REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 221 OF 2011

STEVE TITO MWASYA.

JACINTA NDINDA MUENDO (*Both Suing as The Legal A Representatives of the Estate of Sherrina Koki Tito (Deceased)* .....PLAINTIFFS/RESPONDENTS

VERSUS

ROSEMARY MWASYA.....DEFENDANT/APPLICANT

R U L I N G

The application for consideration by this court is the Notice of Motion dated the 19th day of November, 2015. It is brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the civil Procedure Act, Cap 21 Laws of Kenya. The Applicant has sought the following orders.

1. Spent
2. That there be an order of stay of execution or the enforcement of the judgment and decree delivered on the 6th November, 2015 or any part thereof pending the hearing of this application inter parties and/or until further orders of this court.
3. That, there be an order of stay of execution or enforcement of the judgment and decree delivered on 6th November, 2015 or any part thereof pending the hearing of the intended appeal and/or until further orders of this court.
4. That pending the inter partes hearing of this application an interim relief be granted in terms of prayer 2 above.
5. That costs of this application be granted to the applicant herein.

The application is premised on the grounds set out on the body of the same and on the annexed affidavit sworn by Antony Kariuki on the 19th November, 2015.

The summary of the Applicant's case as captured in the said affidavit is that: the suit herein was filed by the Plaintiff's on the 20th June, 2011 seeking general damages under the law Reform Act and the fatal accidents Act against the Defendant/Applicant. That judgment in the matter was delivered on the 6th day of November, 2015 for Ksh.14,502,680/- together with costs.

The Defendant being disatisfied with the said judgment filed a Notice of Appeal and sought typed proceedings on the 18th November, 2015. The Plaintiff is likely to apply for the decree as indicated in their advocate's latter dated 13th November, 2015 and for that reason, the defendant is apprehensive that execution might issue any time.

He further depones that, he has been informed by his advocate that the judgment was scheduled to be delivered on 30th October, 2015 but was later postponed to the 6th November, 2015 which date was inadvertently not diarized in the firm's diary and as a result there was no opportunity to apply for informal stay of execution. That having elected to exercise its undoubted right of appeal it's only fair and just that a stay of execution be granted pending he hearing of the intended appeal failing which the defendant will suffer irreparable loss.

The deponent further avers that the Plaintiff's financial status is unknown and there is no guarantee that if this amount of money is paid to them, they will be in a position to refund the same should the appeal succeed. On the other hand, the insurers of the Applicant, M/s Britam General Insurance Co. Limited is a financially stable institution which will be in a position to pay the decretal sum should the appeal succeed.

That the intended appeal is arguable and the application has been made timeously and the Defendant is willing to meet such requirements as to security should the court deem it just in the circumstances.

The Plaintiffs have opposed the application and in so doing, they have filed a replying affidavit sworn by one of the Plaintiffs namely Steve Tito Muasya. In the said affidavit, he depones that the deponent of the affidavit in support of the application has no capacity to swear the same on behalf of the Applicant/Defendant and to that effect, the application is not supported by any evidence. He further avers that the Defendant has not demonstrated how she will incur substantial loss if a stay of execution is not granted. He states that he runs a consultancy on clearing and forwarding at Jomo Kenyatta International Airport along Mombasa Road earning a salary of Ksh.400,600/- hence able to repay the sums should the appeal succeed. He further avers that he owns immovable properties within Nairobi City worth Ksh.30 million. It is his contention that no security has been offered by the Defendant and that the intended appeal has no chances of success given that the Defendant elected not to testify in support of her defence.

