



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 73 OF 2018

PATRICK MUTUA.....1ST APPELLANT

JOSHUA MUSYOKI.....2ND APPELLANT

-VERSUS-

MUTUA NYAMAI.....RESPONDENT

(An Appeal from the Judgment of the Chief

Magistrate, Machakos (The Hon. A. Kibiru) delivered on 5th day of June, 2018 in Machakos Chief Magistrate's Court Civil Suit No. 393 of 2017)

BETWEEN

MUTUA NYAMAI.....PLAINTIFF

VERSUS

PATRICK MUTUA

JOSHUA MUSYOKI.....DEFENDANTS

RULING

1. By a Motion on Notice dated 16th July, 2018, the applicants herein seek that there be a stay of execution of the judgement and decree in Machakos CMCC No. 393 of 2017 delivered on 5th day of June, 2018, pending the hearing and determination of this appeal.
2. According to the applicants, upon judgement being entered against them they were informed of the same by their advocates and they informed their advocates to appeal against the whole judgement, both on liability and quantum and the appeal was duly filed.
3. It was the applicants' case that their appeal is arguable and has high chances of success. To the applicants, should the decretal sum be paid out to the Respondent, the appellant shall suffer substantial loss as the cost of recovering the same, if they succeed, may be higher than the decretal sum itself as the Respondent cannot refund the decretal sum at ago since their financial status is unknown hence the appellants may suffer substantial and irreparable loss.
4. The applicants however disclosed that they were ready and willing to provide such reasonable security as may be ordered by this Court for the performance of the decree in the unlikely event of the appeal failing.
5. The applicants contended that this application has been brought without undue delay.
6. The application was opposed by the Respondent. According to him, this application ought to have been filed at the lower court hence the applicants are shopping for court orders as this application was filed on 17th July, 2018 but only served on 14th August, 2018. To the

Respondent, the applicants have come to court with unclean hands as there is no execution process that has started.

7. The Respondent averred that he is a driver as clearly indicated by the records and he owns several properties hence he can easily refund the sum of Kshs 667,450/=. However, should the Court order the Appellants/Applicants to release half of the decretal sum of Kshs 337,725/= to him and the balance be deposited in a joint interest earning account in the names of both advocates.

Determination

8. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made.

9. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules** provides as follows:

6(1). (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

6(2) 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.

10. 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 no longer 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.

11. 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.”

12. 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”.

13. 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.”

14. 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.”

15. 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”.

16. 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.**

17. 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 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.**

18. 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.

19. In this case it is contended, in the submissions as opposed to the affidavit, that the respondent disclosed in his testimony at the trial that he was unemployed and does not earn a living, which is also acknowledged in the judgement of the lower court. It was contended that the respondent to this court no evidence whatsoever that she is a person of means in a position to refund the decretal sum or any part thereof if any part was released to the Respondent.

20. On the other hand the Respondent contends that he is a driver as clearly indicated by the records and he owns several properties hence he can easily refund the sum of Kshs 667,450/=.

21. In this application none of the parties has exhibited either the proceedings appealed from or the judgement. However, 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. 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. In these kinds of applications the burden is on the applicant to satisfy the Court that the respondent, a successful party ought to be deprived of the fruits of his judgement during the pendency of the appeal. Here, there is a positive and express averment in the replying affidavit that the Respondent is in a position to refund the said award.

22. 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 since the proceedings and judgement alluded to are not exhibited. On the other hand the Respondent has deposed that he is a driver 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 driver 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.

23. 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.

24. 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.

25. In the premises the application fails and is dismissed with costs to the Respondent.

26. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of December, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzioka for the Respondent

Mr Mahugu for the Applicant

CA Geoffrey