REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 35 OF 2018

1. FRANCIS MWAURA NGUGI

2. MWAFRA INVESTMENT LIMITED.....APPELLANTS

VERSUS

MONICA NJERI KINUTHIA.....RESPONDENT

R U L I N G

1. The Notice of Motion filed on 28th March, 2019 and expressed to be brought under Order 22 rule 22, 51 rules 1 and 13(2) of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act is for stay of execution of the decree dated on 15th March, 2019 in **Kiambu CMCC No.258 of 2017** pending the hearing and determination of the appeal herein.

2. The 1st Applicant, **FRANCIS MWAURA NGUGI** swore a supporting affidavit to the motion herein. He deposed that the decree issued in the sum of Kshs. 5,252,943.50 which is a large amount, especially as claim in the lower court was for Kshs. 3,185,000/=; that he has been issued with a Notice to show cause and that the court should grant the order to stay execution.

3. The Respondent, **MONICA NJERI KINUTHIA** filed a replying affidavit on 8th April, 2019 in opposition to the motion. She deposed that the orders sought are intended to defeat the course of justice; that after one year since entry of judgment in the lower court, the Applicant filed the current appeal and the application for stay; that the Applicant was misleading the court in regard to the issued decree and that the application for stay pending appeal ought to have been filed without unreasonable delay. She pointed out that the Applicant has demonstrated unwillingness to furnish security and there is no justification to warrant the grant of the orders sought.

4. The application was canvassed by way of oral submissions. Ms. Mwangi, counsel for the Applicants submitted that Applicant will suffer substantial loss as the decree involves a large sum of money; that the delay in filing the appeal was caused by delayed proceedings in the lower court; that the Applicant had been unable to comply with this Court's condition to deposit into court the sum of Kshs. 1,000,000/= as security because the sum is too high; and hence the Applicant was in the alternative seeking to deposit offers a motor vehicle logbook as security. Finally, she submitted that the appeal has high chances of success and will be rendered nugatory if the order for stay is not granted.

5. Miss Muibu, counsel for the Respondent opposed the application. She submitted that there is inordinate delay in filing the application. She contended that a similar application had been filed in the lower court and was denied and therefore ought to have appealed that decison. It was argued that conditional stay herein has already lapsed as the Applicant failed to comply therewith and in the circumstances the order for stay should not be granted.

6. The court has considered the material canvassed in respect of the motion by the 1st Appellant/Applicant. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

i) approach the court without unreasonable delay.

ii) satisfy the court that substantial loss may result unless the order sought is granted.

iii) furnish security for the due performance of the decree appealed from.

7. The appeal herein was filed on 8th March 2018 and was in respect of the ruling of the lower court delivered on 9th February 2018. It appears that subsequently the Applicant applied to the lower court for stay of execution pending appeal. That application filed on 26th July 2018 was dismissed *vide* a ruling delivered on 7th December 2018, following which a notice to show cause why execution should not issue was served on the Applicant to appear on 29th March 2019. Whereupon the Applicant filed the instant application. The Applicant did not explain why he did not immediately after the dismissal of the stay application in the lower court approach this court, and instead waiting

until the eve of the date of his appearance to show cause, to file the present application.

8. That said, the delay of about 2 months cannot be described as inordinate. The Respondent complains that the application ought to have appealed the lower court decision of December 2018 rather than file a similar application before this court. In this regard, I think the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules accommodate the filing of a second stay application as it states that:

> **"Whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such (substantive) 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 set it aside."**

9. In the case of **Peter Maina v Francis Monyo Kimere (2017) eKLR** I had occasion to consider a similar objection to a second application for stay of execution to the appellate court, and observed that:

