REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 87 OF 2017

DANIEL KAHIGA.....1ST APPELLANT

SHADRACK SAKWA JUMA.....2ND APPELLANT

VERSUS

JANET JERUTO TOLONG & MICHAEL CHEPKWONY

(suing as the legal representatives of the estate of

MAUREEN JEPKOECH CHEPKWONY, Deceased).....RESPONDENTS

RULING

[1] This ruling is in respect of the Notice of Motion dated **13 February 2020**. The application was filed pursuant to **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya; Order 22 Rule 22**, **Order 42 Rule 6(1) and (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010.** It seeks orders that the Court be pleased to grant an order of stay of execution of the Judgment and Decree in this matter along with any consequential orders arising therefrom pending the hearing and determination of **Eldoret Civil Appeal No. 81 of 2019**; and that the Court be pleased to retain the security offered in the lower court for purposes of the pending appeal.

[2] The application was premised on the grounds that the appellants have filed an appeal to the Court of Appeal from the Judgment delivered herein on **29 July 2019**, being **Civil Appeal No. 81 of 2019**; which appeal raises numerous triable issues. It was therefore the assertion of the appellants that they are likely to suffer substantial loss and damage if the orders sought herein are not granted. The application is supported by the affidavit sworn by the 1st appellant, **Daniel Kahiga** on **13 February 2020,** in which he expressed the apprehension that the respondents may commence execution proceedings at any time, granted that the temporary order of stay of execution had already lapsed.

[3] It was further the averment of the 1st appellant that he stands to suffer irreparable loss and damage if this application is not allowed; and that the respondents are people of straw and therefore will not be able to refund the decretal sum in the event the appeal succeeds. He added that the respondents will not be prejudiced in any way if the orders sought herein are granted. In terms of security, the 1st appellant proposed that the logbook in respect of his motor vehicle **Registration No. KAG 240Z** which was deposited before the lower court in **Eldoret CMCC No. 593 of 2016** as security, be retained as such pending the hearing and determination of the appeal. He annexed a copy thereof to his Supporting Affidavit in support of his averments.

[4] The respondents opposed the application vide their Replying Affidavit sworn on **5 May 2020**. They averred that, there is a balance of **Kshs. 6,296,289/=** of the decretal sum which is outstanding; and while conceding that the 1st appellant deposited his logbook for motor vehicle **Registration No. KAG 240Z** in **2016** as security for the due satisfaction of the decree, they asserted that the same is no longer sufficient for purposes of the appeal. They averred that the said motor vehicle is now old and dilapidated, and therefore unsuitable as security; particularly because no valuation report had been availed to ascertain its current value.

[5] Thus, the respondents proposed that the 1st appellant be required to deposit the entire balance of the decretal sum in cash; though they are amenable to and order for the deposit of half of the decretal sum in an interest earning account if they are immediately paid the other half. The respondents also asserted that they are in a position to pay back the sums paid to them should the appellant's appeal succeed.

[6] The application was canvassed by way of written submissions pursuant to the directions issued on **4 March 2020**. In their written submissions filed herein on **26 June 2020**, the appellants' counsel proposed the following issues for determination, for purposes of **Order 42 Rule 6** of the **Civil Procedure Rules:**

[a] Whether the appellants are likely to suffer substantial loss if the application is not allowed;

[b] Whether the intended appeal shall be rendered nugatory if the application is not allowed;

[c] Whether the application for stay was made without undue delay;

[d] Whether sufficient security has been offered for the due performance of the decree.

[7] On substantial loss, it was the submission of **Mr. Ommwenga**, counsel for the appellants, that, given the amount of the decree (an amount of **Kshs. 9,296,289/=)** the respondents will not be in a position to make a refund thereof in the event the appeal is successful. He further submitted that an order of stay would not only preserve the substratum of the appeal, but will also allow the parties to canvass the appeal to a logical conclusion. He relied on **Sankale Ole Kantai T/A Kantai & Co. Advocates vs. Housing Finance Co. (K) Ltd** [2014] eKLR; **Amal Hauliers Ltd vs. Abdulnasir Abubakar Hassan** [2017] eKLR and **Samuel Kimutai Korir (suing as the personal and legal representative of the estate of Chelangat Silevia) vs. Nyanchwa Adventist Secondary School & Another** [2017] eKLR, for the proposition that once an applicant raises the apprehension that the respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to rebut that averment by filing an affidavit of means.

[8] On whether the appeal will be rendered nugatory, counsel drew attention to a copy of the Memorandum of Appeal annexed to the Supporting Affidavit to hinge his contention that it raises several triable issues. He reiterated his argument that the respondent will, in all probability, have spent the entire decretal sum by the time the appeal is determined; thereby rendering the appeal nugatory. He relied on Stanley **Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa** [2016] eKLR to buttress his posturing.

[9] It was further the submission of **Mr. Omwenga** that the appeal was lodged without unreasonable delay in that the Notice of Appeal was filed within 10 days of the delivery of judgment, although it took a while for the appellants to be supplied with a certified copy of the proceedings to enable them prepare and file the record of appeal in good time. Counsel attributed the 6 months' delay in filing the instant application to that failure; contending that there was need to attach a copy of the filed Memorandum of Appeal to the application. He relied on **Gabriel S. Imbali & Another vs. Rev. Doughlas Beru (suing for Africa Divine Church)** [2014] eKLR in which a delay of 2 months was excused.

[10] Lastly, it was the submission of **Mr. Omwenga** that the appellants have offered security by seeking that the log book that they had offered before the lower court in **Eldoret CMCC No. 593 of 2016** be retained as security for the due performance of the decree, pending the hearing and determination of the appeal. He accordingly urged the Court to find that the appellants have satisfied the requirements of **Order 42 Rule 6** and are therefore deserving of an order of stay as prayed. He pointed out, on the authority of **Kenya Power & Lighting Company Ltd vs. Esther Wanjiru Wokabi** [2014] eKLR, that the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** are only guidelines; and that the Court has unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.

[11] Mr. Oduor, learned counsel for the respondents, opposed the application, contending that the appellants have not met the threshold for the grant of stay of execution for purposes of **Order 42 Rule 6** of the **Civil Procedure Rules.** He was of the view that the fact only that an appeal has been filed, or that the process of execution is likely to be commenced by the respondents is not an automatic ground for stay. He therefore submitted that the appellants needed to demonstrate that there will be substantial loss if an order of stay is not granted; and that such demonstration must be through facts given in the Supporting Affidavit. Counsel further argued that the mere statement that the respondents are persons of straw and therefore will be unable to refund the decretal amount is not sufficient for an application of this nature. His posturing was that the burden of proof was on the appellants to prove that the respondents are indeed persons of straw. **Mr. Oduor** relied on **Kericho HCMA No. 34 of 2011: Eldoret Bus Services Ltd vs. William Kipkirui Korir & Another; Bungoma HCCA No. 25 of 2011: Geoffrey Situma Wanyonyi vs. Abigail Khavetsa Sikuku** and **Nairobi HCCC No. 830 of 2003: Triton Petroleum Co. Ltd vs. Kirinyaga Construction (K) Ltd** to augment his submissions.

[12] On security, counsel for the respondents reiterated the averment that the motor vehicle whose log book was deposited before the lower court as security is now old and dilapidated; and is therefore no longer sufficient security for purposes of the decree. In his view, it was incumbent upon the appellants to avail a current valuation report to give an updated value of the property as at the time the application was made to enable the Court make a determination as to its sufficiency or otherwise. He relied on **Nairobi HCMA No. 453 of 2017: Congress Rental South Africa vs. Kenyatta International Convention Centre & Others** to support his argument, and in urging for the dismissal of the application for stay.

[13] I have given due consideration to the averments set out in the pertinent affidavits as well as the submissions made in respect thereof by learned counsel for the parties. The background facts are not in dispute; namely that the respondents sued the appellants in **Eldoret CMCC No. 593 of 2016** for compensation on behalf of the estate of **Maureen Jepkoech Chepkwony** (the deceased) and that the lower court found in their favour and made an award of **Kshs. 11,870,289/=.** The appellants appealed that decision whereupon on **29 July 2019**, the award was revised downwards to **Kshs. 9,296,289/=.** The appellants have expressed their dissatisfaction with that determination and have hence filed a second appeal to the Court of Appeal, as they are entitled to do in law. They now seek that execution of the decree be stayed pending the hearing and determination of the appeal.

