REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPLICATION NO. 28 OF 2016

Joseph Gitonga Kuria.....1st Applicant

Elizabeth Wambui Gitonga.....2nd Appellant

vs

Daniel Githaiga Mwaniki.....Respondent

RULING

The applicants herein moved this court under the provisions of sections 65, 79 G and 95 of the Civil Procedure Act[1] and Order 41 Rule 27 & Order 49 Rule 5 of the Civil Procedure Rules, 2010 seeking two substantive orders, namely:- ***(a)*** *Leave to appeal out of time and,* ***(b)*** *an order staying execution of the decree in Karatina PMCC No 28 of 2014 pending the hearing of the intended appeal.*

It is argued that judgement was delivered in the absence of counsel for the applicants on 6th July 2016 at a time when legal practitioners were on a country wide strike, (a fact which this court readily takes judicial notice of) and that by the time the applicants advocates learnt about that judgement had been delivered, obtained proceedings and sought instructions, the period prescribed for filing an appeal had lapsed, hence the delay of **23** days which the applicants content is not inordinate and that the present application was filed without delay.

The application is opposed. The Respondent avers that judgement was delivered on 6th July 2016 and that the applicants did not appeal within the 30 days, that the application is an afterthought, that the intended appeal has no chances of success and that the Respondent is a contractor and is financially capable of refunding the money if the appeal succeeds.

In my view, two fundamental issues fall for determination, namely, ***(a)*** *whether the applicants have good grounds to warrant this court to grant them leave to appeal out of time and,* ***(b)*** *whether there are good grounds to warrant this court to stay the execution of the decree pending the aforesaid appeal.*

With regard to **(a)** above, he policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. In practice courts are probably not as reluctant to grant extensions of time as the authorities may suggest. Consideration will usually be given to the reasons for the delay and the merits of the appeal before declining to grant an extension of time.

The reasons offered are that the judgement was delivered at a time when advocates were on a nationwide strike, a matter which this court has already take cognizance of and which is acceptable. I find that the applicants have offered good reasons for not fling the appeal within the stipulated period and I have no

difficulty in exercising my discretion to enlarge time within which they can file their appeal.

On the second issue, the applicant seeks orders that the judgment of the lower court be stayed pending the hearing and determination of the intended appeal. Order **42** Rule **6 (1) & (2)** provides as follows:-

> (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 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.*
>
> (2) *No order of stay shall be made under sub rule (1) unless-*
>
> > *(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and 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*

The considerations for granting applications for stay pending appeal were discussed by the Court of appeal in the case of *Butt vs Rent Restriction Tribunal*[2] **(Madan, Miller and Porter JJA)** while laid down the following grounds:-

> *i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
>
> *ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
>
> *iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*
>
> *iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

It is clear from the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the above conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[3]What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*[4] where it was held *inter alia* that:-

> *"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*
>
> *The applicant must establish other factors which show that the execution will create a state of*

affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein vs. Chesoni****,**[5]* *……..the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"*

Regarding substantial loss, the applicants have not explained either in the affidavit or the grounds in support of the application that they will suffer substantial loss nor has it been shown that the applicants may not recover the money if paid to the Respondent. In *Equity Bank Ltd vs Taiga Adams Company Ltd****,*** **[6]** the court stated a follows:-

"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant."

In *Elena D.Korir vs Kenyatta University***[7]Justice Nzioki Wa Makau** had this to say:-

*"the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd**[8]** where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, 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**[9]**as follows:-*

"In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

Apart from proof of substantial loss the applicant is enjoined to provide security.[10]The applicantS have not made any proposals in this respect. There is therefore no offer of security coming from the applicants in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[11] The offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others.**[12]*

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd*[13]it was held that:-

"…….of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought…….let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay…" which principle was also emphasized in ***Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.**[14]*

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)***[15]** where 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".

Having carefully considered the application before me and the law, I a persuaded that the applicant has not satisfied the conditions stipulated under Order **42** Rule **6.**

I am fortified in my finding by the following excerpt from *Halsburys Laws of England**[16]* wherein the learned writers observe that:-

"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."

The judgement sought to be appealed against is a money decree. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd*[17] had this to say:-

"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."(Emphasis added)

Having fully considered the facts of this case, the arguments submitted by both parties and the relevant law and authorities, I am persuaded that the applicants have established a good case for the court to grant the applicants extension of time to file their intended appeal.

However, as for the prayer for stay, I have serious misgivings for several reasons, one, the applicant have not satisfied the conditions laid down under the Rules, namely, they have not established that they will suffer substantial loss, secondly, no security has been provided or offered. In fact these key issues were not raised in the application at all yet the said conditions are laid down under the rules and reiterated in numerous authorities.

Thirdly, this is a money decree and it has not been shown that if execution proceeds, the same cannot be recovered from the Respondent. On his part, the Respondent averred that he a contractor and is financially able to refund the money if required. This was not challenged in any manner.

Stay of proceedings is a serious matter and the court can only exercise its discretion to stay a judgement where sufficient grounds to warrant the orders have been established. In the present case, no sufficient grounds have been established to warrant the court to grant the orders of stay. I therefore partly allow and partly decline the application order as follows:-

***i. That** the applicant be and are hereby granted leave to file their intended appeal in the High Court against the judgement/decree delivered in RMCC NO. 28 OF 2014 within 14 days from the date of this ruling.*

***ii. That** the prayer to stay the Judgement/Decree issued in RMCC No 28 of 2014 is refused.*

***iii.** No orders as to costs.*

Orders accordingly

Signed, Delivered and Dated at **Nyeri** this **10th** day of **October** 2016

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2]Civil App No. NAI 6 of 1979

[3] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[4] HC Misc No. 42 of 2012 OR {2012} eKLR

[5] {2002} 1 KLR 867

[6] {2006}eKLR

[7] {2012}eKLR

[8] {1993} KLR 365

[9] {2013}eKLR

[10] See judgement in Republic vs Commissioner for Investigations & Enforcement,Misc App no 51 of 2015 (NBI),

[11] Ibid

[12] Civil Appeal No. 291 of 1997

[13] Supra note 6

[14] Supra note 14

[15] {2002} KLR 63

[16] 4th Edition, Vol 37 pages 330-332

[17] Civil Application number NAI 322 of 2006 (UR)