> **" 12. With regard to the legal objections raised by the Respondent, it does seem to me that this court does exercise both original and appellate jurisdiction with regard to applications for stay pending execution. Order 42 Rule 6 (1) contains the words**:
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> **"……whether the application for such stay shall have been granted or refused by the court appealed from, the court to which the appeal is, preferred shall be at liberty to consider such application and make such order thereon as may to it seem just……"**
>
> 13. **There is before this court an appeal filed by the Applicant in respect of the substantive decision of the lower court. On the authority of Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838 it seems that the existence of the memorandum of appeal clothes this court with a separate original jurisdiction under Order 42 Rule 6 (1) to consider a similar application to the one heard in the lower court. It matters not therefore that no appeal has been filed in respect of the specific decision on the application in the lower court.**
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> 14**. In a recent case, Equity Bank Ltd -Vs- West Link MBO Ltd [2013] eKLR the Court of Appeal discussed at length the nature of its jurisdiction under Rule 5 (2) b) of the Court of Appeal Rules which states**:
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> > **"Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may**
> >
> > **a)……,**
> >
> > **b) In any civil proceeding where notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, injunction or stay any further proceedings on such terms as the court may think just."**
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> 15. **Githinji JA** stated *interalia* in his judgment:
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> > **"It is trite law that in dealing with 5 (2) b) applications the court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6 (1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application exercises an original independent discretion as opposed to appellate jurisdiction (Githunguri -Vs- Jimba Credit Corporation Ltd (No.2) [1988] 838."**
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> 16. In his judgment **Musinga J A** observed on the same question that:
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> > **"The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. (See Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd (Supra)."**
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> 17. **Kiage J A** in his judgment quoted a passage from the judgment of the Court of Appeal in **Gurbux Singh Suiri & Anor. –Vs- Royal Credit Ltd. Civil Application NAI 281 of 1995** expounding the court's reflection in its dictum in the **Githunguri**case as follows:-
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> > **"In ordinary circumstances the court has only appellate jurisdiction and in the absence of Rule 5 (2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction.**
> >
> > **……But because of the existence of Rule 5 (2) (b) one does not have to apply to the court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That is clearly the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the Githunguri case, supra, by use of the expressions such as "we have to apply our minds *denovo* or it is not an**

appeal from the learned Judge's discretion to ours."

18. Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as he has done."

10. Now turning to other considerations in respect of an application for stay pending appeal, has the Applicant demonstrated likelihood of suffering substantial 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**.Holdings 2,3 and 4 therein are particularly relevant. 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.

5. ….."

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set 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 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>"**

12. 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)

13. 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."

15. In his rather brief affidavit in support of the motion, the 1st Applicant merely asserts that the sum in the decree is substantial in comparison to the claim in the plaint, and that he has been served with a notice to show cause. He does not assert that making payments towards the decree would cause him difficulty or hardship or that he would not be able to recover the money from the Respondent who, at any rate does not seem an impecunious person, based on the fact of having paid a substantial amount of money to the Applicant in respect of the transaction leading to the suit in the lower court.

16. The process of execution, including the requirement to show cause, cannot of itself constitute evidence of substantial loss by the judgment debtor. As stated by Platt JA in the shell case, without distraction of substantial loss. As stated by Platt Ag. JA in the Shell case, without a demonstration of substantial loss, it is difficult to justify an order to stay execution by the decree holder who is entitled to the fruits

of his judgment.

17. On the question of security for the performance of the decree, the 1st Applicant's affidavit is silent though his advocate offered from the bar, a log book in respect of a motor vehicle whose details are not stated. When the Applicant first approached this court with the instant application, he was granted conditional stay of execution that required him to deposit a sum of KShs.1 million. He did not comply with the order and his counsel claimed that this amount was too high. The vague offer of a motor vehicle logbook is not a serious pledge to furnish security. In the circumstances, I am not persuaded that the application is merited. The same is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF FEBRUARY 2020

C. MEOLI

JUDGE

In the presence of:

Miss Mwangi holding brief for Mr. Kimani for the Applicant

Miss Muibu for the Respondent

C/A Kevin/Nancy