



**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 123 OF 2013**

**BENARD M. MUGO.....APPELLANT**

**VERSUS**

**AKAMBA TIMBER CO. LTD.....RESPONDENT**

**(Being an appeal from the Ruling/Decree of the Senior Principal Magistrate's Court at Machakos delivered by Hon. P. N. Gesora SPM on the 18<sup>th</sup> June, 2013 in Civil Suit No. 714 of 2011)**

**AKAMBA TIMBER CO. LTD.....PLAINTIFF**

**~VERSUS~**

**BENARD M. MUGO.....DEFENDANT**

**RULING**

1. By a Motion on Notice dated 30<sup>th</sup> October, 2013, the Appellant herein seeks that there be a stay of execution of the ruling/judgement and decree granted by the decree in Senior Principal Magistrate's Court at Machakos SPMCC No. 714 of 2011 pending the hearing and determination of this appeal. They also seek that a provision for the costs of the application be made.
2. The application was supported by an affidavit sworn by the appellant on 30<sup>th</sup> October, 2013. A reading of the said affidavit however, respectfully, does not bring out with clarity the background of the matter. However, from the appellant's submissions, it comes out that the judgement being appealed against was as a summary judgement entered following a successful preliminary objection in which the Respondent contended that the defence on record was defective as the same was not signed by the Appellant or his advocates. As a result of the upholding of the said objection, the said defence was struck out and summary judgement was entered as prayed in the plaint.
3. Aggrieved by the said decision, the Appellant filed this appeal and sought stay of execution before the trial court. The said stay was however granted on condition that the appellant pays half of the decretal sum to the Respondent and deposits the other half in court. It would seem that the Appellant was unable to comply with the said conditions due to domestic responsibilities. It was his view that he has a strong appeal with high chances of success as the lower court wholly misdirected itself in holding that the failure by his advocate to append his signature at the foot of the defence rendered the defence defective whereas the copy served upon the Respondent's Advocate did bear the Appellant's Advocate's signature. It was his case that unlike the Respondent, there is no evidence that he can raise the said part of the decretal sum since in his words he is "as poor as church mice".
4. In opposing the application, the Respondent averred that the application is made in bad faith and is meant to deny it the fruits of his rightfully obtained judgement. It was confirmed that the Appellant was granted a conditional stay on 20<sup>th</sup> October, 2013 but failed to comply with the orders of the court.
5. In the Respondent's view, the Appellant has not satisfied the conditions necessary for grant of stay since he has not shown that he is likely to suffer substantial loss; that there is an appeal with chances of success; and that he is ready to deposit security. On the other hand the Respondent is a company of substance and can repay the full decretal sum in the event of success of the appeal. The Respondent believed that the application is incompetent and ought to be struck out.

**Determination**

6. 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.

7. Order 42 rule 6(1) of the **Civil Procedure Rules** provides that:

*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.*

8. It therefore follows that the mere fact that the Appellant made an application for stay pending appeal which was granted on conditions does not disentitle him from approaching this court for similar orders if he feels that the conditions were onerous.

9. 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.*

10. 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.

11. 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 intendment 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**.

12. 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."**

13. 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."

14. 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."

15. 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."

16. Dealing with the contention that there was no evidence that the 1<sup>st</sup> 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."

17. 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."

18. 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**.

19. 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 since lack of means per se is not necessarily a ground for granting stay. 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. Suffice to state that the plaintiffs, at this moment, are the successful parties and to deny them the fruits of their success, it is upon the applicant to prove that they are unlikely to make good whatever sum they may have received in the meantime.

20. In this application it is not contended that the Respondent is unlikely to refund the part of the decretal sum that the court ordered the Appellant to pay it. In fact, the main ground for seeking stay herein is the impecuniosity of the applicant. While that may not necessarily be a ground for granting stay, 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.

21. In this case none of the parties has disclosed the amount in question. The Appellant however contends that he is unable to cough out the sum in question.

22. As regards the chances of success of the appeal, it is clear that the reason why the defence was struck out was due to failure by the Appellant to sign the defence. In light of the decision of the Court of Appeal in **Atulkumar Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001 Consolidated with Vipin Maganlal Shah vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190**, it may well be arguable whether the consequences of failing to sign the defence must necessarily lead to the striking out of the same and the entry of judgement.

23. In this case, the situation is rather unusual. From the record it would appear that the lower court file has been misplaced and is in the process of being searched for. Without the said file the Appellant is unable to file the record of Appeal. On the other hand, the Respondent is also unlikely to proceed with the execution process. In those circumstances it is my view that the justice of the case requires that the parties "hold their horses" while the lower court fail is being looked for.

24. Accordingly, I hereby direct that the Deputy Registrar of this Court communicates to the lower court the urgency of getting the said file. Since the parties have waited for the matter since 2013, I direct that as soon as the said file is availed, the record be compiled and the appeal be heard and disposed of within 60 days.

25. In the premises, subject to what I have stated above, there will be a stay of execution/proceedings in the lower court pending the determination of this appeal.

26. It is so ordered.

**Read, signed and delivered in open court at Machakos this 17<sup>th</sup> day of July, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Mutinda for Ms Gichuki for the applicant**

**CA Geoffrey**