



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 98 OF 2018

JOHN NJOROGE..... APPELLANT

VERSUS

DMK (Minor suing Through father and next friend MKN)

RULING

1. Before me is an application by way of Notice of Motion filed on 27th September, 2018 and brought primarily under Order 42 rules 6 (1) & 6(6) of the Civil Procedure Rules. The live prayer seeks an order to stay the execution of the judgment and decree issued by the Chief Magistrate's Court at Thika on 25th July, 2018 in **Thika CMCC No. 551 of 2012**, pending the determination of the appeal herein.

2. The gist of the grounds in support of the motion is that the Appellants are aggrieved with, and have appealed against the judgment of the court below wherein the Respondents were awarded a sum of **Sh. 1,671,730/-** made up of general and special damages; that the Appellants are likely to suffer substantial loss and their appeal rendered nugatory if execution is not stayed. Because, the lower court declined to entertain the Applicant's motion for stay on grounds that it was functus officio. The Applicant asserts he has a good and arguable appeal and is ready and willing to deposit the decretal sum. These are the matters contained in the supporting affidavit sworn by **Caroline Kimeto** who describes herself as the Head of Legal in Britam General Insurance Company (K) Ltd.

3. The Respondents swore a replying affidavit in opposition to the motion. The gist thereof is that the application is an afterthought and will occasion irreparable loss to the Respondent if granted; that the Respondent runs a business and would be able to refund the decretal sum if paid over to him; that the minor plaintiff is in need of medical treatment, hence half the decretal sum ought to be paid to him and the balance deposited; and that the appeal herein is only in respect of quantum.

4. The application was canvassed by way of oral submissions. The Appellant submitted that the appeal is arguable and will be rendered nugatory if orders of stay are denied. Counsel relied on two Court of appeal decisions, including **George Gikubu v Kenya Power and Lighting Civil Application No. NAI96 of 2010** on the applicable principles. He pointed out that the appeal is in respect of liability and quantum and further, that the Respondent has not furnished any evidence of his alleged financial means. He reiterated the Applicant's willingness to deposit the entire decreata sum into a joint account.

5. For his part, the Respondent urged the court to consider the interests of both parties by inter alia ordering release of half the decretal sum to the Respondent to facilitate the plaintiff minor's treatment.

6. The court has considered the material canvassed in respect of the motion by the Appellants. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must: -

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

7. Clearly therefore the arguability of the appeal is not a consideration before this court as it is in the Court of Appeal in exercising its discretion under Rule 5(2) b of the Court of Appeal Rules. At this stage, this court is not concerned with the merits or validity of the grounds of appeal. That said, a perusal of the grounds of appeal reveals a challenge to the finding of liability as well as quantum. On the question of timeliness, the motion was filed before the expiry of 30 days since the judgment of the lower court.

8. Has the applicant demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**.

Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

9. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

10. The learned Judge continued to observe that:-

“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 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.”
(emphasis added)

11. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory.

This is shown by the following passage of Cotton L J in *Wilson -Vs- Church (No 2) (1879) 12ChD 454* at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

12. Despite the Applicant’s oblique depositions and canvassing in respect of the question of substantial loss, he has expressed the apprehension, that the appeal may be rendered nugatory if stay is not granted, and pointing out that the Respondent has not demonstrated his means to repay the decretal sum. Ideally, the question of substantial loss ought to be raised in a more direct manner by an applicant and not indirectly as was the case herein. This is because it is the key consideration in an application of this nature. Nevertheless, the Respondent himself despite asserting to be possessed of means has urged the release of half the decretal sum to facilitate treatment for the plaintiff minor. That appears to contradict his claims to have the means to refund the decretal sum which is not insubstantial if the appeal succeeds.

13. In the oft-cited case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another [2006] e KLR* the Court of Appeal stated that:

“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 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 – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

14. The Respondent having admitted albeit indirectly, that he may not be well endowed financially even to pay his son's alleged pressing medical bills, it is clear to me that indeed, the Applicant may not recover any decretal sums paid to the Respondent, with ease or at all, should the appeal succeed. Nevertheless, the court is duty bound to consider the interests of both parties in order to ensure the performance of the decree if confirmed on appeal, or that if the appellant is successful the appeal is not rendered nugatory.

15. That is the balancing act required of this court in an application of this nature as stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198**:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....”

It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

That too is the import of part of the court's observations in **James Wangalwa & Another -Vs- Agnes Naliaka Cheseto [2012] eKLR** and the **Shell** case above.

16. Weighing all the relevant matters, the court is persuaded to grant an order in terms of prayer 3 of the motion filed on 27th September, 2018 on condition that, within 21 days of today's date, the Applicant deposits into an account in the joint names of the parties' advocates the entire decretal sum. For this purpose the sum of Sh.200,000/- (Two Hundred Thousand) pursuant to the court's order on 28th September, 2018 is to be released to the Applicant's advocates.

Costs will abide the outcome of the appeal

DELIVERED AND SIGNED AT KIAMBU THIS 11th DAY OF JULY 2019

C.M. MEOLI

JUDGE

In the presence of:

Applicant – No appearance

Respondent – No appearance

Court Assistant - Nancy