



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 54 OF 2018**

**ORIENT SACCO SOCIETY LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH WAMBUKU KAMAU.....RESPONDENT**

***(An application for stay of execution of the judgement of Bartoo, SRM in Thika, Chief Magistrate's Court Civil Case Number 672 of 2017)***

**RULING**

1. Before me is an application by way of Notice of Motion filed on 9<sup>th</sup> May, 2018 and brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 42 rule 6 and 32, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, and other enabling provisions of the law. The main order sought is that the Court be pleased to order stay of execution of the judgement in **Thika Chief Magistrate's Court Civil Case Number 672 of 2018 John Wamburu Kamau vs. Orient Sacco Society Limited**, pending appeal.
2. **Samson Maina Ngonyoro** swore a supporting affidavit in his capacity as the signatory and the chairman for the Appellant. The Application is premised on the grounds that judgment was entered on 5<sup>th</sup> April, 2018 against the Appellant/Applicant for a sum of Ksh. 2,689,500/=, that being aggrieved have appealed, and that unless stay of execution is granted, the appeal will be rendered nugatory.
3. He deposed that the Respondent has filed an application seeking to attach the monies in bank accounts of the Appellant, which would result in halting the operations of the Appellant. He stated that the Appellant/Applicant is willing to furnish a security. In any event, he deposed that the Respondent's capacity to repay the decretal sum in case the appeal succeeds is unknown. The Respondent's Replying affidavit dwells on issues of the propriety of the appeal.
4. The application was canvassed by way of written submissions. The Appellant/Applicant submitted that the Respondent has filed an application seeking to attach the Appellant's monies held in bank accounts, an action that will halt the Appellant's operations and occasion them irreparable loss. It was submitted that the grant of stay of execution pending appeal is discretionary, and the Appellant relied on the case of **Masisi Mwita vs Damaris Wanjiku Njeri Murang'a HCCA No. 107 of 2015, [2015] e KLR**. Further it was submitted that the Respondent has not demonstrated through evidence that he has the capacity to repay the decretal sum in case the appeal is successful.
5. The Respondent filed his written submissions and just like the Applicant outlined the principles to be considered by the court in an application of this nature. He submitted that the Applicant is guilty of misleading the court as it does not receive salaries from its members, but rather loan instalments. The Respondent submitted further that the allegation by the Applicant/Appellant that he is incapable of repaying the decretal sum is unjustifiable, as he had earlier deposited with the Applicant some Six Million shillings. In the circumstances, counsel for the Respondent argued that the court should not deny the Respondent his rightful fruits of judgment. The case of **Masisi Mwita** was relied upon.
6. The court has considered all the material canvassed in respect of this motion. To be successful, 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. At this point, the court is not concerned with the merits or validity of the grounds of appeal. Undoubtedly the Applicant has approached the court timeously and also offered security. Has the applicant demonstrated that substantial loss will result if the orders sought are denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Limited -Vs- Kibiru &**

Another [1986] KLR 410.

8. 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 4<sup>th</sup> 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. In the instant case, the Applicants have by their affidavits expressed apprehension that they will suffer substantial loss if they pay over the decretal sum to the plaintiff, whom they believe is not capable of refunding the sum if the appeal succeeds. Secondly, that monies in the Applicant's possession have been received on a check-off system from members who also draw their salaries therefrom. Regarding substantial loss, the applicants' fear is predicated upon the inability by the plaintiff to refund the payment if the appeal succeeds, and the applicants' inability to pay the decretal sum and continue its operations. As stated in **ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002** each party bears a specific burden regarding proof of substantial loss in a case such as before us. 13. The Court of Appeal stated therein that:-

“.....So all an Applicant in the position of the bank (Appellant) 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 were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

14. There can be no dispute that the decretal sum herein is quite substantial. The Respondent has sworn an affidavit in a bid to discharge

the evidential burden of proving his ability to refund the decretal sum in the event the appeal succeeds. No independent material beyond what he claims to have paid into the Applicant's account and is also the subject of the dispute, was laid before the court. It is difficult, without the benefit of such material to assess the net worth of the Respondent. Finally, the assertions by the Applicant that the SACCO may experience cash-flow difficulty if forced to pay the decretal sum are not controverted. Cooperative societies such as the Appellant belong to members who deposit money either through check-off system or otherwise. That is common knowledge.

15. The words 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** are apt:

**“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**.

16. For a decree of this nature, I think the court ought to feel assured that the Applicants will be able, without undue difficulty or delay, to recover the sums paid over, in the event their appeal succeeds. A tension is created by two rival but equally important propositions in cases of this nature: the court's duty to ensure that an intended appeal is not rendered nugatory through likely substantial loss on one hand, and concern that a successful litigant should not be deprived of the fruits of his judgment without just cause on the other.

17. It is my considered view in this case, that the Applicant might suffer substantial loss if the stay order is denied and therefore there is a just cause in the court staying execution. However, the Respondent's interests must also be considered through an examination of the form of security suitable for the circumstances of the case.

18. Considering the material presented on this aspect, I take the following view. The decretal sum is no doubt substantial and I agree with the Applicants that it would be onerous to order the entire sum deposited by the Applicants as the operations of the Applicant may well stall or be hampered, as a result occasioning difficulties to the SACCO members. Nonetheless, a proper security is required for the future performance of the decree.

19. Thus, in light of the foregoing, I will allow stay of execution pending the appeal as prayed in the motion filed on 9<sup>th</sup> May 2018 in terms of prayer 2 subject to the following conditions:

- a) That the Appellant/Applicants do deposit a sum of Kshs.300,000/= into an interest earning account in the joint names of the parties' respective advocates.
- b) That the Applicants do further furnish a bank guarantee issued by a reputable bank for the sum of Kshs 500,000/=
- c) That a period of 21 days is allowed to the Applicants, to comply with conditions (a) and (b) above, during which period, for the avoidance of doubt, the stay order will be in force.

The Applicants will bear the costs of the application.

**DELIVERED AND SIGNED AT KIAMBU THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2018.**

.....

**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Njehu holding brief for Mr. Gachau for Applicant

Mr. Toro holding brief for Mr. Washe for Respondent

Court clerk - Kevin