REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NUMBER 208 OF 2015 (JR)

F W NJOROGE

T/A F W NJOROGE & CO. ADVOCATES…….....APPLICANT

VERSUS

COUNTY SECRETARY, OLKEJUADO COUNTY GOVERNMENT

(Sued as the successor of

OLKEJUADO COUNTY COUNCIL)…….....…....RESPONDENT

RULING

1. On 25th January, 2016, this Court delivered a judgement herein in which it issued an order of *mandamus* is hereby issued compelling the Respondent, the Applicant in the instant application (hereinafter referred to as the Client), to pay to the ex parte Applicant (hereinafter referred to as the advocate) the sum of Kshs 5,073,269.00 being the decretal amount together with interest thereon at 14% per annum from 22nd April, 2012 until payment in full in Nairobi HC Milimani Miscellaneous Application Number 281 of 2012 between F W Njoroge & Co. Advocates vs. Olkejuado County Council. It also awarded the costs of the application to the advocate.

2. By a Notice of Motion dated 5th February, 2016, the client herein now seeks the following orders:

> **1) That the Honourable Court be pleased to certify the application as being urgent and be heard in the first instance "ex parte".**
>
> **2) That there be a stay of execution of the judgment, decree and any other consequential orders by Hon. G.V. Odunga, delivered on the 25th day of January 2016 at Nairobi pending the hearing and determination of the intended appeal to be filed by the Respondent.**
>
> **3) That the costs of this application be in the cause.**

3. According to the client, being dissatisfied and aggrieved with the said decision on both issues of law and facts, it intends to lodge an appeal at the Court of Appeal. In its view, the notice of appeal file herein is well within the time frame provided for under section 75(2) (sic) of the ***Appellate Jurisdiction Act***.

4. In support of its case, the client relied on the allegation that the ex parte applicant in her affidavit filed before this court on the 6th day of July 2015 and dated the 30th day of June 2015 deposed that she was in urgent need of money as she had made commitments which she had to meet urgently. It was therefore

contended that the advocate had through her own admission demonstrated that she was in dire financial need and was entirely dependent upon the decretal sum for her present and further survival and should she be paid the decretal sum pending appeal there is no way she will be able to reimburse said the sum thus rendering the intended appeal nugatory. On the other hand, the stay of execution of the decree herein will not in any way prejudice the advocate as it satisfies all the prerequisite and fundamental requirements for granting a stay of execution being that the Appeal raises such serious and weighty issues; the balance of convenience is in granting the stay of executing; and the appeal and application serves and affects the Respondent directly and hence of grant public importance.

5. In the client's view, its intended appeal raises substantial and weighty issues of law with a very high likelihood of succeeding once heard.

6. The advocate opposed the application. According to her, an advocate of the High Court of Kenya, 25 years standing, she is also a business lady with a lot of interest in real estate.

7. The advocate averred that despite the Court having directed the client to file an affidavit showing the inability of the applicant to repay the decretal sum ion the event of the appeal succeeding, the client did not adhere to the timelines given by the Court.

8. It was however contended that this court's jurisdiction under Order 42 Rule 6(1) of the ***Civil Procedure Rules*** is to be invoked where an Applicant has moved the court without unreasonable delay, has provided sufficient security for due performance of the decree and the court has to be satisfied that substantial loss will be occasioned to the applicant. While appreciating that the client had moved the court without unreasonable delay, it was contended that the client had not demonstrated what loss it would suffer and how the advocate would not repay the sum more so as it related to her fees which had been outstanding since the year 2009.

9. The advocate disclosed that she was a person of means hence able to refund back the entire sum of Kshs 5,073,269/= together with interest at 14% from 22nd April 2012. In support of this averment, the advocate disclosed her worth as follows :

a. Nabo Capital Fixed deposit expected to Mature on 26th April 2016 at Kshs 13,944,089.94

b. Motor vehicle Log Book for Range Rover V8 registration number KBX 122H currently valued at valued at Kshs 6,150,000/=

c. Certificate of Lease for Nairobi/block/93/1523 a house in South B worth about Kshs 20,000,000/=

d. Title deed for Kjd/Dalalekutuk/5179 land in Kajiadovalued at about Kshs 5,000,000/=

e. Title deed for Kjd/Meto2276 land in Kajiado valued at about Kshs 22,500,000/=

f. Title deed for Kjd/Kitengela/24019 Plot in Kitengela valued at about Kshs 3,000,000/=

g. Title deed for Kjd/kitendant/23976 Plot in Kitengela valued at about Kshs 1,500,000/=

h. Title deed for Kjd/Kitengela/23977 Plot in Kitengela valued at about Kshs 1,500,000/=

i. Title deed for Kjd/Kitengela/23978 Plot in Kitengela valued at about Kshs 1,500,000/=

j. Title deed for Kjd/Kitengela 23973 Plot in Kitengela valued at about Kshs 1,500,000/=

k. Title deed for Kjd/Kapitiei North/22202 valued at about Kshs 1,500,000/=

l. Lease for house Apartment Number C3 BLOCK C XENIA APARTMENT ON

LR.NO.209/8248 NAIROBI located on State House Avenue and valued at about Kshs 27,000,000/=

m. Transfer of Flat Number 66 on Land Reference Number 1/1148 valued at about Kshs 12,000,000.

