REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 22 OF 2019

FIRST ASSURANCE CO. LIMITED.............APPLICANT

~AND~

JOSHUA MUTUA MWOLOLO................RESPONDENT

(Being an appeal from the ruling of Senior Principal Magistrate's Court at Kangundo delivered on 23rd January, 2019 by the Senior Principal Magistrate D. Orimba in Kangundo SPMCC No. 173 of 2017)

~BETWEEN~

JOSHUA MUTUA MWOLOLO......................PLAINTIFF

~VERSUS~

FIRST ASSURANCE CO. LIMITED..........DEFENDANT

RULING

1. By a Motion on Notice dated 6th March, 2019 expressed to be brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the ***Civil Procedure Rules***, the applicant herein primarily seeks an order for stay of execution of judgment and Decree issued on 23rd January 2019 in Kangundo SPMCC No. 174 of 2017***;*** **Florence Wavinya Mutua vs. First Assurance Company Limited** pending the hearing and determination of this Appeal.

2. The said application was based on grounds indicated in the notice of motion and supported by an affidavit sworn by the Legal Officer of applicant in which it is averred that the suit in the lower court was filed against the Appellant and upon the filing of the defence, the respondent filed an application to strike out the applicant's statement of defence. By its ruling delivered on 23rd January, 2019, the said application was allowed and the Appellant's said defence was struck out.

3. Aggrieved by the said decision, the Appellant has lodged the instant appeal which in its view has high chances of success. According to the Appellant, the Learned Trial Magistrate failed to find that though the Appellant was the Insurer of Motor Vehicle Reg. No. KBQ 568C, its insured **Bake 'N' Bite Limited** was never sued in the primary suit contrary to section 10 of the ***Insurance (Motor Vehicles Third Party Risk) Act***. Instead the entity that was sued was **Bake 'N' Bite Mombasa Limited.** It was therefore contended that in the absence of production of Policy of Insurance or Certificate of Insurance, the identity of the insured, which was disputed was unclear and was unproved hence the matter ought to have gone to full trial. The learned trial magistrate was therefore accused of having misapprehended the principles governing striking out of pleadings.

4. The appellant is however apprehensive that should the respondent proceed to execute the judgement against it before the appeal is heard and determined, the appellant stands to suffer substantial loss since it is likely to render the appeal nugatory. The applicant is however able ready and willing to provide security for the due performance of the decree which may ultimately become binding upon it based on its attached a copy of the financial report.

5. The application was opposed on the following grounds;

(1) The application is frivolous, incompetent and vexatious; bad in law; incurably defective; an abuse of the court process; and

afterthought and brought in bad faith; and brought after inordinate delay and otherwise an afterthought.

(2) That the application is brought in bad faith to frustrate the process of execution.

(3) That the Appellant has not given any good reasons as to why the application should be allowed.

(4) That the application is improperly before this Court.

(5) That the Appellant has not offered any security for costs as required in law and should be ordered to release to the plaintiff half of the decretal sum plus costs of Kshs 190,865/= and deposit the balance of Kshs 190,865/= in Court within 14 days.

(6) That the purported appeal has limited chances of success.

6. In its written submissions, the Appellant reproduced the provisions of Order 42, Rule 6(1) & (2) of the ***Civil Procedure Rules*** and contended that the said provision requires satisfaction of three conditions which in its view, it had satisfied. As regards the condition whether substantial loss may result to the appellant unless stay of execution is granted the Appellant relied on Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes Naliaka Cheseto**.

7. It was submitted that the appellant was apprehensive that the Respondent will proceed to enforce the erroneous award thereby rendering the Appeal nugatory. According to the Appellant, since the Respondent is a casual labourer, the Appellant has reasonable fear that the Respondent will be unable to pay back the decretal sum should the Appeal succeed. In this regard it was the Appellant's submission that no evidence had been tendered by the Respondent in support its grounds of opposition and reliance was placed on section 112 of the ***Evidence Act***. On the same issue reliance was sought from Civil Application No. 238 of 2005; **National Industrial Credit Bank Ltd vs. Aquinans Francis Wasike**.

8. On the second requirement, it was submitted that the Appellant's Appeal arises from the Ruling of the Lower Court rendered on 23rd January, 2019. Following the delivery thereof, the Appellant's Advocates advised it of the ruling and sought instructions on the way forward. Subsequently, the Appellant instructed its Advocates to obtain a copy of the ruling so that the Appellant could study it and give appropriate instructions which the said Advocate did and after holding internal consultative meetings the Appellant filed its Memorandum of Appeal on 22nd February, 2019, within the 30 days' period prescribed by section 79G of the ***Civil Procedure Act*** and filed its Application for stay of execution on 6th March, 2019. It was therefore submitted that the same was made without undue delay.

9. On the issue of security, it was submitted that as deposed to in the affidavit, the Appellant is ready and willing to tender such security as this Honourable Court may order for the due performance of the Decree. The Court was therefore urged to exercise its discretion and allow the Appellant to deposit the Judgement sum in Court or in an interest earning account in the name of both law firms.

10. Based on the foregoing, it was contended that the Appellant has met the criteria set out in Order 42 Rule 6(1) & (2) of the ***Civil Procedure Rules*** for granting stay of execution pending Appeal and that it risks suffering irreparable loss if the Respondent proceeds with execution because that would render the Appeal nugatory, yet the application has been brought without undue delay and the Appellant has also clearly demonstrated its readiness and willingness to provide security for the due performance of the decree as the Court may deem fit.

11. The Respondent, on the other hand took a different view. According to the Respondent, no good reason has been given by the Appellant why the application should be allowed as the Appellant was the insurer of the suit vehicle which was undeniably owned by its insured at the time of accident in question and also did not deny the same during the hearing of the primary suit nor when he was served with statutory notice, notice of entry of judgment and intended execution or notice of intention to file declaratory suit.

12. It was the Respondent's position that all procedural requirements were followed to have this case heard and determined and in her view the Applicant brought the instant application with the sole purpose of denying the Respondent from enjoying the fruits of a lawfully obtained judgment.

13. It was further submitted that since the Appellant has not offered any security for costs as required in law the appellant should be ordered to release to the plaintiff half of the decretal sum plus of costs of Kshs. 157,478.425/= and deposit the balance of Kshs. 157,478.425/= in Court within (14) fourteen days from the date of ruling of this application to demonstrate their seriousness. It was however submitted that since the Appellant's application dated 6th March 2019 lacks merit, the same should be dismissed the same with costs.

Determination

14. I have considered the application, the affidavit both in support of the application, grounds of opposition to the application, the submissions filed as well as the authorities relied upon.

15. 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.

16. 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.

17. 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.**

18. 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."**

19. 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."**

20. 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".

21. 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."**

22. 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."**

23. 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."**

24. 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.**

25. 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.

26. The decision that provoked this appeal was the striking out of the defence and presumably the entry of judgement against the Appellant. The Appellant contends that in doing so the learned trial magistrate ignored the principles guiding the striking out of defences or pleadings. It is further averred that it was not proved that the entity against which judgement was entered was the Appellant's insured in order to render the Appellant liable. At this stage, the Court cannot say that the grounds upon which the appeal is based are frivolous more so in the absence of either the pleadings in the primary suit or the proceedings appealed from. What is clear, however, is that if the appellant's contentions are true then the appeal may well succeed.

27. In this application however, the Appellant has not placed before the Court material upon which it believes that its appeal if successful would be rendered nugatory if the stay is not granted. It is not for example contended that the Respondent's position is so precarious that he is unlikely to refund the decretal sum once the same is paid over to him. Conversely, the Appellant does not contend that if compelled to pay the decretal sum it is likely to fold up. To the contrary, it seems to be the Appellant's case that it is financially solid. I agree with the position adopted in Bungoma High Court Misc Application No 42 of 2011 - **James Wangalwa & Another vs. Agnes Naliaka Cheseto** that:

> **"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''**

28. In this case the issue of the Respondent being a casual labourer, a factual issue that ought to have been deposed to in the supporting affidavit was regrettably sneaked in in the submissions. That, with due respect is not the way in which such an important factual issue ought to be introduced.

29. What has troubled me however, is the fact that the Respondent has not bothered to controvert the factual position deposed to by the Appellant since he did not swear any affidavit.

30. 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.**

31. 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."**

32. Having considered the instant application, it is my view that this is a case where a stay ought to be granted but on conditions. Accordingly, 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 Appellant deposits the entire decretal sum in a joint interest earning account in the names of the advocates for the respective parties in Kenya Commercial Bank, Machakos within 30 days from today and in default this application shall be deemed to have been dismissed with costs to the Respondent.

33. It is so ordered.

Read, signed and delivered in open court at Machakos this 18th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwangi for Mrs Mutunga for the Respondent

CA Geoffrey