REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 1 OF 2015

ZAVERIO KIRAI RINJIRU ..... APPELLANT/APPLICANT

VERSUS

JOSEPH WAWERU IMANI.....RESPONDENT

RULING

By a notice of motion dated 30th January, 2015 and filed in court on 2nd February, 2015, the appellant sought for an order for stay of execution of the decree arising out of the judgment delivered on 26th November 2014 in **Nanyuki Chief Magistrates Court Civil Case No. 115 of 2013** pending the hearing and determination of, initially, the application and, subsequently, the appeal that he has lodged against the judgment of the lower court; this ruling is on the second limb of the appellant's prayer.

The motion was supported by the affidavit of the applicant himself; he has sworn that he initially filed an application for stay of execution of the judgment and decree in the magistrates' court but that his application was rejected. He deposes that if execution is allowed to proceed before his appeal is determined, the appeal will be rendered nugatory. He has also sworn that that he will suffer irreparable loss because he may not be able to recover the decretal sum from the respondent whose means are, according to him, unknown.

The respondent opposed the application and swore an affidavit in which he stated that the claim against the appellant arose out of a road traffic accident involving the appellant's motor vehicle and the respondent; he sustained bodily injuries as a result of the accident and the judgment against the appellant was the award made to him in compensation for the loss and damage he suffered. The appellant, according to the respondent, closed his case without calling any witness to controvert the respondent's case. The respondent also swore that he was capable of refunding the decretal sum should the appellant's appeal succeed.

The parties sought to have the application determined by way of written submissions and following this court's directions they filed and exchanged written submissions which I have had opportunity to consider in coming to this this decision.

One of the issues raised in the submissions and which has to be determined at the preliminary stage is whether the appeal was filed within time. This is an issue on which counsel for the respondent has founded a preliminary objection to the application arguing that the appeal was filed out of time without leave of this Court and thus there is, in effect, no appeal in which this application can be said to have been filed. In his submissions, counsel relied on **section 79G** of the **Civil Procedure Act, Cap 21** which provides that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time

which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. There is a proviso to that section to the effect that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

As noted earlier the judgment in issue was delivered on 26th November 2014; it is not clear from the applicant's application that a copy of the decree was ever prepared or delivered but for purposes of determination of the preliminary issue, I will take it that the material date was the date of the judgment which, ordinarily, is the date of the decree.

The memorandum of appeal was filed on 9th January, 2015 which counsel for the respondent argued was 44 days after the delivery of judgment and which, obviously, was outside the 30 day statutory limit.

In response to the preliminary objection, counsel for the appellant urged that the objection was misconceived because under **Order 50 rule 4** of the **Civil Procedure Rules** the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following (both days inclusive) is excluded from computation of time for amendment, delivery or filing of any pleading or the doing of any other act. Going by this rule, so counsel urged, the memorandum of appeal was filed twenty one days after the delivery of judgment and thus well within time. To appreciate the force of the appellant's submission, it is necessary to reproduce this particular rule here; it states:-

> ***50. (4). Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.***

The rule is self-explanatory that between the twenty first day of December of any particular year and the thirteenth day of January of the year following, time does not run for purposes of, amongst other things, filing any pleading, which in these circumstances would include the filing of an appeal.

Counsel for the respondent did not address this rule in his preliminary objection perhaps because he was not aware of it or may be because he did not have any answer to the rule's express provisions. Be that as it may, it is apparent that the appellant's memorandum of appeal was filed 24 days after the delivery of the judgment and thus within the limitation period. It follows that the respondent's preliminary objection is misconceived and it is hereby overruled.

Coming back to the merits of the application **Order 42 (6) of the Civil Procedure Rules** under which the application was made provides as

follows:-

> ***6. (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.***
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> ***(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

The grant of stay of execution is a temporary discretionary remedy**; Order 42(1)** generally gives this court the discretion to grant an order for stay of execution or make such order that it deems just as occasion demands. My understanding of r**ule 2(1)** of **Order 42 is that it** lays out the boundaries within which that discretion can be exercised and more specifically prescribes the circumstances when the order for stay cannot be issued regardless of the discretion with which the court has been clothed. It follows that the court may not exercise its discretion in favour of the applicant unless it is satisfied that a substantial loss may result and that the applicant has provided such security as may be necessary for due performance of the decree should the appeal fail.

In **Kenya Shell Limited versus Kibiru & Another (1986) KLR** at page 416, it was held (per Platt Ag JA) that substantial loss in its various forms, is the cornerstone in the appellate jurisdictions of both the High Court (under **Order XLI rule 4**, now **Order 42 rule 6**) and the Court of Appeal (**under rule 5(2)** of the **Court of Appeal Rules**) for granting a stay of execution of the decree appealed against; it is this substantial loss that has to be prevented in exercise of both appellate jurisdictions. The court held that without evidence of such a loss it was difficult to see why the respondent, who is a beneficiary of a money decree, should be kept out of his money.

On 30th January, 2016 this Court ordered the applicant to deposit the decretal sum in a joint interest earning account pending the hearing and determination of the application herein; if this order was complied with, and the respondent has not suggested that it was not, then the appellant has provided the necessary security for the performance of the decree. The only question is whether the appellant will suffer substantial loss if the decretal sum is paid the respondent.

The applicant has not mentioned anywhere in his application the sum awarded; neither did he attach a copy of the decree nor the impugned judgment from which the court could gather the extent of the award made. In the absence of such crucial material, it is not possible to tell that the applicant will 'suffer substantial loss' if the decretal sum is paid to the respondent.

As noted in the **Kenya Shell Limited (supra) case** a stay will not be granted unless there is evidence of substantial loss; a mere allegation that there is bound to be a substantial loss without substantiation of how such loss will occur is not sufficient. While referring to the need for such substantiation, Gachuhi Ag JA stated in this case at page 416 that:

It is not sufficient by merely stating that the sum of Shs 20, 380.00 is a lot of money and that 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 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 judgment. 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 judgment.

The Court of Appeal rejected the application and held that the applicant had not given to court sufficient material to enable it to exercise its discretion in granting the order for stay. I would say the same of the applicant's application; without sufficient material before court, there is no reason why the stay of execution should be granted; I would adopt the words of the learned judges in the ***Kenya Shell Limited case*** that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause.

For the foregoing reasons I would dismiss the applicant's application with costs.

Signed, dated and delivered in open court this 3rd June, 2016

Ngaah Jairus

JUDGE