REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 431 OF 2010

JARED KANGWANA……..……1ST PLAINTIFF

THE MONARCH GROUP LIMITED…….…..….2ND PLAINTIFF

VERSES

SAMSON KEENGU NYAMWEYA…….…….....1ST DEFENDANT

BOIN HOLDINGS LIMITED.....2ND DEFENDANT

RULING

1. On 6th November 2014, the Court granted judgment in favour of the plaintiff, for the sum of Kshs. 6,500,000/-. The court also awarded interest at court rates from the date of judgment. Finally, the costs of the suit were awarded to the plaintiff.
2. The Defendants have now come to court seeking leave to appeal out of time. The Defendants also seek an order for stay of execution until the Defendants can apply to the Court of Appeal for stay of execution pending the hearing and determination of their intended appeal.
3. The Defendants' application was supported by the affidavit of **SAMSON KEENGU NYAMWEYA,** the 1st Defendant. He deponed that the defendants were dissatisfied with the Ruling dated 6th November 2014, and that they, therefore intended to challenge it through an appeal.
4. According to the defendants' they could not have sought leave of the court earlier because their Advocates, who were on record at the material time, were not properly on the record.
5. On account of the failure to be properly on record, the said advocates were said to have been unable to respond to the issues raised in the application dated 16th June 2014.
6. The Defendants further said that their advocates could also not have applied for leave to appeal, because those advocates were not properly on record.
7. As a consequence of the failure by those advocates to place themselves properly on record, there was a delay in taking action, as so to enable the defendants lodge an appeal.
8. According to the defendants, they were now exposed to *"imminent and possible"* execution. That exposure is what prompted the defendants to bring the current application to court, under a certificate of urgency.
9. It was the defendants' contention that unless this court ordered the stay of execution, their intended appeal would be rendered nugatory.
10. In the assessment of the defendants, the intended appeal was arguable, and it had a high probability of success. Therefore, if execution was levied before the defendants had had their opportunity to canvass the appeal, the defendants feel that they would suffer irreparable damage.

11. The defendants also advanced the argument that the delay in bringing the current application was not so inordinate, or so great, as to be inexcusable. In any event, the said delay was blamed on the defendants previous advocates. Therefore, the defendants asked the court not visit upon them the mistake of their former lawyers.
12. In their written submissions, the defendants described the failure to seek stay of execution and the delay to seek leave to appeal as an honest mistake which was beyond the control of the defendants.
13. It was the defendants' case that as soon as they discovered the mistake, they remedied it expeditiously.
14. The defendants made it clear that they were fully aware of the requirements which must be met by a party seeking stay of execution. This is how they made that point;

> ***"5. Under Order 42 (6) (2) of the Civil Procedure Rules, a party must satisfy the court that unless stay of execution is granted substantial loss may result to the applicants and that the application has been made without unreasonable delay. The court may also impose security for the due performance of the decree. The provision of security is particularly pertinent in monetary decrees".***

15. The defendants quoted the following words of Gikonyo J. from **BUNGOMA HC MISC. APPLICATION No. 42 of 2011 JAMES WANGALWA & ANOTHER Vs AGNES NALIAKA CHESETO;**

> ***"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".***

16. Bearing in mind those words, the defendants went on to declare that;

> ***"….it is imperative upon the Applicants herein to show that the execution will irreparably affect or negate the very essential core of the applicants".***

17. It would therefore have been expected that the defendants would proceed to discharge the onus which they had identified so clearly. This is that the defendants said next;

> ***"The consequences of execution of the Judgment of 6th November, 2014 are far reaching and insurmountable to the applicants. Upon enforcement of the judgment/order, the Applicants will automatically be denied their right to justice and to defend their cause".***

