicants have an arguable appeal that raises serious points of law and fact. Regarding substantial loss he cited several authorities, including, **National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] eKLR** and **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2012] eKLR** to submit that the decretal sum is a substantial sum and that the Applicants are apprehensive that the Respondent has no means to refund the decretal sum on successful appeal. Hence the possibility of the appeal, if successful, being rendered nugatory. Counsel reiterated the Applicants' offer to give security for the performance of the decree.

5. The Respondent took the position that the Applicants have neither established substantial loss nor an arguable appeal. She asserted that the Respondent was not under any obligation to prove her means and while rejecting the offer of a bank guarantee as security affirmed the court's discretion to determine the nature of security to be furnished. The Respondent relied on the decision in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** in support of her submissions.

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 judicially. See **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 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."**

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 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)**"**

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. <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. At this stage, the court is not concerned with the consideration whether the appeal is arguable; that is a consideration in applications for

stay of execution before the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. Regarding substantial loss, the Applicants have asserted that the decretal sum is substantial and expressed apprehension as to the Respondent's means to refund such monies should the appeal resolve in their favour and hence the possibility of their appeal being rendered nugatory. The Respondent's response is that she was not obligated to prove her financial means. 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 so that the successful appeal is not rendered nugatory. It is enough that the Applicant expresses apprehension concerning the Respondent's ability to refund the decretal sum on a 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 decree in the lower court was for a sum of **Kshs 2,546,067.54/-** with costs and interest. As the Applicants correctly emphasize, this is a substantial sum. The Applicants having expressed apprehension about the Respondent's capacity to repay, they discharged their burden and the onus shifted upon the Respondent to controvert the assertion by proving her means. The Applicants cannot be expected to prove the Respondent's means as the Respondent appears to suggest. The Respondent has not demonstrated her means to refund any monies paid to her in execution. In the circumstances, it appears likely that the Applicants would suffer substantial loss and their appeal rendered nugatory if stay is not granted.

15. The Applicants expressed willingness to provide security by way of bank guarantee, a proposition the Respondent vehemently opposed to. The court is obligated to balance the Applicants' undoubted right of appeal against the Respondent's right to enjoy the fruits of her judgment.

16. 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……"**

17. In the result, the court is persuaded that the motion dated 4th March 2021 is for granting, but on condition that the Applicants deposit into an interest earning account in the joint names of the parties' advocates the sum of Shs. 1,500,000/- (One Million Five Hundred Thousand) within 45 days of today's date. Costs will abide by the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 2ND DAY OF DECEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Ms. Sang h/b for Ms. Sagini for the Applicants

Mr Malonza for the Respondent

C/A: Carol