REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 21 OF 2020

ERICK FRANCIS WAFULA.....APPELLANT

VERSUS

BENJAMIN SAKWA OKOMBA.....RESPONDENT

RULING

1. The application for determination is a Motion, dated 28th April 2020, seeking stay of execution of stay of execution of the judgment or decree in Mumias SPMCCC No. 187 of 2018 pending appeal. The application is based on the grounds on the face of the application and the facts deposed in the supporting affidavit, sworn on the 28th April 2020. It is averred that the appellant was aggrieved by the judgement and decree, hence the appeal. He states that he moved the appellate court timeously, without delay. He states further that his appeal is meritorious and has reasonable chances of success, and execution of the decree would render it academic. He argues that he believes that the respondent was a man of straw, and there was no guarantee that he could recover the decretal amount from him should the decree be settled only for the appeal to succeed. He expresses willingness to abide by any orders with respect to security. He has attached a copy of the impugned judgment and the memorandum of appeal filed herein.

2. The respondent has responded to the Motion, dated 28th April 2020, through his replying affidavit, sworn on 14th May 2020. He avers that the grounds of appeal do not disclose a meritorious appeal warranting being canvassed at the full hearing. He then goes on to narrate what transpired at the trial court, from the filing of the suit to judgment. He states that the appellant failed to file his written submissions even after being given time by the trial court to do so. He avers that the accident the subject of the suit rendered him crippled, and delay in payment of the judgement sum would aggravate is current medical condition. He proposes that the appellant be required to settle half of the decree so that he can get money for medical care and upkeep. He avers that the appellant would suffer no prejudice if that is done since the parties entered into a consent, where the appellant conceded liability at 75%. He accuses the appellant of coming to court with tainted hands. He has attached to that affidavit copies of the pleadings lodged in Mumias SPMCCC No. 187 of 2018 and the medical reports.

3. The Motion was placed before me on 29th April 2020, under certificate of urgency, and I certified it as such, and granted a temporary stay of execution on condition that the appellant deposited half of the decreed sum in court before 6th of May 2020.Tthe appellant has since complied with the order. I directed, on 22nd May 2020, that the Motion be disposed of by way of written submissions. The parties have complied with the directions, by filing their respective written submissions. I have read through the said written submissions and noted the arguments advanced in them by the parties.

4. In his written submissions, the appellant urges court to allow the application, stating that the appeal has a high chance of success, and if the application is not allowed he would suffer substantial loss. He further submits that that the respondent is a man of straw, and that he will not be able to recover the amount should the appeal succeed after the decretal amount is paid to him. He submits that he has complied with the requirements under Order 42 of the Civil Procedure Rules, and that he has deposited half the decreed sum in court as security for the grant of stay orders. He also contends that he could not pay half of the decreed sum to the respondent as he was not confident that he will be able to refund the same in case the appeal succeeds.

5. On his part, the respondent submits that he proved his case at the trial court to the required standards, and that the appeal has no chance of success, and, therefore, this application was a total waste of time. He submits that his financial status should not keep him away from enjoying the fruits of his decree, considering the fact that he is disabled and needs future medical treatment. He requests, should the prayer for stay of execution be granted, that he be given half the decreed sum as chances are that the appeal is unlikely to succeed. He relies on the decision in *Gilbert Mokua Bitange vs. Godfrey Kinyua Muriiti* [2015] eKLR.

6. There is only one issue for determination: whether the order of stay of execution should be granted.

7. Stay of execution is provided for in Order 42 Rule 6 of the Civil Procedure Rules, in the following terms:

> *"(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.*
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> *(2) No order for stay of execution shall be made under subrule (1) unless—*
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> > *(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.*
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> *(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*
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> *(4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.*
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> *(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*
>
> *(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with."*

8. An applicant for stay of execution of a decree or order pending appeal is under obligation to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.

9. The Court of Appeal stated, in *Butt vs. Rent Restriction Tribunal* [1979] eKLR, what ought to be considered for grant or refusal of stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary. The discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it, merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

10. From the facts of the instant case, it is clear that the application was filed without unreasonable delay. The only issue pending determination is whether the appellant has established that he stands to incur substantial loss should the orders not be granted. The other issue would what may be offered as the security for due performance.

