REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 174 'A' OF 2017

SOCFINAF LTD (RUERA ESTATE).....APPELLANT

VERSUS

ABISAGI IGOKI.....RESPONDENT

RULING

1. The Application before the Court is a Notice of Motion dated 08/11/2017. In the main it seeks an order for stay of execution of the judgment delivered by the Honourable C. Nyongesa in Gatundu SPMCC No. 234 of 2010. The claim was a personal injury claim based on a work-place injury and judgment was in favour of the Respondent.

2. The Appellant is wholly dissatisfied with the judgment and timeously preferred an appeal. It then filed the present application.

3. The Appellant filed a Supporting Affidavit in support of its Application.

4. The Application is opposed. The Respondent filed a Replying Affidavit.

5. On the date set for hearing, the Appellant's advocates filed a list of authorities in support of their application. The parties briefly argued the application before me orally but it is unnecessary to rehash their arguments.

6. This is a well-trodden path. The procedural posture of the Application is that this is an application for stay of the judgment of the lower Court. It is, therefore, governed, primarily, by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> *6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.*
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> *(2) No order for stay of execution shall be made under sub-rule (1) unless—*
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> *(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.

7. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

*It was laid down in **M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979**, (following **Wilson v Church (No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.*

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

8. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. He must demonstrate that:

a. The appeal he has filed is arguable;

b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

9. The Respondent claims that the Memorandum of Appeal does not raise any arguable point of appeal because it only raises points of facts. This is, no doubt, a misconception: a contestation of findings of facts on a first appeal can constitute points of law. I have therefore no difficulty in concluding that the grounds of appeal enumerated are arguable. I should point out that to earn a stay of execution, one is ***not*** required to persuade the Appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The Appellant contests both apportionment of liability (an eminently arguable issue considering that the Deceased was a pedestrian who was allegedly drunk at the time of the accident) as well as on damages.

10. But what is the substantial loss that the Appellant is likely to suffer if the order is not granted? The Applicant sought to establish that the appeal will be rendered nugatory by the high likelihood that the 1st Respondent will be unable to refund any amounts paid to him. This is an allegation raised in the Supporting Affidavit and it is not controverted in any way by the Respondent. In ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another*** the Court of Appeal held thus:

This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because a respondent 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 lack of them. Once an applicant expresses 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.

11. In this case, the Respondent claims whether she can refund the decretal sum is immaterial for the

determination of the Application. She is obviously wrong in that. The Appellant has a legitimate fear that should the Court overturn the decision of the lower Court on appeal, the Respondent would have no means to repay and amounts paid to him. I therefore find that the second element has been satisfied.

12. It is not contested that the Application was timeously made. However, in this case, rather than offer security for the due performance of the decree that might ultimately be binding on it, the Appellant has simply asserted that it is a large insurance company that will be able to pay any decree binding upon it. It therefore ought, it argued, to be required to not deposit any deposit. The authorities cited by My Saluny for the Appellant tended in that direction.

13. I am not persuaded by that line of reasoning. Our statutory and decisional law require those requesting for stay to furnish security that they will abide by the final decree ultimately binding on them. This applies whether they are the largest insurance company in the country or whether they are Githeri man in Githurai.

14. In the circumstances I will grant the stay of execution prayed upon the following conditions:

a. **That the Applicant deposit the entire decretal sum in in court within thirty will lead to automatic execution;**

b. **That the Applicant does file a Record of Appeal within sixty (60) days of today so as to expedite the appeal process.**

c. Costs of this Application will follow the costs in the Appeal.

15. Orders accordingly.

Dated and delivered at Kiambu this 1st day of February, 2018.

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JOEL NGUGI

JUDGE