REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION 796 OF 2004

BLUE SHIELD INSURANCE CO. LTD.....PLAINTIFF/DECREE HOLDER

VERSUS

COUNTY GOVT OF MOMBASA.....DEFENDANT/JUDGMENT DEBTOR

-AND-

NATIONAL BANK OF KENYA LTD.....1ST GARNISHEE

KENYA COMMERCIAL BANK LTD.....2ND GARNISHEE

RULING

1) The Judgment Debtor,the COUNTY GOVERNMENT OF MOMBASA, filed a Notice of Motion application under a certificate of Urgency dated 18th October, 2019.The Application was brought under Order 42 Rule 6, 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, IB, 3, 3A and Section 63 (e) of the Civil Procedure Act Cap 21 laws of Kenya and all other Enabling Provisions of the Law.

2) The Applicant prayed for the following Orders;

i. **Spent;**

ii. **Spent;**

iii. **That this Honourable court be pleased to stay execution of the Garnishee Order Absolute issued on 14th October, 2019 in Mombasa High Court Miscellaneous Civil Application No. 796 of 2004 and subsequent execution proceedings thereto, together with all consequential orders pending hearing and determination of the intended appeal;**

iv. **That the costs of this application be provided for.**

3) The Application is premised on the grounds on the face of the Application and the Applicant's main ground is that it intends to appeal against this Court's ruling herein delivered on 2nd August, 2019 and for which the Applicant has filed a notice of appeal and applied for certified copies of proceedings to enable it mount the appeal.The Applicant also avers that the court granted the garnishee order absolute issued on 14th October, 2019 which is the subject matter of the instant application and if stay is not granted the intended appeal will be rendered nugatory. The application is further supported by an affidavit sworn on 18/10/2019 and a further affidavit sworn on 16/12/2019 both by Jimmy Wafula, Director legal services of the Applicant herein and several annextures attached thereto being JWI – JFMM-3.

4) The Plaintiff filed grounds of opposition dated 26/11/2019 and a replying affidavit sworn on 25/11/2019 by its advocate, John Gachiri Kariuki to oppose the Application. The Plaintiff/ respondent avers therein that the application is incompetent as it is founded upon an incompetent appeal since it was filed out of time without leave. It is argued that the application is yet another attempt by the Defendant to frustrate the right of the Plaintiff to enjoy the fruits of its judgment which was issued way back in 1999.

5) It is deponed that as at January, 2018 the garnishee order issued was for debt restriction of Kshs.19,909,774/= and that the Applicant has reneged all its proposals to settle the decretal sum and has to date not made any effort to settle the debt. It is argued that the Applicant has approached the court with unclean hands and further that the applicant is seeking equitable reliefs when it is not ready to do equity itself.

6) The Plaintiff further argues that the Applicant has not established what irreparable loss it will suffer if the orders for stay are not granted

and in any case the balance of justice is against allowing the application since the same would amount to aiding the Defendant in avoiding paying the debt. According to the Plaintiff it has not been shown that it is incapable of repaying the decretal sum should the appeal succeed.

7) On 2nd December, 2019, the court by consent of the advocates appearing for the parties directed that the application be disposed by way of written submissions to be highlighted on a further date.

8) On 20th February, 2020 the court reconvened and counsels informed the court that they would go by their written submissions. The respective submissions by both parties are as follows.

The Judgment Debtor/Applicant's Submission

9) The Applicant identified two issues for determination, that is;

i. Whether the High Court has Jurisdiction to determine the validity of the Notice of appeal;

ii. Whether the Application dated 18th October, 2018 meets the threshold set out in Order 42 Rule 6 of the Civil Procedure Rules 2010.

10) On the first issue, the Applicant submits that the subject ruling for the intended appeal was delivered on 2/8/2019 but it only became aware of the orders of garnishee absolute on 14/10/2019 and consequently filed the instant application with no delay. In any event, the Applicant submits that the issue of competency of the intended appeal is exclusively vested to the Jurisdiction of the appellate court by virtue of Rule 74 of the Court of Appeal rules. On that line of argument ,reliance is placed on the case of ***Samuel Kimutai Korir (suing as personal representative of the estate of Chelangat Silevia –vs-Nyanchwa Aadventist Secondary School & Nyanchwa Adventist College [2017] eKLR.***

Whether the application meets the threshold of the mandatory provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010

11) On this issue, it is submitted that the Order 42 Rule 6 calls for the Applicant to prove three conditions as a pre-condition to orders of stay which are;- the Applicant has to show that it will suffer substantial loss unless the orders are issued, that the application has been made without undue delay and lastly that the Applicant is willing to deposit security in due performance of the decree.

