REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 67 OF 2018

CHINA WU YI LIMITED.....1ST APPELLANT/APPLICANT

WILSON GITHU.....2ND APPELLANT/APPLICANT

VERSUS

IRENE LEAH MUSAU.....RESPONDENT

(Being an appeal from the Judgement of Honourable L. Kassan, SPMA Mavoko, delivered on 14th May, 2018 in Senior Principal Magistrate's Court at Mavoko in Mavoko SPMCC No. 618 of 2014 – Irene Leah Musau vs. China Wu Yi Limited and Wilson Githu)

~BETWEEN~

IRENE LEAH MUSAU.....PLAINTIFF

~VERSUS~

CHINA WU YI LIMITED.....1ST DEFENDANT

WILSON GITHU.....2ND DEFENDANT

RULING

1. By a Motion on Notice dated 20th November, 2018, the applicants herein seek that there be a stay of execution of the decree in Senior Principal Magistrate's Court at Mavoko in Mavoko SPMCC No. 618 of 2014 – **Irene Leah Musau vs. China Wu Yi Limited and Wilson Githu** pending the hearing and determination of this appeal. They also seek that a provision for the costs of the application be made.

2. According to the applicants, the judgement being appealed from was entered on the 14th May, 2018 in favour of the Respondent against the Appellants in which the court assessed the general damages at Kshs 1,200,000.00 and future medical expenses in the sum of Kshs 100,000.00.

3. Aggrieved by the said decision, in its entirety, this appeal has been lodged and according to the applicant, since the 1st Defendant is a contractor whose assets are highly dependent on its acquired assets, it stands to suffer substantial loss,

4. It was disclosed that though the appellant had filed a similar application before the trial court, the said file could not be traced as the same had been transmitted to this court.

5. The applicants confirmed that they are willing and able to give such security as this Court may deem fit, proper and just in the circumstances, including giving a bond or depositing half of the judgement sum in court and/or in a joint interest earning account during the pendency of this appeal.

6. The application was however opposed by way of a replying affidavit sworn by **Mutiso Makau**, the Respondent's advocate on 14th February, 2019

7. According to the deponent, the Respondent sued the Appellants and that he together with his witnesses testified and closed his case after which the Appellants indicated that they were not calling any witness and closed the defence case. The deponent further deposed that the application is unmeritorious, defective, bad in law, an abuse of the court process and otherwise an afterthought. It was averred that the decree and certificate of costs had not been applied for and were hence yet to be issued by the trial court.

8. It was however his view, that the judgement being challenged was proper and that the award on general damages and future medical expenses are commensurate with the injuries that he sustained and are not excessive in any manner.

9. The Respondent was however of the view that the Appellants ought to have moved the subordinate court before coming to this court. In his view, the Appellants do not have an arguable appeal with any chances of success since the evidence tendered was not challenged by the Appellants. It was therefore his view that the present application is just a well calculated scheme by the Appellants to not only delay the matter, but to invoke annoyance and deny the Respondent enjoyment of the fruits of a regular judgement procedurally entered.

10. According to the deponent, the Respondent is a woman of means currently in gainful employment with the Ministry of Youth and Gender who is well able to refund the decretal sum in the event that this appeal succeeds. It was however deposed that should the court be inclined to grant the orders sought, it should order that 70% thereof be released while the balance of 30% be deposited in a joint account in the names of all the advocates on record within a limited period pending the hearing and determination of the appeal. However, since the Appellants have not demonstrated any prejudice that they stand to suffer if the application is not granted, the court was urged to dismiss the application as it has not met the tenets of law to warrant it being allowed.

Determination

11. 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.

12. The first issue for determination is whether this application is properly before this Court. It has been stated that the application ought to have been made before the trial court first. However, the Appellants have disclosed that whereas they made an application before the trial court, the lower court file was transmitted to this court before the same was heard and disposed off. 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***
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> ***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.***

13. It is therefore clear that ordinarily an application for stay pending appeal ought to be made to the court from which an appeal is preferred first. In this case however there is a plausible explanation why the application, though made could not be heard as the file had already been transmitted to this court. In the premises, that cannot be a basis for declining to entertain this application.

14. 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.***

15. 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 nolonger 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.

16. 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.**

17. 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."**

18. 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."**

19. 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".**

20. 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."**

21. 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."

22. 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."**

23. 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.**

24. 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.

25. In this application the only basis for seeking stay of execution is that the 1st Appellant being a contractor relies on his assets and that if the execution proceeds, it stands to suffer substantial loss. Nowhere is it alleged that the Respondent is unlikely to refund the decretal sum if the appeal were to succeed. However, the Respondent herself has not sworn any affidavit. The information as regards the ability of the Respondent to repay the sum if paid over to her is by way of a replying affidavit sworn by her counsel. It has been said severally that in matters where the facts are in dispute or contested, an advocate ought not to swear an affidavit. Therefore, as regards the competency of the replying affidavit, the law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure. In the case of **Yussuf Abdulgani Vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugivs. Law Society of Kenya & Another [2005] 1 KLR 463,Ojwang, J** (as he then was stated as follows:

> **"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to Order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".**

26. Similarly, in **Small Enterprises Finance Co. Ltd. vs. George GikubuMbuthia Nairobi HCCC No. 3088 of 1994** it was held that advocates should not depose to contested matters of facts.

27. Therefore, counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted.

28. In matters dealing with one's financial status, 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.**

29. The same sentiments were expressed in Civil Application No. 238 of 2005; **National Industrial Credit Bank Ltd vs. Aquinans Francis**

Wasike in which the Court of Appeal expressed itself at Page 3 Paragraph 2 as follows:-

> **"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the 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."**

30. Having considered the instant application, the response thereto and the submissions made, taking into account the fact that the Appellants did not adduce any rebuttal evidence, the success of the appeal, if at all, is only likely to be on quantum. However, considering what I have stated as regards the competency of the replying affidavit, the order which commends itself to me and which I hereby grant is that there will be stay of execution pending the hearing of this appeal on condition that the Appellants pay to the Respondent 60% of the decretal sum and deposits the balance of 40% in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos. Both conditions to be complied with within 30 days from today and in default this application shall be deemed to have been dismissed with costs to the Respondent.

31. It is so ordered.

Read, signed and delivered in open court at Machakos this 17th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muli for Mr Makau for the Respondent

Ms Ndegwa for Kioko for the Appellant

CA Geoffrey