REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 26 OF 2017

SHADRACK MUTUKU MUSILI.....APPELLANT/APPLICANT

VERSUS

JONATHAN NZIOKA NZUKI.....RESPONDENT

RULING

1. By a Motion on Notice dated 30th March, 2017, the applicant/appellant herein, **Shadrack Mutuku Musili**, substantially seeks an order that pending the hearing and determination of this appeal there be a stay of execution of the court's judgement and decree in Machakos CMCC No. 699 of 2015 (hereinafter referred to as "the said suit"). He also seeks that this court stays the execution of the same judgement and decree pending the hearing and determination of Machakos Criminal Appeal No. 277 of 2013 (hereinafter referred to as "the said Appeal").

2. According to the applicant, the Respondent herein obtained a judgement against the appellant in the said suit for the sum of Kshs 254,647/= plus costs and interests on 28th February, 2017. Being dissatisfied with the said judgement, the appellant filed the instant appeal. In the meantime the court granted the appellant a 30 days stay of execution in the said suit which period was lapsing. It was therefore the appellant's apprehension that the Respondent would proceed to execute the said decree unless the orders sought herein were granted and that if that were to happen, the appellant would suffer irreparable loss and damage.

3. It was the appellant's view that his appeal has high chances of success and that unless the stay sought is ranted, that appeal would be rendered nugatory as the same shall have been overtaken by events.

4. According to the appellant, the basis of the judgement in the said suit was the appellant's conviction in Machakos criminal case No. 1916 of 2009 which conviction he appealed against in Criminal Appeal No. 277 of 2013. The appellant was therefore of the opinion that, from the judgement, the said criminal appeal has to be determined as that was the basis on which the court in the said suit found him liable.

5. The appellant stated disclosed his willingness to furnish the Court with ¼ decretal sum as security. In his view this application was brought without unreasonable delay hence the interest of justice required that the application be allowed as no prejudice would suffered by the Respondent if the prayers sought were granted.

6. It was submitted on behalf of the Appellant that the application had been brought without unreasonable delay. It was submitted that if the appellant is compelled to pay the decretal amount before the appeal is heard and determined, the appellant would suffer irreparable harm as the Respondent has not demonstrated that he will be able to refund the said sum if the appeal is successful.

7. In support of his submissions the appellant relied on **Butt vs. Rent Restriction Tribunal [1982] KLR 417**, **Duncan Nduracha vs. Fuad Mohammed & 2 Others [2011] eKLR**, **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others Civil Appeal No. 77 of 2012** and **Rhoda Mukoma vs. John Abuoga [1988] KLR**.

8. In response to the application the Respondent filed a notice of preliminary objection in which it sought that the application be struck off and/or dismissed on the grounds that the application offends the mandatory provisions of Order 42 Rule 6 of the ***Civil Procedure Rules***, 2010 and that the application was without basis in law.

9. Apart from that the Respondent also filed a replying affidavit in which it was averred that no reason had been given by the appellant why

he had not satisfied the lower court's judgement dated 28th February, 2017. According to the Respondent, the applicant had not demonstrated that this appeal would be rendered nugatory if the orders sought herein were not granted.

10. In his view the applicant cannot rely on the said criminal appeal as a reason for seeking stay of execution of the said suit since the appellant unlawfully assaulted him and inflicted severe bodily injuries on him pursuant to which the appellant was prosecuted, convicted and sentenced in Criminal Case No. 1916 of 2009. It was subsequent to those proceedings that the Respondent instituted the proceedings in CMCC No. 699 of 2015 which was determined in his favour and he was awarded Kshs 254,000.00 in damages plus costs and interests.

11. It was the Respondents deposition that he is not a man of straw as he is a retired teacher and a man of reasonable means who could easily refund the judgement sum in the event that the appeal succeeds, which appeal was filed more than a year ago.

12. In his submissions the Respondent contended that no sufficient cause as required under Order 42 Rule 6(1) of the ***Civil Procedure Rules*** why a stay pending appeal should be ordered has been shown. It was further submitted that the applicant had not given any security for due performance of the decree by himself and that the Appellant had not sought stay of execution before the Court appealed from.

Determination

13. 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.***

14. 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.

15. 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.** 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."

16. 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".

17. 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."

18. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **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."

19. Therefore the mere fact that the decree holder is not a man of means does not necessarily justify him 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".

20. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

21. 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.**

22. 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.

23. In this case the applicant has not disclosed his grounds for believing that the Respondent would not be able to refund the decretal sum herein. On the other hand the Respondent has deposed that he is a retired teacher and has the means to refund the said sum. Whereas the Respondent has not shown his source of income, the fact that he has deposed that he is a retired teacher places the two positions at par. However as was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, in those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore

not proved.

24. Suffice to say 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.

25. In the premises it is my view and I hold that the appellant herein has failed to prove that substantial loss may result to him unless the order sought is made.

26. In the premises the application fails and is dismissed.

27. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

> ***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

28. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

29. It is so ordered.

Read, signed and delivered in open Court at Machakos this 12th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey