REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NUMBER NO. 83B OF 2015

DELINA GENERAL ENTERPRISES LIMITED...APPELLANT/APPLICANT

VERSUS

MONICA KILONZO NZUKI (Suing as the legal

representative of the estate of ELIZABETH

MUTHEU PAUL (DECEASED).....RESPONDENT

RULING

1. By a Motion on Notice dated 24th November, 2017, the applicant/appellant herein, **Delina General Enterprises Limited**, seeks an order that pending the hearing and determination of its appeal there be a stay of execution of this court's judgement delivered on 9th October, 2017.

2. The application was supported by an affidavit sworn by **Paul Kibet** who described himself as a Legal Officer at APA Insurance Company Limited, who are the insurer of the Applicant herein and who are liable to satisfy the decretal award herein.

3. According to the deponent, Judgement was delivered in favour of the Respondent against the applicant in the sum of Kshs 10,000/= being damages for pain and suffering, Kshs 100,000/= for loss of expectation of life, Kshs 750,000/= for loss of dependency/income, Kshs 54,500/= being special damages totalling Kshs 914,900/=. This was less 20% being contributory negligence thereby reducing the amount due to Kshs 731,600/=

4. Being aggrieved by the said judgement, the deponent issued instructions to their advocates to file an appeal and pursuant thereto a Notice of Appeal was duly filed and served on the Respondent's advocates.

5. It was deposed that though a stay of execution was given for 30 days the same lapsed on 9th November, 2017 hence the applicant was exposed to the process of execution. According to the deponent, the insurers who are obliged to pay the sum on behalf of the applicant have reasonable and justifiable apprehension that they will be unable to recover the decretal amount from the respondent in the event that a stay of execution is not granted and the appellant is successful in the appeal. This apprehension was based on the fact that the Respondent will not have the financial ability to refund the decretal sum once paid to the Respondent thus rendering the appeal nugatory and subject the insurers to substantial loss.

6. It was disclosed that the insurers were ready and willing to provide such security deemed fit for the due performance of such decree or order as may ultimately be binding upon the applicant hence it would be in the interest of justice to allow the application.

7. In the submissions filed on behalf of the applicant, it was contended that under Order 42 Rule 6 (2) of the ***Civil Procedure Rules, 2010*** for the court to grant the stay pending appeal the following conditions must be met, firstly the applicant must show that it will suffer substantial loss should the application not be allowed, secondly that the Applicant must show that the application has been made without unreasonable delay and lastly that such security as the court orders for the due performance of such decree or order as may be ultimately binding on the applicant has been given by the applicant. In this respect the applicant relied on **Trust Bank Limited vs. Ajay Shah and 3 Others [Civil Case No 875 of 2001].**

8. In the applicant's view, there is sufficient cause for allowing this Application since a notice of Appeal has been filed and the intended appeal does raise triable issues with high chances of success and should this Court deny the orders sought for, that, execution of the Decretal sum be stayed pending the hearing and determination of the Appeal, the said Appeal will be rendered nugatory and the Applicant herein will greatly be prejudiced.

9. According to the applicant, it will suffer great loss should this Application be disallowed, and the Respondent be allowed to commence realization of the award herein since the award of Kshs 736,000/= to be paid out to the Respondent herein is indeed an inordinately large sum and any such pay out would affect the day to day running of the company as well as have serious financial ramifications on the Company. The end result would even be that the Company would have a hard time recovering from such a pay-out, even with the further possibility of a drop in profitability.

10. The applicant submitted that in his Replying Affidavit the Respondents herein have not demonstrated that they are able to refund the decretal sum should the appeal succeed. There is no proof of this capability to pay the decretal sum and further the Respondents herein have not attached any documentary evidence as to any property and/or assets they own that can be sold to repay such a huge sum of money. In support of its submissions the applicant relied on **Equity Bank Limited VS. Taiga Adams Company Limited (2006) eKLR** and contended that the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondents the moment the Appellant states that it is unaware of the Respondent's resources. In this case it was submitted that the Respondents have remained silent on the allegations that they have no capacity to refund the decretal sum should the court of Appeal allow the Appellants Appeal and set aside the Judgement of this Honourable Court. In this respect the Applicant relied on **Kenya Orient Insurance Co. Ltd vs. Paul Mathenge Gichuki & Anor (2014) eKLR** for the position that the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of the Respondent's resources. To the Applicant, the Defendant having failed to state that the Plaintiff is not in a position to refund the decretal sum in its Application and Supporting Affidavit cannot expect the Plaintiff to discharge this burden cannot at the point of submissions.

11. The Applicant asserted that the Decretal sum herein is a large sum for the average individual and it is incumbent upon the Respondent to satisfactorily counter the assertion that they have no known assets by showing the basic assets that they have if need would arise, they would depend on to repay the Decretal sum. This the Respondents have not done.

12. It was averred that the judgment herein was delivered on 9th day of October 2017 and the Appellants obtained 30 days stay of execution which lapsed on the 9th day of November 2017.This Application was filed on the 24th of November 2018 hence there has been no delay in filing this Application.

13. On security it was reiterated that the Applicant herein is willing to abide by the conditions imposed on them by this Court in relation to granting to security herein. Despite the fact that there is no specific amount quoted by the Applicants, at the very least there is an offer for security of costs as the court may wish to impose on the Applicants, who have shown this court good faith by agreeing to abide by any conditions that this court may impose on it in return for a grant of stay of execution pending the appeal herein.

14. It was therefore submitted that the Applicant had satisfied the mandatory conditions for grant of stay pending appeal under Order 42 Rule 6 (2) of the ***Civil Procedure Rules*** and the Court was urged to allow the application as prayed.

15. The application was opposed by way of an affidavit sworn by **S M Makau**, Advocate for the Respondent.

16. According to him, the cause of action herein arose out of a Road Traffic Accident on or about 8/12/2011 and this matter has been in court since 12/10/2012 over 5 years ago. It was his contention that the deponent to this supporting affidavit, **Paul Kibet**, is not a party to this suit hence cannot suffer any prejudice as he alleges. It was therefore averred that the Applicant had not fulfilled the mandatory requirements of Order 42 Rule 6 of ***Civil Procedure Rules***.

17. To the deponent, this application is not merited since the Respondent has not commenced execution and is a gross abuse of this honourable courts process and this application is made in bad faith and a deliberate attempt to deny the Respondent from enjoying the fruits of his lawfully obtained Judgment.

18. Without prejudice, the deponent urged that the Appellant/Applicant should release half of the Decretal sum plus costs of Appeal to the Respondent to avoid prejudice to the Respondent.

19. It was submitted that the appellant has not demonstrated to this Honourable court he has an arguable Appeal, which has a high chance of success and if not allowed the application will be rendered nugatory. Further, the Appellant has failed to demonstrate to this Honourable Court that the Respondent will be unable to refund the decretal sum in the unlikely event the Appeal is successful. The Respondent contended that the court cannot punish a litigant merely because he/she is poor.

20. As regards security, it was submitted that since the Appeal is only on quantum, the applicant can release half of the decretal sum to the Respondent since the Applicant has not demonstrated to this Court that any prejudice will be suffered by the Respondent if this application is not allowed.

21. While the Respondent prayed that the application be dismissed, it was its view that in the event that the application is allowed, the Applicant should release half of the decretal sum of Kshs 365,800/= and deposit the balance in court as security.

Determination

22. 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.***

23. 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.

24. 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."**

25. 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".**

26. 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."**

27. 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."**

28. 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".**

29. 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.**

30. 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. 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. 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.

32. In this case the applicant has not disclosed its grounds for believing that the Respondent would not be able to refund the decretal sum herein. The supporting affidavit, as rightly pointed by the Respondent is deposed by an agent of the applicant's insurers. He has not disclosed his source of information that the Respondent will be unable to refund the decretal sum if paid over to him. In my view it is not sufficient to simply make a bare averment that the Respondent will not be able to refund. As far as the Court is concerned the Respondent is the successful party and has a right to enjoy the fruits of his judgement unless the circumstances dictate otherwise. It is upon the party seeking to deprive the successful party from enjoying his fruits of judgement that ought to prove that those circumstances do exist. That threshold cannot be said to have been attained by mere bare allegations devoid of sources of information or grounds of belief.

33. Whereas the Respondent has not shown his source of income, 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.

34. The applicant contends that it will suffer great loss should this Application be disallowed, and the Respondent be allowed to commence realization of the award herein since the award of Kshs 736,000/= to be paid out to the Respondent herein is indeed an inordinately large sum and any such pay out would affect the day to day running of the company as well as have serious financial ramifications on the Company. The end result would even be that the Company would have a hard time recovering from such a pay-out, even with the further possibility of a drop in profitability. In other words the applicant seems to be saying that if forced to pay the said sum, it may be placed in financially embarrassing situation. If that is the position, it seems that if the applicant's appeal does not succeed, it stands to be placed in similar predicament. Whereas the magnitude of the sum payable may be taken into account, where the deposition comes from an insurance company that it may find itself in difficulty if compelled to pay out the decretal sum, it would not make any difference if the Court was to compel it to deposit the sum in question since the end result would be that it would have been denied access to the sum in question. Therefore the offer by the applicant herein to abide by any condition that this Court may impose sounds hollow.

35. In the premises it is my view and I hold that the applicant herein has failed to prove that substantial loss may result to it unless the order

sought is made.

36. In the premises the application fails and is dismissed with costs.

37. It is so ordered.

Read, signed and delivered in open Court at Machakos this 5th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Karanja for the Appellant

Miss Gicharu for the Respondent

CA Geoffrey