[14] In common parlance, a successful litigant is entitled to the fruits of his litigation. Thus, in **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)** [2002] KLR 63 it was recognized that**:**

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or 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."

[15] Nevertheless, **Order 42 Rule 6(1)** of the **Civil Procedure Rules,** pursuant to which the instant application has been brought, provides that:

"… 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..."

[16] Thus, the Court has the discretion to grant stay of execution where a justification has been made therefor. It is for this reason **that Order 42 Rule 6(2)** of the **Civil Procedure Rules**, stipulates that:

(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 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."

[17] In the light of that provision, I have given due consideration to the application at hand and note that it was filed 6 months after the date of the Judgment. In his written submissions dated **22 June 2020, Mr. Omwenga** for the appellants was at pains to explain the delay in filing the instant application, blaming it on the delay in obtaining a certified copy of the proceedings and judgment. It is nevertheless evident that the Notice of Appeal was filed timeously. I would accordingly give the appellants the benefit of the doubt regarding their tardiness in bringing the instant application.

[18] The main thrust of the application is that the decretal sum is substantial and that if paid, may not be easily recovered from the respondents, in the event of a successful appeal. Thus, the respondents posited that they risk suffering substantial loss should the Court decline their application for stay of execution. I agree that the decretal sum is substantial. Accordingly, it was incumbent on the respondents to furnish the Court with some reassurance that they are in a position to repay the same should the appellants succeed on appeal. No such response was given. To the contrary, counsel for the respondents took the posturing, on the basis of merely persuasive authorities, that the burden of proof was on the appellant to demonstrate that the respondents are persons of straw; which view appears to be the reason why no effort was made by the respondents to file an affidavit of means.

[19] The Court of Appeal made it clear in **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR**, 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 an 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."

[20] Accordingly, I would agree that, in the circumstances, the appellants' apprehension that they stand to suffer substantial loss should the decree be executed before the hearing and determination of their appeal, is well-founded; the respondents having failed to demonstrate their ability to repay the decretal sum should this be warranted at the conclusion of the appeal.

[21] It was also the submission of the appellants that the appeal had several triable issues with a high chance of success. I however take the view that, for purposes of **Order 42 Rule 6 of the Civil Procedure Rules,** the merits or otherwise of the appeal is not a pertinent consideration. Indeed, it would be anomalous to require this Court to determine whether an appeal against its decision has high chances of success. That is a factor that rests with the Court of Appeal for consideration and determination.

[22] That brings me to the issue of security, in respect of which counsel for the appellants proposed that the log book that they had offered in **Eldoret CMCC No. 593 of 2016** be retained as security for the due performance of the decree pending the hearing and determination of the appeal. As was correctly observed by counsel for the respondents, the security was furnished in **2016.** No current valuation report was availed to paint a picture to the Court as to its current state and value; and therefore it is impossible to gauge whether it constitutes sufficient security for the satisfaction of the decree. On the other hand, having failed to demonstrate their financial capability to pay back the funds if paid, it would be imprudent to require payment of the entire decretal sum to the respondents as proposed by counsel for the respondents.

[23] Thus, having weighed the competing interests of the parties, the reasonable and just course would be to require that half of the decretal sum due be deposited in a joint interest earning account within 3 months from the date hereof as a condition for stay. This takes into account the acknowledgment by the respondents that the insurance company has already paid **Kshs. 3,000,000/=** of the decretal sum, leaving a balance of **Kshs. 6,296,289/=.**

[24] Consequently, the orders that commend themselves to me, and which I hereby grant, are as hereunder:

[a] That the application dated **13 February 2010** be and is hereby allowed with costs;

[b] That an order of stay of execution be and is hereby granted staying the execution of the decree arising from the Judgment of the Court herein dated **29 July 2019** pending the hearing and determination of **Civil Appeal No.81 of 2019** on condition that the appellants deposit half of the balance of the decretal sum (balance for this purpose being **Kshs. 6,296,289/=)** in a joint interest earning account in the names of counsel on record herein for the parties within 3 months from the date hereof.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2020

OLGA SEWE

JUDGE