



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 31 OF 2019

KIOKO PETER.....APPELLANT

-VERSUS-

KISAKWA NDOLO KINGÓKU.....RESPONDENT

(Being an Appeal against the Judgement of Honourable Shikanda delivered on 5th February, 2019 in Machakos CMCC No. 59 of 2018)

**KISAKWA NDOLO KINGÓKU (Suing as the legal representative of the Estate of the
MWANIA KISAKWA - Deceased).....PLAINTIFF**

-VERSUS-

KIOKO PETER.....1ST DEFENDANT

RULING

1. The Respondent herein filed a suit against the Applicant before the Chief Magistrate’s Court, Machakos seeking damages arising from a fatal accident involving the appellant’s motor vehicle in which the deceased was traveling as a passenger. Upon the close of the plaintiff’s case, the defence case was adjourned to a further date. On the date of the further hearing, however, the applicant sought adjournment which was however denied as a result of which the court directed that the defence case be closed and that submissions be filed.
2. Based only on the evidence in support of the respondent’s case, the learned trial magistrate found the defendant liable and proceeded to award damages for the respondent against the appellant which he assessed in the total sum of Kshs 1,559,500/=. He also awarded interest and costs of the suit to the respondent.
3. Aggrieved by the said decision the applicant has lodged this appeal. In the meantime, he seeks that pending the hearing and determination of the said appeal, there be a stay of the judgement (sic) and its consequential orders.
4. According to the applicant, the learned trial magistrate ordered the closure of the defence case before they were heard yet he had filed his witness statements and the evidence of his driver was crucial. The applicant proceeded to misleadingly aver that subsequent to the delivery of the ruling denying him adjournment, he applied to this court for stay of proceedings and that this court ordered for review of the decision of the trial magistrate. Nothing can be far from the truth. I have perused the said ruling and it is clear that this court found that the said application was devoid of merit and dismissed the application. What the Court said was that the applicant ought to have applied for review before the lower court. In my view to marked such remarkable averments can only be taken to be meant to mislead the court. Parties and Counsel ought to give the court’s some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that **Madan, J** (as he then was) had in mind when in **N vs. N [1991] KLR 685** he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that

“in my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa...”

6. According to the applicant, since he has a meritorious appeal, it is fair that the proceedings be stayed until the appeal is heard and determined.

7. In opposition to the application the respondent averred that the application is vexatious, devoid of merits and made in bad faith to deny him the fruits of his rightfully obtained judgement. It was further contended that the applicant had not satisfied the conditions for grant of stay of execution. He averred that he is a man of substance and that he can repay back any sum paid to him in the event the appeal succeeds since appeals in monetary decrees are never rendered nugatory as one can sue for recovery.

8. The respondent disclosed that the applicant has filed related appeal challenging the denial of the adjournment which is yet to be prosecuted. According to the respondent the appeal is only on quantum hence if the court is inclined to allow the application, the same ought to be conditional on payment of half the decretal sum with the other half being deposited in court.

9. In rejoinder, the applicant averred that the respondent had not demonstrated that he is a man with ability to refund the money if the appeal succeeds. He stated that though the applicant indicated in his evidence that he is a farmer, he did not disclose the nature thereof.

Determination

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

11. 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.

12. 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.

13. 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 intentment 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.

14. 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.”

15. 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.”

16. 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”.

17. 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.”

18. Dealing with the contention that there was no evidence that the 1st 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.”

19. 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.”

20. 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.**

21. 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.

22. In this case, the applicant contends that the applicant disclosed that he was a farmer without disclosing the nature of the farming he was engaged in. However, it 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. Lack of knowledge of the financial means of a successful litigant, is therefore not one of the grounds for denying him the fruits of his judgement. Suffice too state that he is, at this moment, the successful party and 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.

23. In this case, it is true that the applicant has averred that he is capable of refunding the sum that may be paid to him. He has however not disclosed his source of income so that this court can confirm the said averment. 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.**

24. This court cannot, however, close its eyes to the fact that the Respondent is an estate of a deceased person. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondent has not disclosed the estate’s source of income, if any.

25. As regards to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** it was held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the latter case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

26. The Respondent contended that in monetary decrees stay ought not to be granted. That, with due respect, is not exactly the legal position. In **Madhupaper Case** (supra) the Court used the word “normally. In other words, it is not normal in such decrees that the appeal or intended appeal would be rendered nugatory. What the Court was saying, in my view, was that since the issue is quantifiable, the same may not be rendered nugatory since money being a commodity of trade can always be refunded. However, that position assumes that the other party may refund the same. Accordingly, where the successful party shows that he is in a position to refund the decretal sum and that the sum in question is not such that it is likely to make the applicant go under, the court would be very reluctant to grant the stay sought. The statement in **Madhupaper Case** was subsequently qualified by the Court of Appeal in **Transouth Conveyors Limited vs. Kenya Revenue Authority & Another Civil Application No. Nai. 37 of 2007** where it was stated that:

“It has become necessary for the court to qualify the usual principle that the success of a money decree, so long as it is certain that the respondent was capable of repaying the decretal sum, would not render an intended appeal nugatory. The qualification has got to do with the interests of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated.”

27. It was therefore appreciated by the same court in **Nation Newspapers Limited vs. Peter Baraza Rabando Civil Application No. Nai. 1 of 2007** that:

“Although the respondent’s is a money decree, recent decisions of the Court are to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory, and the court granted a stay in those cases. In such cases, however, the court balances two parallel positions. First, that a litigant if successful should not be deprived of the fruits of a judgement in his favour without just cause. The second factor is that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, may be on terms.”

28. This court appreciates the legal position in **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR,** where it was held 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.”

29. While appreciating that the amount herein was awarded to an estate of the deceased, it is clear that there was no evidence adduced by the applicant challenging liability before the trial court. Accordingly, a challenge as to the applicant’s liability is bound to be an uphill task.

30. In the premises, there will be a stay of execution pending this appeal on condition that the Applicants remit to the Respondents half of the decretal sum and deposit the other half in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date hereof. In default, this application shall be deemed to have been dismissed with costs

31. In light of a clear misleading averment made by the applicant as to the import of the ruling made by this court in the related matter, the applicant shall bear the costs of this application in any event.

32. It is so ordered.

Read, signed and delivered in open Court at Machakos this 10th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mr A. K Mutua for the Respondent

Mr Mutinda for Mr Tamata for the Applicant

CA Geoffrey