Parties agreed to dispose off the application by way of written submissions which they duly filed. The submissions reiterate the contents of their respective affidavits. In their submissions, the applicants relied on the case of **Joseph Kangethe Kabogo and another Vs Michael Kinyua Ngari (2012) eKLR** on the issue of the competence of the deponent of the supporting affidavit and in that case the judge held: -

> ***"In my view, an application can be supported by the affidavit of any person who has an explained legal nexus with the Applicant. The affidavit sworn in support of this application is done by a person with such legal nexus to the Applicant, more so through the explained doctrine of subrogation. I, therefore, find that this application is competent before the court."***

On the stay of execution, he has relied on the case of **James Wangalwa & another Vs Agnes Naliaka Cheseto [2012] eKLR** where the court considered the conditions to be satisfied by the applicant in dealing with an application for stay of execution wherein the court held that: -

> ***"Sufficient cause being a technical as well as a legal requirement will depend entirely on the applicant satisfying the court that:-***
>
> a. ***Substantial loss may result to the applicant unless the order is made,***
> b. ***The application has been made without unreasonable delay and***
>
> c. ***Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant."***

On the first issue, the deponent Antony Kariuki has described himself as the legal manager of Britam General Insurance Co. Kenya Limited, who are the insurers of the Applicant hence seized of and fully conversant with the matter herein. The Plaintiff/Respondent submits that the said deponent has no capacity to swear the said affidavit on behalf of the Applicant.

In my view, the insurers have an interest in the matter in that they are liable to pay the decretal sum in the event that the Applicant is found liable and judgment is entered against them as in this case. Their legal

interest is explained by the principle of subrogation. I, therefore, find that the application is competently before the court.

On his part, the Respondent/Applicant has relied on the following cases: -

Halal & Another Vs Thornton Turpin (193) LTD KR 365 where the Court of Appeal stated as follows: -

> ***"The High Court discretion to order stay of execution of its order or decree is fettered by three conditions: -***
>
> 1. ***Sufficient cause.***
> 2. ***Substantial loss would ensure form a refusal to grant stay.***
> 3. ***The Applicant must furnish security.***
> 4. ***The Application must be made without unreasonable delay.***
>
> ***In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo Vs Straman EA Ltd [2013] eKLR."***

The Respondent further submitted that all the four conditions enumerated above must be met before the court can exercise its discretion under Order 42 Rule 6 of the Civil Procedure Rules. They relied on the case of **Equity Bank Limited Vs Taiga Adams Company Ltd [2006] eKLR** where the court held:

> ***"…… of even greater impact is the fact that an applicant has not offered security at all, and that is one of the mandatory tenets under which the application is brought…. Let me conclude by stressing that all the four not one or some, must be met before this court can grant an order of stay……"***

It was their further submissions that the Applicant must discharge his burden of proof by demonstrating (by way of evidence) why the decree holder may be unable to repay the decretal sum. They relied on the case of **Socfinac Co. Limited Vs Nelphael Kimotho Mutuu [2013] eKLR** where the court held: -

> ***"The appellant's belief that the respondent will be unable to repay the sum is solely based on the Appellant's lack of knowledge as to the respondent's financial capability and does not give rise to the presumption that the respondent will be unable to repay the sum. There must be factors that led to that presumption. The law of evidence places the onus of proof on the party making the allegation and a mere averment that due to the respondent's social and economic status she is unlikely to refund the money is not tenable in law."***

The Respondent's also relied on the case of **Machira T/a Machira & Co. Advocates Vs. East African Standard [2002] 2KLR** where Justice Kuloba observed thus: -

> ***"In addition, in the exercise of the courts discretion in a judicial fashion, the court cannot legitimately look at a matter on one assumption alone, favouring one party and ignoring the other party. In applications of this nature there is no rule of law or practice or sound principle requiring a court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is preferred party. There would be no sound principle to back up such presumption. The matter must remain in the discretion of the court always exercised judicially, i.e. circumspectly and considering all the material circumstances of the case an excluding everything that is extraneous, and never shutting one's eye to the interests of any party. As the appellant or intended appellant exercises his right of appeal nothing ought to be done which will jeopardize his interests in case his appeal is successful, or which may be a futile endeavour trying to take further steps; but on the reserve side of things, from the point of view of the party who is, at least for the time being, successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails……."***

I have carefully considered the materials before me and the submissions by the learned counsels and in my view, the issues to be determined by this court are as hereunder.