12) On the issue of substantial loss, it is argued that the accounts held by the 1st and 2nd garnishees are revenue collection and government expenditure accounts and the expenditure thereof must be budgeted and appropriated in the confines of the law. If execution proceeds then the Applicant and the general public will then stand to suffer substantial loss. The Applicant further submits that in the event that stay is not granted, then the intended appeal will be nothing but a mere academic exercise should it eventually succeed.To buttress these arguments, reliance is placed on the cases of ***County Government of Mombasa –vs- V. Chokaa & Company Advocates [2015] eKLR*** and ***Congress Rental South Aafrica –vs- Kenyatta International Conference Center, Co-orperative Bank of Kenya Limited & Another (Garnshee) [2019] eKLR.***

13) It is the Applicant's further submission that the present application has been brought without unreasonable delay bearing in mind that it was served with the Garnishee Order Absolute on 14th October, 2019 and the instant application was filed on 18th October, 2019.

14) On the issue of security, the Applicant submits that it is willing to provide any security that this court may deem reasonable. As such, the Applicant argues that it has met the threshold under Order 42 Rule 6 of the Civil Procedure Code and thereby the orders sought should be granted.

The Plaintiff/Respondent's Submissions

15) The Plaintiff submits that this application ought to have been dismissed preliminarily on the basis that the Notice of appeal is incompetent having been filed out of time and without the leave of the court. Much reliance is placed on Rule 75 of the Court of Appeal Rules which provides that an appeal should be lodged within 14 days of the decision appealed from.

16) Nonetheless, it is submitted for the Plaintiff that the court in the case of ***Jennifer Njuguna & another-vs-Rober Kamiti Gichuhi [2017] eKLR,*** dictated four(4)requirements to be met before an order for stay of execution pending appeal is granted. They are;- that the appeal filed is arguable, the Applicant is likely to suffer substantial loss unless stay is granted/the appeal will be rendered nugatory if stay is not granted, the application has been made without unreasonable delay and lastly that the applicant has given or is willing to give security.

17) First, it has been argued that the Applicant has not placed before the court any material to establish whether it has an arguable appeal. In essence,no Memorandum of Appeal has been annexed to the application which is the only way by which the court can determine an arguable appeal. This argument is buttressed by an excerpt from the case of ***Benedict Ojou Juma & 10 others –vs- A.J Pereira & Sons Limited [2016]eKLR.***

18) On whether the Applicant will suffer substantial loss, it is argued that the Applicant ought to establish the hardship it would suffer or what futility the appeal would suffer if the orders sought are denied. The Plaintiff's counsel disagrees with the Applicant's argument that if stay is not granted and the Plaintiff goes on with the execution, then it would suffer substantial loss and render the intended appeal nugatory. Instead, the counsel argues that the Plaintiff is capable of repaying the decretal sum should the appeal succeed and the applicant has not shown the contrary or otherwise shown the Plaintiff's inability to repay the sum.

19) On whether the application has been brought after undue delay, it is submitted that the application was filed more than 2 months after the date of the ruling. The Defendant/Applicant has not adduced any plausible reason for the delay and it is argued that the same is inordinate.

20) The last issue submitted on is whether the Applicant's past conduct divests it of equity. The Plaintiff's case is that there is a debt which was consented to by the Defendant and has remained unpaid for 20 years. That there have been attempts at execution and promises made to pay but the Applicant has occasionally reneged the same. The Plaintiff argues that it has indulged and accommodated the Defendant to- date , and by its past conduct, equity was never intended to aid such parties. Since the Defendant has not sought to do equity, then it is argued that it cannot seek equity from this court.

Analysis and Determination

21) I have very carefully perused and considered the Notice of Motion dated 18th October, 2019, rival submissions by counsel, together with the statutes and the authorities relied on therein.I find the issues arising for determination can be summed up as follows;

a) Whether this court is vested with Jurisdiction to determine the competency of the intended appeal

b) *Whether the Application has satisfied the principles for granting stay of execution orders?*

Whether this court can determine the competency of the intended appeal

22) The Plaintiff argues that the notice of appeal defies Order 75 of the Court of Appeal Rules having been filed out of the prescribed 14 days in which an appeal should be lodged at the court of appeal from the date of the ruling appealed from. It is submitted that the application should fail on this ground because it cannot stand when the intended appeal is defective. The Defendant on the other side argues that the issue of competency is exclusively vested with the appellate court and this court cannot adjudicate on the same. In the instant case, it is not in dispute that the ruling of this court, which is the subject of the intended appeal, was delivered on 2nd August, 2019 and the Notice of Appeal filed in this court on 17th October, 2019; more than two months later, which was a period way beyond the 14 days stipulated by **Rule 74 of the Court of Appeal Rules**.