n. 2 Ordinary shares in Riverwood Ridge Ltd which owns 150 acres in Isinya-Kajiado and 156 acres in Naivasha whose value are in excess of Kshs 400,000,000/=

10. She therefore contended that her current assets can be estimated to be over Kshs. 100,000,000/= hence very able to pay back the client the sum of Kshs 5,073,269/= together with interest at 14% from 22nd April 2012 should its appeal succeed. The advocate further expressed her willingness to deposit one of her title deed, of equal value as security with this court or any security as the Court orders to assure the client that she would make good the sum of Kshs 5,073,269/= together with interest at 14% from 22nd April 2012 in the very unlikely event that it succeeds in its appeal.

11. The advocate clarified that although in the affidavit of 30thJune 2015, she deposed that she was in urgent need of money as she had made commitments which she had to urgently meet she did not mean nor should be understood to mean that she was a person of straw and this is the only money she has or was expecting but rather that what she is claiming is her legal fees which she is entitled to after rendering legal service and which costs were duly taxed by the court against the respondent and that justice delayed is justice denied.

12. In her view, as a business lady opportunities knock and when they knock one has to be prepared and have liquid cash hence her constant urgent need of money more so when faced with the opportunities.

13. I have considered the application herein and the various positions urged on behalf of the parties.

14. 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*** under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. Accordingly, as was held by the Court of Appeal in **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** this Court's jurisdiction in considering an application for stay as opposed to the jurisdiction of the Court of Appeal is fettered by the aforesaid conditions. 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 same, 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 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 thereof 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 to be 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. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality.

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. The client contended that the averments made by the advocate to the effect that she was in dire need of finances was an indication that the advocate would not be in position to refund the decretal sum. This was the position adopted by **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. In my view the mere fact that a person in whose favour a decree has been issued requires money does not necessarily render such a person incapable of refunding the decretal sum. After all the reason why the advocate commenced this litigation was because she was in need of the said money. To use such an averment against the advocate would be unreasonable and unfair. 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**

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 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 persons 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.

23. In the replying affidavit, the advocate has deposed that she is a person of means and this averment is not seriously contested by way of contrary credible evidence save for attempts to discredit the same from the bar. The client's belief that the respondent will be unable to repay the decretal sum has accordingly been displaced by way of credible evidentiary facts. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

> **"Since in the replying affidavit the respondent has shown that he is not a man of straw and that he would be in a position to refund the decretal sum, the court is not satisfied that if the applicant's intended appeal were eventually to succeed, that success would be rendered nugatory by the refusal to stay the execution of the decree."**

24. In my view, even if it were the case that an applicant does not know the respondent's financial capability, that would not necessarily give rise to the presumption that the respondent will be unable to repay the sum. There must be some other factors present on the basis of which such a presumption can be made.

25. On the material before the Court I am not satisfied that the client has shown that it stands to suffer substantial loss if the stay sought is not granted. It has not been contended that the client is likely to close shop if it is compelled to pay the said sum. The advocate has shown on the other hand that all things being equal she is capable of making good the sum in question should the client's appeal succeed.

26. On the issue of the chances of success of the appeal, this Court is not at liberty to delve into the details of that matter as to do so would amount to this Court sitting on an appeal against its own decision. Whereas the Court appreciates that its decision may be reversed on appeal, until that happens the Court must have confidence in its decision and it would be absurd for the Court to make a finding that the intended appeal against its decision has high chances of success.

27. With respect to the validity of the Notice of Appeal, it is not for this Court to deal with the said matter. For the purposes of an application for stay what gives the Court jurisdiction is the existence of a Notice of Appeal as opposed to the existence of a valid Notice of Appeal.

28. Taking into account the principle of proportionality and equality of arms as required under the overriding objective principle I am of the view that in the absence of evidence that the applicant stands to suffer substantial loss coupled with the fact that the advocate has a judgement in her favour, there would

be a much larger risk of injustice if the court found in favour of the client, than if it determined this application in favour of the advocate. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

29. Consequently the instant Notice of Motion lacks merit and the same is dismissed with costs.

30. Orders accordingly.

Dated at Nairobi this 10th March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwaniki for Mr Makumi for the advocate

Mr Kinyanjui for Mr Mungao for the client

Cc Mutisya