



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 161 OF 2019**

**AWALE TRANSPORTERS LTD.....APPELLANT**

**VERSUS**

**KELVIN PERMINUS KIMANZI.....RESPONDENT**

**RULING**

1. By a Motion on Notice dated 9<sup>th</sup> December, 2019, the applicant herein seeks an order for stay of execution of the judgement and/or decree delivered in Machakos CMCC No. 936A of 2007 pending the hearing and determination of this appeal.

2. According to the Appellant/Applicant, on 4<sup>th</sup> December, 2019, the Chief Magistrate's Court, Machakos delivered a ruling in favour of the Respondent herein and the Applicant, being aggrieved by the said decision has preferred an appeal to this Court. In the meantime, the Respondent has instructed auctioneers to proclaim the Applicant's properties. The Applicant's apprehension was that unless the Respondents are restrained, they will proceed to attach the Applicant's properties and sale the same hence grinding the Applicant's affairs to a halt yet the Applicant has an appeal with overwhelming chances of success and the Applicant was ready and willing to abide by any conditions that the Court may impose. According to the Applicant, the grant of the orders sought are unlikely to prejudice the Respondent and the application has been made without unreasonable delay. In the Applicant's view, the failure to grant the orders sought will render the appeal nugatory as the Respondent will proceed to execute hence it is in the interest of justice that the application be allowed.

3. In opposing the application, it was averred on behalf of the Respondent that the firm of advocates which made the application was not on record in the lower court hence could not apply for setting aside the judgement. Even in this appeal it was averred that it is not clear whether the firm of D. M. Mutinda & Co. Advocates which has filed the appeal is on record for the Appellant since the supporting affidavit discloses the address of the deponent as that of Muema & Associates Advocates.

4. It was however averred that the firm which was on record, Kiai Nuthu & Co. Advocates, was however properly served and judgement was delivered. It was averred that the judgement was apportioned 50:50 and following the delivery of the judgement, one of the defendants settled its 50% share of the judgement and was no longer interested in the matter hence there will be no party to litigate against.

5. According to the Respondent, no substantial loss has been established in the application since he is an employee of National Irrigation Board capable of refunding the decretal sum herein. He therefore urged the court to dismiss the application with costs.

**Determination**

6. I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon.

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

***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. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. According to section 1A(2) of the **Civil Procedure Act** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

9. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

10. The same position was adopted by Kimaru, J in Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

"The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

11. This was the position of Warsame, J (as he then was) in Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

12. On the first principle, Platt, Ag. JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416 expressed himself as follows:

"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. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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".

13. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

**“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”**

14. Dealing with the contention that there was no evidence that the 1<sup>st</sup> Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

**“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”**

15. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

**“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”**

16. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

17. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting stay. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

18. In this case it was the applicant’s case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement. Therefore, in proceeding with the execution process the Respondent is simply exercising a right which has been bestowed upon him by the law and such an exercise cannot be stayed unless good reasons are given by the Applicant.

19. In this case the applicant has not even disclosed the nature of the judgement. The Respondent contends that he is employed by the National Irrigation Board hence in a position to make good any decretal sum paid to him. It is contended that half of the decretal sum has in fact been paid. While that fact does not militate against the Applicant’s exercise of his right of appeal and even applying for stay pending the exercise of that right, the onus is upon the Applicant to disclose to the court its liability in the decree in order to enable the gauge whether or not it is so heavy that it merits the brakes being applied on the Respondent’s vehicle towards the realisation of his fruits of the decree. Without doing so there is no basis upon which the Court can stay the decree. Apart from that the Applicant has not disclosed what security if any it has that may be resorted to in the event that the appeal fails.

20. In the premises I find no merit in this application which I hereby dismiss with costs.

21. This ruling has been delivered online with concurrence of both advocates for the parties due to the prevailing restrictions occasioned by COVID 19 pandemic.

22. It is so ordered.

**Read, signed and delivered online at Machakos this 8<sup>th</sup> day of April, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**