**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 40 OF 2019**

**TIMAFLOR LIMITED…...……APPELLANT**

**Versus**

**SAMMY MURITHI JAPHLET……RESPONDENT**

**RULING**

**Stay of execution pending appeal**

[1] Before me is an application dated 24th May 2019 which seeks inter alia for stay of execution pending appeal. The application is supported by the affidavit of ERICK ONDERI. His major argument is that the trial court ordered half of the decretal sum to be paid into an interest earning account and the other half to the Respondent. The appellant has trouble with the one half being paid to the respondent whom they described as a man of straw incapable of making a refund of the money should the appeal succeed. This is their worry as it would render the appeal nugatory. Instead, they proposed to deposit the entire amount in an interest earning account in the joint names of counsels.

[2] The respondent was of a different opinion. He averred in his replying affidavit that the trial court determined a similar application and gave stay on specified conditions. Therefore, the application before me is merely to frustrate him. He is in need of medication on a daily basis due to the injuries he sustained. He has exhausted his resources on the medication. He clinched on his right to enjoy the fruits of his judgment and stated that he should be paid half of the decretal sum as was ordered by the trial court.

[3] If I understood the respondent's argument, he seems to be saying that this application should not be considered for a similar application was determined by the trial court. This is far from the true position in law on stay of execution pending appeal. Under order 42 Rule 6(1) of the Civil Procedure Rules, an appellate court is at liberty to hear an application for stay of execution regardless whether similar application had been granted or refused granted by the trial court. The order also provides that a party aggrieved by any stay order by the trial court may apply to the appellate court to have the order set aside. Such party could be the appellant or the respondent. It is not strange that the respondent may also be aggrieved by a stay order and may also apply for it to be set aside under order 42 Rule 6 of the CPR. I will therefore consider the application on merit, See the relevant rule below:-

> **6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.**

[4] This case presents difficult scenario. On one hand is the appellant who claims right of appeal. On the other hand is the respondent who claims right of enjoyment of fruits of his judgment. These two rights are competing for recognition and enforcement; neither the right of appeal should be rendered otiose nor right to enjoyment of fruits of judgment be postponed. Such requires novel and apt judicial balancing so as not to create any disadvantage to any of the parties. See what was stated in the case of **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR that:**

> ***''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 which is not a question of discrimination''.***

[5] In considering the prescriptions of law, the court should take into consideration all circumstances of the case in order to serve substantive justice. It bears repeating that the respondent is entitled to immediate realization of his judgment. Despite allegations that he is a man of straw, I find no proof thereto. Except I also find from his averments that his resources have been dwindled by the cost of medication due to

the injuries he sustained. He will require further medication and care in the future. There is therefore no strict proof of substantial loss occurring unless stay is ordered. Nonetheless, it is important to note that the decretal sum is huge and half thereof is also considerable amount. Therefore payment of half thereof may not be justified in the circumstances of the case. I therefore set aside the order by the trial court. Notably, the appellant offered to deposit the entire sum in an interest earning account. But, in these circumstances, such order that the entire sum be deposited in an account is unfair to the respondent in his position and condition. The appropriate order is and I hereby order that the respondent shall now be paid one third of the decretal sum within 30 days. The remaining two thirds thereof shall be deposited within 90 days in an interest earning account in the joint names of counsels for the parties.

**Dated, signed and delivered in open court 10th June 2019.**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

M/s Njenga for respondents

Kibicho for Applicants – absent

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**F. GIKONYO**

**JUDGE**