1. Whether the application is competently before the court.
2. Whether the Applicant has satisfied the requisite conditions to warrant granting of orders sought.

The conditions for granting a stay of execution are now settled. While an order for stay of execution is a discretionary one, that discretion is fettered by several conditions as set out in Order 42 Rule 6(2) of the Civil Procedure rules. The conditions are as hereunder: -

1. Application must be made without undue delay.
2. The applicant must demonstrate that they will suffer substantial loss unless the order sought staying execution is granted.
3. That the applicant should provide security as may be ordered by the court.

On the first condition and whether the application was filed without undue delay, it is noted that judgment was delivered on 6th November, 2015 and the application was filed on the 20th November, 2015. In my view the application was filed timeously two weeks.

Regarding the second condition of substantial loss that is likely to be suffered by the applicant if a stay is not granted, the Applicant submitted that it will suffer substantial loss and damage if stay is not granted because the decretal sum is substantial and the financial status of the Plaintiffs are unknown and there is no guarantee that they will be in a position to refund the money if the appeal succeeds. The Respondent on his part submits that he is a man of means earning a salary of Ksh.410,000/- and (he owns properties worth Ksh.30 Million). He avers that he is in a position to refund the decretal sum should the appeal succeed.

The applicant has not stated on oath that the respondent is a person of no means and that he will not be in a position to refund the money in the event that the appeal succeeds. He has only deponed the fact that the Respondent's financial status is unknown and, therefore, there is no guarantee that he will be able to refund. Whereas some courts have held that it is the duty of the applicant to show that the Respondent is not capable of refunding the money, I am persuaded in this regard by the holding in the case of **National Industrial Credit Bank Limited Vs Aquinas Francis Wasike & another (UR)** (Nairobi Civil Appeal No. 238/2005) where the Court of Appeal stated: -

> ***"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge"***

Going by that holding the Respondents had a duty to prove that they are in a position to refund the decretal sum if the appeal succeeds. Though the 1st Plaintiff deponed that he is a consultant earning a sum of Ksh.400,000/- and that he owns properties in Nairobi worth Ksh.30 Million, he did not annex evidence by way of pay slip to prove that he indeed earns that kind of salary. Similarly, no evidence of ownership of the alleged properties was annexed by way of title documents to wit a certificate of lease and/or title. In absence of such evidence the 1st Plaintiff unfortunately, failed to discharge the burden of proof of his capability to refund the money should the appeal succeed.

It is noted that the decretal sum herein is a substantial amount and the 1st Plaintiff ought to have satisfied this court that he can refund the money. He needed to go further and annex evidence and not merely state, as he did, that he is capable of refunding the same.

On the third condition of security, the Applicant states that she is ready and willing to meet such requirements as security should the court deem it just.

The Respondent argues that the Applicants have not offered any security. Though order 42 Rule 6 (1) requires that the Applicant should offer security, the Applicant by deponing that she is ready to meet such requirements as the court shall deem fit and just means that she will be bound by whatever conditions that this Honourable court shall impose which in my view is good enough.

This being an application for stay, pending appeal to the court of Appeal, the Applicant is also under duty to show that she has an arguable appeal. I have perused the draft Memorandum of Appeal and without going into the merits of the same, it is an appeal that is arguable, in my opinion. As the courts have expressed themselves on several occasions, an arguable appeal does not necessarily mean that the appeal shall succeed.

For the reasons stated above, I hereby grant the following orders: -

1. ***A stay of execution of enforcement of the judgment and decree delivered on 6th November, 2015 or any party thereof pending the hearing of the intended appeal.***

2. ***The applicant to deposit the entire decretal sum, costs and interests that is to say a sum of Ksh.14,502,680/- in a joint account in the names of both Advocates within 30 days from today and in default execution to issue.***

3. ***There will be no orders as to costs.***

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

L NJUGUNA

JUDGE

In the presence of

…… ***for the Plaintiffs/Respondents***

…… ***for the Respondent/Applicant***