18. To my mind, the foregoing is a bare statement, devoid of any evidence.
19. Even the defendants knew that they needed to provide evidence to show that they would suffer substantial loss if stay of execution was not ordered. I say that the defendants were aware of that need because they quoted the following words of Platt Ag. J.A in **KENYA SHELL LIMITED Vs KIBIRU [1986] KLR 410, at page 416;**

> ***"It is usually a good rule to see if Order XL1 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".***

20. The plaintiffs also share that view. They quoted the following words of Mwera J. (as he then was) in **ADAN NYAMBOK Vs UGANDA HOLDING PROPERTIES LTD (MSA) CIVIL APPEAL NO. 11 of 2012;**

> ***"Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal".***

21. Why then did I say that the defendants had made a bare statement which was devoid of evidence?

22. In **MACHIRA t/a MACHIRA & Co. ADVOCATES Vs EAST AFRICAN STANDARD (No.2) [2002] KLR 63, KLR 63,** Kuloba J. said that the person seeking stay of execution should;

> ***"Satisfy the court, on affidavit or on some other proper evidential material, that substantial loss may result to him, out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted".***

23. The learned Judge emphasized that it was definitely not enough for the applicant to restate the words of statute i.e. that he would suffer substantial loss.
24. He made it abundantly clear that;

> ***"If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified; details or particulars thereof must be given".***

25. In this case, the affidavit in support of the defendants application did not specify the details or the particulars of the loss which they would suffer if stay of execution was not ordered.
26. However, in their submissions, the defendants stated that unless execution was stayed the intended appeal would be rendered nugatory.
27. Therefore, the court was requested to stay execution in order to preserve the subject matter of the dispute.
28. In this case, the dispute is over money. The money was allegedly paid by the plaintiffs to the defendants, as a deposit towards the purchase price of a piece of land. The sale transaction is said to have fallen through. It is then that the plaintiffs filed suit to recover their money.
29. In those circumstances, if the subject matter of the dispute would be preserved, it would be akin to saying to the successful party to continue staying without the refund of money which had been paid to the defendants.
30. Considering that the sale transaction fell through, I am unable to appreciate how justice and fairness was likely to be achieved when the purchasers continued to be kept away from their money, for which the defendants do not appear to have given any consideration.
31. The defendants said the following, at the tail-end of their submissions;

> ***"While it is easy to qualify and quantify loss from a monetary perspective, there are other types of loss and harm or prejudice that are not readily amenable to monetary quantification and which the law recognizes as falling within the scope of what would lead to substantial loss or whether an Appeal being rendered nugatory".***

32. The eloquence of the defendants was, however, not followed through with evidence of the other types of loss, harm or prejudice which they would suffer if stay of execution was not granted.
33. In **APAR INDUSTRIES LIMITED Vs JOE's FREIGHTERS LIMITED, CIVIL APPLICATION No. 197 of 2012, (COMMERCIAL & ADMIRALTY DIVISION, MILIMANI), GIKONYO J.** expressed himself thus;

> ***"So the applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words, he will be reduced to a mere explorer in the judicial process, if he does what the decree commands him to do without prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved, as long as the Respondent cannot pay back".***

34. And in respect to the onus of proof, the burden rests on the applicant.
35. It is not for the Respondent to prove his ability to repay the money, in the event that the Applicant was ultimately successful in his appeal.
36. In this case, the defendants did not even suggest that the plaintiffs might be unable to repay the money to the defendants, in the event of the appeal succeeding.

37. My other concern in this case, was that the defendants did not offer any security for the due performance of the decree. That failure does not aid the defendants at all.
38. In the result, I find no merit in the application for stay of execution. The same is therefore rejected.
39. However, the defendants are granted leave to appeal out of time. The said appeal shall be filed within the next **TEN (10) DAYS.**
40. As the application dated 23rd November 2014 is partially successful, I order the defendants to pay to the plaintiff's one-half of the costs which would have been payable if the whole application were dismissed.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **10th day** of **June** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ondieki for the 1st Plaintiff

No appearance for the 2nd Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.