11. As to what substantial loss, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

> *"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. 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.... 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."*

12. In *Masisi Mwita vs. Damaris Wanjiku Njeri* (2016) eKLR, it was stated that for the appellant to show that he stands to suffer substantial loss, it must be demonstrated that the respondent will not pay the money back if the appellant succeeds in his appeal. The Court of Appeal in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike and Another* [2006] eKLR, stated that:

> *"This court has said before and it would bear repeating that while the legal duty is on an Applicant 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 applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant 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."*

13. In *ABN Amro Bank, NV vs. Le Mond Foods Limited* Civil Application No. Nai 15 of 2002 (unreported), the Court of Appeal said:

> *"We agree with Mr. Regeru for the Respondent that the burden was upon the bank to show that its appeal would be rendered nugatory if a stay is not granted. But in requiring an applicant to discharge that burden, the Court must also be alive to certain*

limitations which an Applicant such as the bank, must of necessity suffer from. The bank in this case is required to pay over to the Respondent over Kshs. 30 million. An officer of the bank has sworn that they are not aware of any assets owned by the Respondent. They swear that they have checked the returns filed by the Respondent with the Registrar of Companies and they are unable to find in those returns what property, if any, the Respondent owns. They, of course, cannot be expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. So all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on."

14. The only way the applicant can demonstrate substantial loss in a money decree is if he can show that, if the decreed sum is paid to the respondent, and the appeal succeeds, the respondent would not be able to reimburse it. It is the position of the appellant herein that the respondent is a man of straw, and that he will not be able to pay the said amount if the appeal succeeds.

15. In *Hyder Nthenya Musili & another (Suing as the Legal Representatives of the Estate of Collins Mumo Mbindyo) vs. China Wu Yi Ltd & another* [2019] eKLR it was observed that:

"18. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

19. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.

20. 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. Suffice to say 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.

21. In this case, however, the decree sum is over Kshs 5 million. While the general rule is that poverty of the judgement creditor is not necessarily a ground for granting stay of execution, where the award is on the face of it high, that is a factor which this Court may take into account."

16. From the case law above, it is clear that once an applicant argues that the respondent cannot pay, the pendulum should swing to the respondent to counter the submission that it would be unable to refund the judgement amount if the appeal was successful. See also *Bonface Kariuki Wahome vs. Peter Nzuki Nyamai & Another* [2019] eKLR.

17. In the instant application, the respondent, in his replying affidavit, at paragraph 13, admits that he is not stable financially, as he is now crippled as a result of the subject accident, and, that he, in fact, needs part of the decreed sum to help him pay for his future medical treatment and other expenses. The respondent has also not offered any evidence to show that he is a man of means, and that he is in a position to refund the sum of money should the appeal succeed. The decreed amount herein is Kshs. 3,000,000.00, which is not a small amount of money. If the respondent cannot fend for himself, chances are that he will not be able to refund it once the same, or any part of it, is paid to him before the appeal is heard and determined.

18. On security, the appellant submits that he is willing to pay security. He submits that he has deposited half of the decreed sum in court, and that he is willing to deposit the remaining half in a joint interest earning bank account in the names of advocates on record for both sides. The respondent, on his part, prays that the half of the decreed sum be paid to him, so that he can settle his future medical bills, and that the remaining half could be deposited in a joint interest earning bank account in the names of the advocates on record.

19. The court, in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR, stated:

'The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation…'

20. In *Mwaura Karuga T/A Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was said that:

> *"… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2)(b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."*

21. In *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, court observed that:

> *"… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.*
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> *Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal …*
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> *Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.*

22. In *Arun C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others* [2014] eKLR, the court stated that:

> *"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor……. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."*

23. While in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

> *"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."*

24. In the instant case, parties are in agreement that half the decreed sum be deposited in a joint interest earning account in the names of the advocates on record. The other half, however, is the issue. While the appellant has deposited it in court, the respondent prays that the same be paid to him as he submits that the appeal is unlikely to reduce the decreed sum by more than half. From the memorandum of appeal, it is clear that the appellant is challenging the quantum of damages awarded by the trial court. The records show that liability was settled by consent, and, therefore, the only issue in contention is with regard to the quantum of damages awarded. The appellant did not call any witness at the trial, and there is a possibility, as submitted by the respondent, that the quantum could be reduced by more than half owing to the injuries sustained by the respondent vis-à-vis the appellant's case.

25. I believe the appellant has displayed sufficient goodwill by the deposit that he has since made in court. In the end, I will dispose of the application in the terms that the Motion dated 28th April 2020 is allowed, on condition that the half of the decreed sum, that is to say Kshs 1,500,000,00 remain deposited in court as security, with the parties being at liberty to transfer it to an interest earning account in the joint names of their advocates. Rather than order that a portion of the judgment be paid to the respondent, I will direct the parties to move quickly to have the appeal heard and determined. Towards that end, I hereby direct the Deputy Registrar to call for the original records from the trial court, and the appellant to file and serve record of appeal within thirty (30) days. Costs of the application shall be in the appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3rd DAY OF July, 2020

W MUSYOKA

JUDGE