REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 560 OF 2018

JOSHUA WANDERI.....1ST APPELLANT/APPLICANT

JOHN C.W. KARIUKI.....2ND APPELLANT/APPLICANT

-VERSUS-

JANE WANGUI NYAMBURA.....1ST RESPONDENT

LOISE WANJIRU WARURII.....2ND RESPONDENT

RULING

1. This ruling was precipitated by the Notice of Motion dated 22nd January, 2019 brought by the appellants/applicants herein. The Motion stands supported by the grounds laid out on its body as well as the facts deponed to in the affidavit of *Anthony Kariuki*. The applicants have brought the Motion under Order 42, Rule 6 and Order 22, Rule 22 of the Civil Procedure Rules, seeking the substantive order for a stay of execution of the judgment delivered by Honourable D.A. Ocharo (Mr.) (Senior Resident Magistrate) on 31st October, 2018 in CMCC NO. 4930 OF 2012, pending the hearing and determination of the appeal.

2. The deponent, *Anthony Kariuki*, swore the affidavit in support thereof as the Legal Officer at Kenya Alliance Insurance Co. Ltd (*the insurer*) which company had insured the applicants against the claim before the trial court. He stated that the insurer, being aggrieved by the trial court's award of Kshs.968,256/=, had lodged the appeal against the same, adding that negotiations with the respondents in lieu of appeal were unsuccessful and the 30 days' stay of execution granted by the trial court has since expired.

3. The deponent asserted that the insurer is apprehensive that unless an order for stay is granted, the respondents will proceed with execution, thereby rendering the appeal nugatory. He further asserted that should the appeal prove successful, there is a likelihood the decretal sum will not be recoverable from the respondents, carefully averring that the insurer is ready and willing to offer security for the due performance of the decree.

4. The Motion is opposed by way of the replying affidavit sworn by the 1st respondent on her own behalf and that of the 2nd respondent. She deponed that the Motion and supporting affidavit ought to be expunged from the record for the reason that *Anthony Kariuki* who swore the aforesaid affidavit is a stranger to the proceedings. The deponent further asserted that not only is she in a position to refund the decretal sum when the circumstances call for it, but that it would appear the insurer is undergoing financial challenges and may not be able to refund the said sum.

5. The parties argued the application orally before this court, with *Mr. Mwangi* learned counsel for the applicants arguing that the applicants have not only demonstrated substantial loss but that the respondents have not demonstrated their ability to refund the decretal amount. The advocate went further to submit that his clients had offered to deposit the decretal sum in a joint interest account but the respondents instead demanded that part of the money be released to them.

6. In his reply submissions, *Mr. Wandaka* advocate for the respondents maintained his clients' position that they will be ready to refund the same if the appeal succeeds. Counsel also contended that the trial court proceedings ought to have been annexed to the application, further reiterating the insurer's apparent financial distress and pointing out that there has been a delay in bringing the application which goes to show that it is a mere afterthought, to which *Mr. Mwangi* in rejoinder submitted the relationship between the insurer and the applicants has been adequately explained in the supporting affidavit filed and that the delay in bringing the application was caused by the ongoing negotiations between the parties at the time.

7. I have taken into consideration the grounds set out on the face of the Motion; the affidavits both in support of and in opposition to the same; and the rival arguments placed before this court. Before I cast focus on the merits of the application, I deem it necessary to address the

argument brought forth by the respondents as relates to the *locus standi* of *Anthony Kariuki* who swore the supporting affidavit.

8. I have noted the letter dated 12th September, 2012 annexed to the Motion as "*AK 1*" addressed by the insurer to the applicants' firm of advocates essentially forwarding copies of the summons and plaint, and instructing the said firm to take up the matter on behalf of the applicants. This letter remains uncontroverted by way of evidence. Similarly, it has not been disputed that the deponent is an employee of the insurer. I am therefore satisfied that the deponent, though not directly a party to the proceedings, is employed by the insurer as a Legal Officer and would therefore more likely than not have knowledge of the facts pertaining to the matter and in any event, the insurers have a right to defend the suit under the principle of subrogation. I thus find no basis for this argument.

9. Turning to the merits of the application, the germane principles/conditions that will offer guidance in determining whether to grant the order for a stay of execution are framed under *Order 42, Rule 6 (2)* of the *Civil Procedure Rules* in the following manner:

> ***a) The application must be brought without unreasonable delay;***
>
> ***b) The applicant must demonstrate that substantial loss may result; and***
>
> ***c) Provision should be made for security.***

10. In respect to the principle of unreasonable delay, the record reveals that the impugned judgment was delivered on 31st October, 2018 whereas the current application was filed close to three (3) months later on 22nd January, 2019. The applicants' counsel submitted that such delay resulted from the time taken in exploring negotiations between the parties; it is not controverted that such negotiations took place. In the circumstances, I find that the delay in filing the application has been adequately explained.

11. I will now address the second principle on substantial loss which constitutes the cornerstone of any application for a stay of execution, as portrayed in ***Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR*** with reference to ***Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018*** thus:

> ***"Substantial loss in its various forms is the cornerstone of both jurisdictions for granting 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."***

12. From the foregoing, it is not only deemed important but necessary for a party to demonstrate that he or she will suffer irreparable or substantial loss, since a successful party ought not to be prevented from enjoying the fruits of his or her judgment unless and until substantial loss is shown.

13. In addressing the applicants' submission that execution is imminent, I am of the reasoned view that this in itself cannot constitute substantial loss for the reason that execution is by all means a lawful process.

14. It is thus clear that the applicants would be required to establish other factors that give rise to substantial loss. I have considered their contention regarding the respondents' potential inability to refund the decretal sum once paid to them and the appeal succeeds in the end. I have also noted the respondents' assertion on their ability to repay the decretal amount.

15. This subject has come up on numerous occasions previously and the courts have more often than not rendered that while it is the applicant's duty to establish that his or her appeal will be rendered nugatory on the premise of the respondent's inability to refund the decretal sum, such applicant has no way of determining the financial standing of the respondent unless evidence of the same is availed. The Court of Appeal in ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*** fittingly addressed the subject in this way:

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

16. In view of the foregoing, it is fair to state that once the issue of inability to repay the decretal sum was raised by the applicants, the evidential burden automatically shifted to the respondents to prove otherwise by way of evidence; this was not done. However, the court notes that the appeal herein is on quantum. Parties recorded a consent on liability before the trial court. The Respondent has asked the court to order for release of part of the decretal sum which, in the circumstances of this case, is not unreasonable.

17. There is no need to dwell much on the subject of provision of security as the applicants pointed out their readiness and willingness to provide the same as will be ordered by this court.

18. The upshot is that I find merit in the Motion and will allow the same conditional upon the applicants releasing half of the decretal sum (Kshs.484,128/=) to the respondents and depositing the remaining half (Kshs. Kshs.484,128/=) in a joint interest earning account in the joint names of the advocates' firm within 30 days from today, failure to which the order for stay shall automatically lapse. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 18TH day of JULY, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellants/Applicants

.....for the Respondents