23) The ongoing question can only be determined with consideration to the Court of Appeal Rules. Under Rule 2 of the Court of Appeal Rules "court" means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone. "Notice of Appeal" under Rule 2 means a notice lodged in accordance with rule 74. Therefore, it cannot go without saying that the Notice of Appeal is a creation of the court of Appeal rules embodied in the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya. The preamble of the said Act reads as follows; ***"An Act of Parliament to confer to the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto."*** It follows that any creation of the Appellate Jurisdiction Act including the Notice of Appeal squarely falls within the Jurisdiction of the court of Appeal and I therefore find that this court lacks jurisdiction to determine the validity of a Notice of Appeal issued pursuant to the provisions of the Appellate Jurisdiction Act. This court agrees with the Applicant that the validity of the Notice of Appeal is a matter that can only be determined by the Court of Appeal. This position is the same as the one in the case which the Defendant/Applicant invited this court to consider.In the case of ***Samwel Kimutai Korir (Suing As Personal And Legal Representative Of Estate) Of Chelangat Silevia V Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR***

Whether the Application has satisfied the principles for granting stay of execution orders

24) The principles that guide Court when deciding on an application for stay of execution pending appeal are clearly set out under Order 42 Rule 6 of the Civil Procedure Rules, which provides:

No order for stay of execution shall be made under sub-rule (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.

25) The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

a) **Substantial loss may result to the applicant unless the order is made,**

b) **The application has been made without unreasonable delay, and**

c) **Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.**

I will now consider whether these conditions have been met.

i. **Substantial loss occurring**

26.The onus of proving that substantial loss would occur unless stay is issued rests upon, and must be discharged accordingly by the

applicant. It is not enough to merely state that loss will be suffered; the applicant ought to show the substantial loss that it will suffer in the event the orders sought are not granted. In this case the Applicant is apprehensive of the fact that the Plaintiff may proceed with execution of the garnishee absolute order.

27.In the case of ***James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR***, the Court held the following view on the issue of substantial loss;-

> ***No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***

28.The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Rhoda Mukuma v John Abuoga[1988] eKLR***. The court of appeal in referring to the exercise of discretion by the High Court and the Court of Appeal in granting the stay of execution under ***Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules,*** respectively, emphasized the centrality of substantial loss thus:

> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

29.In the instant case, the Applicant avers that if stay is not granted, the Plaintiff will proceed with execution of the garnishee absolute and therefore not only will the Applicant suffer loss on its budget planning but also the general public will. The view of this court is that the Applicant is not likely to suffer substantial loss in the circumstances considering that in-case of monetary decrees, award of damages can suffice incase the appeal succeeds.

ii.Requisite security

30.The Applicant has submitted that it is willing to provide any security that the Court may deem reasonable and necessary. It is the duty of the court to determine the security if the applicant is successful.

iii.Was there undue delay?

*31.*The ruling subject of the intended appeal was delivered on 2/8/2019 whilst the instant application was filed on 18/10/2019. The Applicant argues that it was not aware of the orders of garnishee absolute until 14/10/2019 and it swiftly moved to file the notice of appeal on 17/10/2019 and subsequently the instant application. I find no inordinate delay from the date of filing the notice of appeal to the date of filing the instant application.

32.Substantial loss is key in determining whether to grant an application for stay of execution pending appeal. I am not convinced, in the instant case, that the Defendant has shown that it will suffer substantial loss if execution to honour and satisfy a decree issued as early as 1999. I see no reason why the successful Plaintiff should be locked out of the fruits of its judgment. I see no reason to grant any stay of execution even upon a condition as to security. I therefore decline to exercise my discretion in favour of the Defendant.

33.The other issue that has weighed heavily on my mind against the award of the orders sought by the Applicant arises from the fact that the applicant does not dispute that it does not deny owing the Plaintiff in a Judgment issued as far back as 1999, a period now ofs more than 20 years with no hopes of settling the decretal sum. The order of stay of execution that the applicant seeks is an equitable remedy. As the court of Appeal stated in the case of ***Star Transport Co. Ltd v Ali Mwinyi Mvita [2016] eKLR,*** the conduct of a party who seeks an equitable remedy must in all matters relating to the suit meet the approval of a court of equity before he can obtain an equitable relief. An equity relief will not be granted to a party who by his conduct has shown himself to be undeserving of such a relief.

34.In the event, this application must fail and the same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Delivered and Signed at NAIROBI this 19TH day of MAY,2020.

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes