REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 413 OF 2014

MILIMANI LAW COURTS

SAMUEL NJENGA ……………….....………………………….. APPELLANT

VERSUS

AUGOSTINO ONANDA ……………..……………….... 1ST RESPONDENT

OROKISE SACCO LIMITED ………….…………… 2ND RESPONDENT

R U L I N G

Before this court for determination are two applications, one filed by the 1st Respondent Agostino Onanda seeking to have this appeal as filed struck out. The said application by way of Notice of Motion is dated 6th November 2014.

The second application is dated 3rd February 2015 filed by the appellant Samuel Njenga, seeking for stay of execution of decree issued in Milimani Nairobi Chief Magistrate's Court on 8th August 2014 by Honourable Ms Kabaria Resident Magistrate, pending the hearing and determination of this appeal.

The two applications were heard together on 18th February 2015 after the court gave directions on 11th February 2015 to that effect. I will first deal with the application dated 6th November 2014 as it seeks to dispose of the appeal as filed on 5th September 2014 and amended on 22nd September 2014 summarily.

In the said application, the respondent lays 4 grounds supported by the affidavit sworn by Augustino Onanda sworn on 6th November 2014.

In his view, the appeal as filed is a sham not worth going to a full trial.

Further, that the amended Memorandum of Appeal is scandalous, frivolous and or vexatious and amounts to an abuse of the process of the court. Finally, that the amended Memorandum of Appeal may prejudice, embarrass or delay the fair trial of this matter.

The application is brought under the provisions of Article 50 (1) (e) of the Constitution Section 3A, Sections 63(e), 79B, 79G of the Civil Procedure Act, Order 2 Rule 15, Order Rule (1) of the Civil Procedure Rules and all enabling provisions of the law and procedure. The supporting affidavit sworn by the respondent/applicant deposes to the facts that form the background and facts of the case as decreed in the lower court.

Mr Onanda deposes that on 24th July 2012 he instituted suit against the 1st and 2bd respondent Samuel Njenga and Orokise Sacco Ltd for recovery of kshs 364,558.00 being loss and damages suffered by him in respect of :

a. ***Value of motor vehicle registration number KAT 897K less the balance owed to the defendant kshs 240,000.***
b. ***Loss of user with effect from the 5th June 2012 until date of filing suit.***
c. ***Kshs 2542 (average of profit made per day) by 49 days = 124,554.00 total 364,558. He deposed that on 8th August 2014, judgment was entered in his favour against Samuel Njenga for kshs 240,000 without any interest and each party were ordered to bear their own costs, but the suit against Orokise Sacco Ltd was dismissed with costs.***

The applicant sets out his evidence before the lower court on how he paid the money for purchase of motor vehicle registration KAT 897K in three installments and that therefore there would be no issue for consideration in this appeal, the lower court having found in his favour, and that as the claim was based on contract, the applicant accuses the respondent of delaying and denying justice to the applicant.

Further, that the amended Memorandum of Appeal was filed out of time without obtaining leave of court hence it should be struck out. That the appellant/respondent is using the court to unjustly enrich himself as he is keeping both the motor vehicle and the money which is immoral.

That with overwhelming evidence that the appellant owes the applicant the money decreed, the amended Memorandum of Appeal is a sham as it introduces issues of a road traffic accident which are irrelevant , depicting the scandalous, frivolous and vexatious nature of appeal as a whole and negates the well settled principle of law that there must be an end to litigation.

That this court should find that there is no sufficient ground for interfering with the decree or part of the decree of the subordinate court and reject the appeal summarily.

The application by the 1st respondent was opposed by the appellant who filed grounds of opposition dated 26th November 2014, stating that:-

1. The Respondent's applications has no merits whatsoever.
2. The appeal conforms to the provisions of Section 65 and 79G of the Civil Procedure Act.
3. The Memorandum of Appeal is filed pursuant to Order 42(1) of the Civil Procedure Rules.
4. Any errors in the Memorandum of Appeal may be remedied pursuant to Order 42 Rule 3 of the Civil Procedure Rules.
5. The appeal has not gone before the judge pursuant to Section 79B of the Civil Procedure Act and Rule 12 and 13 of the Civil Procedure Rules.
6. Order 42 Rule 35 are not available to the 1st respondent .
7. The applicant is not in any way prevented by the appeal from recovering under the decree. The appellant has an inherent right under the Civil Procedure Rules, Article 159 of the Constitution to be heard on his appeal.
8. The application has not established any reasonable grounds to warrant the issuance of the orders sought.
9. The application is premature, made in bad faith and therefore amounts to an abuse of the process of court.
10. The appellant urged this court to dismiss the 1st respondent's application with costs.

The 1st respondent also filed some submissions dated 17th December 2014 but no reference was made thereto as no leave of the court was sought or obtained to file the same and there is no indication that they were served upon the appellant who equally did not refer to them.

The application by the 1st respondent was argued orally on 18th February 2015 with Miss Badia

submitting on behalf of the 1st respondent/application that the application was guided by the provisions of Section 79B and Order 2 Rule 15, Order 42 Rule 11 of the Civil Procedure Rules. She urged the court to examine Order 42 Rule 2 and find that since there is no copy of certified decree filed with the Memorandum of Appeal and as there are no certified proceedings filed and served, the court should direct the respondent/appellant to comply with Order 42 Rules 2 and 4 of the Civil Procedure Rules.

In the opposing submissions made by Mr Ambani representing the appellant/respondent, counsel contended that the appeal was filed within time and that the appeal herein raises grounds which can be canvassed at the hearing hence it should not be struck out as that order of striking out the appeal would be hearing the appeal prematurely . That under Order 2 Rule 15, one must select under which paragraph, citing the DT Dobie & Co vs Muchira case, the appellant submitted that a suit ought not to be dismissed unless it appears to be so hopeless that it cannot be cured by an amendment. That Order 42 Rule 2 of the Civil Procedure Rules allows the appellant to file a decree as soon as possible and that the appellant was in the process of extracting a decree and compiling a record of appeal. Mr Ambani urged the court to dismiss the applicant/1st respondent's application with costs.

I have carefully considered the application dated 6th November 2014 by the 1st respondent seeking to strike out the appeal herein under various provisions of the law as supported by the grounds on the face of the application and the 1st respondent's supporting affidavit and submissions by his counsel. I have also considered the appellant's grounds of opposition and opposing submissions.

The issue for determination is whether the 1st respondent was made out a case for striking out of the appeal under the provisions of the law relied on.

The primary provisions of the procedural law under which the application is predicated are Order 2 Rule 15 of the Civil Procedure Rules. The Rule 15 of Order 2 allows the court at any stage of the proceedings to order to be struck out or amended any pleading on the grounds that 15 (1)-

a. It discloses no reasonable cause of action or defence in law; or
b. It is scandalous , frivolous or vexatious ,or
c. It may prejudice, embarrass or delay the fair trial of the action.
d. It is otherwise an abuse of the process of court.

On any of the above listed 4 grounds, the court may thus order the suit to be stayed , dismissed or judgment entered accordingly, as the case may be.

The power conferred upon the court to strike out the pleadings under the above provisions of Order 2 Rule 15(1) of the Civil Procedure Rules is a discretionary power. It has been held time and again that discretionary power to strike out a pleading is a jurisdiction that must be exercised sparingly and only in clear and obvious or plain cases. In addition, that unless a matter is clear and obvious, a party to a civil litigation should not be deprived of his right to have his suit or appeal determined in a full trial. Further, that a court ought to act cautiously and carefully and consider all the facts of the case without embarking upon a mini trial thereof before dismissing a case for not disclosing a reasonable cause of action or being scandalous, vexatious, frivolous or an abuse of the court process.

The above position was settled in the celebrated and most cited and most approved case of **DT Dobie & Co Ltd vs Joseph Muchira (1982) 1 KLR** where the Court of Appeal land marked that:-

> ***" The power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. It should be exercised sparingly and cautiously." It should be exercised only after the court has considered all facts , but it must not embark on the merits of the case itself as this is solely reserved for the trial judge". " The court should aim at sustaining rather than terminating a suit. A suit should be struck out if its so weak that is it beyond redemption and incurable by amendment.***

As long as a suit can be injected with life by amendment, it should not be struck out".

From the above decision which I wholly approve, the striking out of a pleading is a summary procedure that is applied radically and in a draconian manner. It must therefore be exercised with caution and courts must therefore be slow in resorting to it. It therefore follows that if a pleading raises a triable issue, even if at the end of it, it may not succeed, the pleading ought to go forth for a full trial.

However, where the pleading or suit is plainly and obviously without substance or is groundless or fanciful and or is instituted with the intention to overreach or with ulterior motive or for purposes of gaining some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not permit its processes to be used as a forum for such theatrical maneuvers since to do that will be giving an opportunity to parties to crowd the court or litigate over matters which lack bona fides with the sole intention of

Vexing the adverse party and subjecting them to unwarranted anxiety, trouble and expense and also wasting very precious judicial time and resources that could be allotted to deserving cases, in contravention of the very overriding objectives of the law as espoused in Section 1A and 1B of the Civil Procedure Act, 2010.

The important ancillary questions that must of necessity be answered in determining this application for striking out the appeal are:-

Does the appeal herein as filed disclose no reasonable cause of action? And what is a cause of action, and what does disclosing no reasonable cause of action mean ?

A cause of action has been defined in many ways by different authors and judicial authorities. In **Lentang vs Cooper (19650 QB 232**, it was held that a cause of action is ***" a factual situation the existence of which entitles one person to obtain a remedy against another person."*** In **Savage and Another vs Uwechua (1972) 1 LL NLR part 1 251 at page 257; (1972) 3 Supreme Court of Nigeria 24 page 221** Fatal Williams, J.SC (as he was) stated:-

> " ***A cause of action is defined in Stroud's Judicial Dictionary as the entire set of circumstances giving rise to an enforceable claim. To our mind, it is, in effect, he fact or combination of facts, which gave rise to a right to sue and it consists of two elements. The wrongful act of the defendant which gives the plaintiffs his cause of complaint and the consequent damage."***

On the other hand, **Lord Esher in Cooke v Gill(1873) LR 8.C.P. 107** and **in Read v Brown (1888) 22 O.B.D 128 (CA)** stated:

" It is every fact that it would be necessary for the plaintiff to move, if traversed, in order to support his right to the judgment of the court." As to what " ***reasonable cause of action"*** means, In **Drummond Jackson v British Medical Association and Others, (1970) 1 W.LR 688 at page 696** by Lord Pearson:-

" …………………..No exact paraphrase can be given, but I think "reasonable cause of action means a cause of action with some chance of success when……………only the allegation in the pleadings are considered as required by paragraph 2 of the Rule:

"***If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."***

The above rule 15 of Order 2 also empowers the court to strike out a pleading which is scandalous, frivolous, vexatious and an abuse of the process of the court. . In **Blake vs Albon Life Assurance Society (1876) QB 663, MARHAM vs Werner, Bett & Co (1902) 18. Christie vs Christie (1973) LR,**

ch 499, it was stated that“ A pleading is said to be scandalous if it states:-

i. ***Matters which are indecent, or***
ii. ***Matter that are offensive, or***
iii. ***Matter made for the mere purpose of abusing or prejudicing the opposite party, or***
iv. ***Matters which charge the opposite party with bad faith or misconduct against him or anyone else; or matters that are necessary but otherwise accompanied by unnecessary details or***
v. ***Matters that contain degrading charges”***

In HCC 587/2011-Jackson Ngechu Kimotho vs Equity Bank Ltd & KRA, Odunga J observed ***that “……….the word “scandalous” for the purposes of striking out a pleading under Order 2 Rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well known fact can also be rightly described as scandalous referring to the case of J.P. Muchira vs Wangethi Mwangi & Nation Newspaper CA 179/1997. But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matte is scandalous, regard must be had to the nature of the actions.”***

It has also been held that a matter is frivolous if : It has no substance; or is fanciful or where a party is fighting with the court or when to put up a defence would be wasting court’s time, and when it is not capable of reasoned argument. See (**Dawkins vs Prince Edward of Save Weimber (1976) 1 QB 499; and Chaffers vs GoldsMid (1894) 1 QB 186.**

Under Order 2 Rule 15 of the Civil Procedure Rules aforesaid, the court may strike out a pleading where it is satisfied that the same is frivolous , vexatious , scandalous or does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. However, the words “scandalous ‘ for the purposes of striking out a pleading under Order 2 R 15 of the Rules is not limited to the indecent.

In **Dev Surinder Kumar By v Agility Logistics Ltd HCC 311/2**014, it was held inter alia:-

“ For a pleading to be dismissed pursuant to the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, it should be made clear and obvious that the issues raised by the plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action against the defendant”.

The respondent also contends that the Appeal as filed is scandalous frivolous and vexatious and may prejudice or delay the fair trial of the case. Further, that the Memorandum of Appeal as amended is an abuse of the court process as it introduces issues of road traffic accident which are irrelevant as the claim before the lower court was premised on a contract for sale and purchase of a motor vehicle . Further , that the appellant’s amended Memorandum of Appeal was filed out of time without leave of the court .

I have examined the amended Memorandum of Appeal filed in court on 9th October 2014. I have also read the initial Memorandum of Appeal filed as 5th September 2014.

The difference between the two Memorandum of Appeal is that the first one filed on 5th September 2014 is not dated whereas the latter filed on 9th October 2014 is dated 5th September 2014 and amended on 22nd September 2014. The latter Memorandum of Appeal also quotes that the amendments are pursuant to Order 42 Rule 3 of the Civil Procedure Rules. All the grounds of Appeal are the same.

The applicant has not shown that at the time the amended Memorandum of Appeal was filed, he had been served with initial memorandum. That being the case I see no reason why the appellant would require leave of court to file an amended Memorandum of Appeal which amendment only allowed the dating of the Memorandum of Appeal filed on 5th September 2014. I therefore dismiss the contention

by the respondent/applicant that the Memorandum of Appeal was filed out of time without leave of court, that being a mere procedural technicality that cannot vitiate the appeal.

The 1st respondent also avers that the appellant owes him the sum of kshs 240,000 as was decreed by the lower court on 8th August 2014. That may be so, as there is indeed judgment for the 1st respondent against the appellant, which judgment is impugned by this appeal. The only question therefore is whether the appeal is a sham not worth going for a full trial. The applicant/ 1st respondent swore a very detailed affidavit which tended to reproduce the pleadings in the lower court but which pleadings were never annexed to the affidavit.

This court is therefore left speculating as to what kind of pleadings were lodged in the lower court and what the judgment was all about, albeit both parties agree that there was judgment in favour of the 1st respondent for kshs 240,000 without interest.

This court appreciated that the 1st respondent has a valid judgment . However, the court cannot lose sight of the appellant's right of appeal, which rights have to be balanced out.

This court would off course appreciate the merits of the appeal as filed, as a compelling factor in making any orders as sought by the 1st respondent . However, this court cannot be called upon, at this stage, even before he lower court file is availed and the record perused, to determine the merits or demerits of an appeal that is validly on record.

In my view, striking out this appeal would require an in-depth examination of all the facts on record as pleaded, the evidence as adduced in the lower court by both parties and the judgment by the trial court.

It is impossible, to gauge from the affidavit evidence whether or not the appeal as filed is scandalous, frivolous, vexatious and or that it amounts to an abuse of the court process, or that it is a sham not worth going for full trial , or that it may prejudice,, embarrass or delay the fair trial of this matter, in the absence of or without perusing the entire lower court record.

It would also be impossible at this stage for this court to determine that the appeal as filed should be summarily rejected as contemplated under Section 79B of the Civil Procedure Act, without examining the lower court record.

I note that the Deputy Registrar has already called for the submission of the lower court record to this appeal vide letter dated 10th September 2014. But I am also aware that the proceedings and judgment must be typed and certified before the file can be submitted to the High Court for the matter to be considered by a judge for summary rejection. It would therefore be a miscarriage of justice for this court to summarily reject the appeal before examining the entire lower court record vis avis the contention in the applicant's supporting affidavit.

A party who avails themselves before this court deserve to be accorded a fair hearing, which right to a fair hearing is guaranteed under Article 50(1) of the Constitution and is unlimited pursuant to Article 25 of the Constitution This court would also be ousting the appellant from the judgment seat and therefore denying him access to justice, which is guaranteed under Article 48 of the Constitution if it was to reject the appeal summarily without seeing the record from which the appeal is raised.

In **Elijah Sikona & George Panken Narok on behalf of Trusted Society of Human Rights Alliance vs Mara Conservancy & 5 Others, Civil Case NO. 37/2013(2014)eKLR,** Emukule J when dealing with an application seeking to strike out a plaint observed that:

" There are well established principles which guide the court in the exercise of its discretion under these Rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious , a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and

carefully and consider all facts of the case without embarking on a mini trial therefore before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court……"

The above holding by Emukuke J echoes the locus classicus case of **D.T. Dobie & Co (K) Ltd vs Joseph Muchira (1982) KLR** which enunciated principles applicable in considering whether or not to strike out a pleading. Madan JA (as he then was) adopting the finding of Sellers L in **Wenlock vs Moloney (1965) 1 WLR 1238** where it was stated :-

" This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Further, Danckwerts L.J in the same case stated:

" The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading".

In **Crescent Construction Co.Ltd vs Delphis Bank Ltd CA 146/2001(2007) e KLR** the Court of Appeal in dealing with an appeal where a plaint was struck out on the grounds that it disclosed no cause of action and that it was frivolous , vexatious and an abuse of the court process observed:

" ***However, one thing remains clear and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive any litigant however weak his cause may be from the seat of justice . This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non starter."***

I am persuaded that on the pleadings before this court which merely consist of the amended Memorandum of Appeal and the application seeking to strike out the appeal under Order 2 Rule 15(1) of the Civil Procedure Rules , there is no sufficient material upon which this court can find in favour of the applicant/respondent and I accordingly dismiss the application dated 28th October 2014 as being premature, misconceived, frivolous, vexatious and an abuse of the court process.

turning on the appellant's application for stay pending appeal filed on 3rd February 2015 and dated 3rd February 2015, the appellant contends that his rights under the Constitution is threatened with infringement as the respondent is in the process of having the appellant arrested and committed to civil jail in execution of decree passed on 8th August 2014. He also contends in his grounds that he cannot secure the entire decretal sum pending the hearing of the appeal and prayed to be depositing 1/3 of his wages to secure payment of the decree. The appellant further contends that his appeal has merit and that it is in the interest of justice that the prayer for stay be granted as sought. The appellant's application is supported by the sworn affidavit sworn by the appellant Samuel Njenga on February 2014 wherein he deposes that prior to the institution of the suit in the lower court against him, he had saved some money and bought a matatu the subject matter of the suit but due to personal problems he disposed it off to the 1st respondent and what transpired is documented in the suit subject of this appeal.

The appellant further contends that after the judgment was delivered against him in the lower court, he was advised by his advocates to file an application for stay of execution but that he was advised that this being a decree for payment of money it was a requirement of the law that he furnishes security sufficient to cover the decree and costs but he did not have money hence he did not file the

application. The applicant deposes that he filed the application herein because his liberty was threatened and that he does not have any attachable assets which he can dispose of to raise the whole decretal sum or offer as security for costs. That he is a PSV conductor in Ongata Rongai route matatus and his wage was only kshs 300 per day and since he has a family and children who go to school, he can only commit 1/3 of his wage towards securing settlement of the decree wherein he believes the law allows him to avoid going to civil jail as committing him to civil jail will not serve any purpose since it will not secure payment of the decree and will only distort his life as he will not be in a position to work and take care of his family and settle the decretal amount. He prayed for stay of execution pending appeal and an order that he sets aside kshs 100/- towards settlement of decree while he looks for other alternative sources to enhance his payments as a condition for the stay contemplated in this application.

In a reply of 30 paragraph opposing affidavit, the 1st respondent vigorously opposed the appellant's application for stay pending appeal.

He contends that the application for stay of execution of decree pending appeal was not merited since the appellant had stated in his grounds of opposition to the application by the 1st respondent seeking to strike out the appeal dated 26th November 2014 at paragraph 7 that the applicant is not in any way prevented by the appeal from recovering under the decree. the 1st respondent further deposes that the appellant has been absenting himself from the subordinate court deliberately in order to protract the matter and that he believes that the appellant is hell bent to frustrate and deny the 1st respondent from realizing the fruits of his lawfully obtained judgment.

It is further contended that the appellant's conduct of having different lawyers in the lower court and in the appeal herein yet the pleadings appear to be prepared by one and the same advocate precludes him from being considered a pauper and is intended to prevent and frustrate the 1st respondent from executing decree herein.

In addition, the respondent avers that the appellant's rights under the constitution as consistently quoted in his numerous applications are to be balanced as against the 1st respondent constitutional rights as well.

The respondent depose that the appellant cannot quote and or use the law which he himself is circumventing and that poverty is not a defence in law and that after he sold the motor vehicle to the 1st respondent and received kshs 240,000/- the appellant attached the said motor vehicle and resold it to meet his financial needs in blatant disregard of the 1st respondents position and leaving the 1st respondent with nothing.

The 1st respondent further contends that it is arrogant for the appellant to say that he wishes to settle the decretal sum of kshs 278,860.00 at the rate of kshs 100 per day and that it is only a treacherous indication of how he wishes that the 1st respondent decree holder does not benefit from the judgment of the court. Further, that the appellant's application is a calculated venture to subvert the cause of justice which should not be allowed by this court . The 1st respondent urged this court to dismiss the appellant's application with costs.

In their oral submission made in court on 18th February 2015, the appellant's counsel Mr Ambani submitted that there is an appeal filed and that they have satisfied all the conditions for stay pending appeal.

On substantial loss, it is submitted that if the appellant is incarcerated, he will loose his liberty and will not be in a position to pay the decretal sum.

On whether the application was filed without undue delay, It was submitted that the appellant did not have security for the due performance of decree that is why he could not file this application in good

time and that he cannot furnish security as he is a PSV conductor.

In response, Miss Badia counsel for the 1st respondent submitted that the conditions for stay pending appeal as set out in order 42 Rule 6(2) of the Civil Procedure Rules had not been fulfilled by the appellant/applicant.

Miss Badia submitted that the application was filed with unreasonable delay as judgment was delivered on 8th August 2014 and appeal filed on 9th October 2014 yet it was not filed until 3rd February 2015 after 6 months which delay is unexplained yet the applicant admits that he was aware of the need to file the application. Further it was submitted that the application herein was filed to circumvent the Notice to show cause commenced in the lower court.

The respondent's counsel maintained that it had not been demonstrated what substantial loss the appellant would suffer if stay is not granted and that there is no sufficient cause shown for stay to issue pending appeal. It was further submitted that there is no offer for security for due performance of decree which is a mandatory requirement under the law, and urged the stay pending appeal application to be dismissed.

In a brief rejoinder, Mr Ambani for the appellant submitted that an appeal is not a stay but the mode of execution, and that there are many other modes of execution available and that the court can order for security as a condition for stay of execution pending appeal.

I have considered all the materials before me and in my view, the following are the issues for determination.

a. Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Act for the grant of stay of execution pending appeal;
b. Whether the argument by the appellant/applicant that he is poor and cannot be able to settle decree or deposit security for costs should be accepted by the court.
c. What orders should the court make.

On the first issue, the granting of stay of execution of decree pending appeal by the High Court is governed by Order 42 Rule 6(2) of the Civil Procedure Rules, and is granted at the discretion of the court when sufficient cause has been established by the applicant, on whom the incidence of the legal burden of proof lies (see section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya and Halsbury's Laws of England , VOL 17, paragraph 14 that :

"The incidence of burden:…………In respect of a particular allegation, the burden lies upon the party for whom the substation of the particular allegation is an essential of his cases."

Under the said Order 42 Rule 6 sufficient cause is established when the applicant proves the following conditions on a balance of probabilities that:-

a. Substantial loss may result to the applicant unless the order is made;
b. The applicant 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.

The above three conditions are the essence of Order 42 Rule 6 of the Civil Procedure Rules. They share an inextricable bond such that if one is absent it will affect the exercise of the courts discretion in granting stay of execution, although the court uis not precluded from considering other factors in fulfillment of the overridigng objectives of the law. see **Mukuma vs Abuoga (1988) KLR 645** where the Court of Appeal reinforced the above position.

On the first condition of substantial loss occurring, in **Mukuma vs Abuoga (supra)** the Court of Appeal was categorical that:

“………. the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

In **Tabro Tranporter Ltd vs Absolom Dora Lumbani (2012) e KLR** Gikonyo J was categorical that;-

“ Of course a frivolous appeal cannot be rendered nugatory. The only caution however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the Civil Procedure Rule on the chances o the success of the appeal. It must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test I have set out above”.

In this appeal, the appellant has alleged that the trial magistrate awarded damages that were never pleaded and prayed for in the sum of kshs 240,000.

In the application herein for stay of execution, the appellant has disclosed and it has emerged clearly that there was a notice to show cause why the appellant should not be committed to civil jail in execution of decree in the lower court, which prompted the appellant to seek refuge from this court, claiming that there are other modes of execution of decree besides committal to civil jail and that the committal to civil will infringe on his constitutional right to personal liberty whose consequences are said to be that will be not be in a position to settle the decree or look for money from alternative sources to settle.

On the other hand, the respondent states that the condition on what substantial loss will occur unless an order of stay is made has not been fulfilled.

I shall therefore tackle the issue of infringement of the right of personal liberty before returning to the subject of substantial loss. The commencement point is Section 34(1) of the Civil Procedure Act which enjoins the court executing a decree to deal with all questions arising between the parties relating to execute and provides:-

“ 34 (1) all questions arising between the parties to the suit in which the decree was passed, on their representatives and relating to the execution, discharge or satisfaction of the decrees, shall be determined by the court executing the decree and not by a separate suit”.

Thus, this court has not been told why the appellant did not apply for stay of execution of decree in the trial court that passed the decree, explaining therein the reasons why such stay is necessary and why the appellant is unable to settle the decree at one. The issue of whether or not the appellant is possessed of sufficient means to settle decree can only be determined by the court which passed the decree and executing such decree and not this court.

From the affidavit sworn by the appellant, it is clear that the appellant is urging this court to allow him to pay kshs 100/- per day which he

claims is 1/3 of his wages as a matatu PSV conductor, until payment of decretal sum, of over 278,000/- is settled. In the same breath, he is urging this court to allow him to pay kshs 100/- per day until security for due performance of decree is satisfied. The appellant contends that unless his terms as proposed are accepted by the court, he will suffer substantial loss of being committed to civil jail which will not be a solution as he will be curtailed from looking for alternative means settling the claim.

The question therefore is whether the committal of the appellant to civil jail in execution of decree of the court is unconstitutional.

The power of the court executing decree to commit a judgment debtor to civil jail is found in Section 38 of the Civil Procedure Act which enacts material to this application:

"…….provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the court, for the reasons to be recorded in writing is satisfied;-

(a) That the judgment debtor, with the object or effect of obstructing or delaying the execution of decree .

(i) Is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii)Has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of this property or committed any other act of bad faith in relation to his property; or

(b) that the judgment debtor has or has had since the date of the decree the means to pay the amount of the decree, or some substantial part thereof and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) That the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account."

From the pleadings hereto by both parties, it is clear that the execution proceedings in the lower court were by way of notice to show cause why the appellant should not be committed to civil jail . The appellant does not disclose whether or not he appeared before the trial court to show such cause.

However, from the 1st respondent's detailed affidavit, this court gather's that on each occasion when the matter came up for notice to show cause, the appellant with is advocate did not attend court or gave excuses until they obtained a temporary reprieve from this court, about six months from the date of filing the appeal.

Instead, the appellant sought refuge from this court complaining that committing him to civil jail would violate his fundamental right and freedom of liberty . The constitutionality of committal to civil jail for a debt was elaborately dealt with in the case No. **HC JR 132/2014** where the question was the same as what is before this court save that the petitioner/applicant contended that the committal to civil jail not only offended his right to personal liberty under Article 29 of the Constitution but also violated Article 11 of the 1 C C P R which, pursuant to Article 2 (b) of the Constitution of Kenya forms part of the law of Kenya under the Constitution as it was ratified by Kenya.

Article 29 of the Constitution enacts that

" Every person has the right to freedom and security of the person, which includes the right not to be:

Deprived of freedom arbitrarily or without just cause."

On the other hand Article 11 of the IC PPR provides:

" No one shall be imprisoned merely on the ground of inability or fulfill a contractual obligation. The court in the JR 132/2014 was referred to the case of **Re the matter** of **Zipporah Wambui Mathara (2010) e KLR** where it was held that to commit the respondent to civil jail was unconstitutional. The court was also referred to **Diamond Trust Kenya Ltd vs Daniel Mwema Mulwa HCC 70/2002.** The court in this held, inter alia

"……………for that reason for as long as Section 40 (Civil Procedure Rule) remains in the statute

book, it is not unconstitutional for a judgment debtor to be committed to a civil jail upon his failure to pay his debts."

And in **Beatrice Wanjiku & Another vs Attorney General & Another Nairobi Petition 190/2011** that :-

" The Civil procedure Act and the Rules provide a legal regime for

arrest and committal as a means of enforcement of a judgment debt. Article 11 of the IC PPR states: No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation……….. read the merely as used above to mean that one cannot be imprisoned or the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognizes that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted.

As there is no inconsistency between Article 11 of the convention and the general tenor of the committal regime under the Civil Procedure Act and Rules, the provisions of Article 11 of the convention are at best an inter pretative aid."

The court in the above **Beatrice Wanjiku** case concluded that the objective and intendment of the Civil Procedure Act and Rules is to provide the mechanism for the enforcement of judgment debts which is a legitimate and reasonable state objective and arrest and committal is one of enforcing court judgments . What is to be kept in mind whether the means adopted distinguished those who can pay but are merely refusing to pay and those who cannot.

In **Jayne Wangui Gachoka vs KCB petition 51/2010,** it was held:

" The deprivation of liberty sanctioned by Section 38 and 40of the Civil Procedure Act is permissible and is not in violation of either the Constitution or the IC CPR. The caveat, however which has been emphasized in all the cases set out above, is hast before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the proceedings laid down in the Civil Procedure Act and Rules , which provides the due process safeguards essential to the making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

Similarly, in **KBS Ltd & Others vs Attorney General and Others (2005) 1 EA 111;(2005) 1 KLR 743** it was held:

" Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest…………The function of the court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions . On the other hand is to do a balancing act and in this balancing act are principle values, objective to be attained, a sense of proportionality and public interest and public policy consideration………

There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradictions to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are obligations of violation of the Constitution by the state or Government."

The same issue was considered by Nyamu J (as he then was) and Wendoh J in **Braeburn Ltd vs Gachoka & Another (2007) 2 EA 67** where the court held:

"To determine whether the right to liberty is limited by the law prescribed, and the person whose

liberty is circumscribed has been subjected to due process under the law an independent and impartial court established by the law as per Section 77(1) and 77(7) , this court must examine the concerned law in the light of Section 84(1) of the Constitution to establish that both the substantive and procedural law under which a person may be deprived of his liberty, itself meets with the constitutional safeguards under those provisions of the Constitution and in a manner justifiable in a democratic society………

Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person's liberty . This is so because the deprivation of a person whether for contempt of court (under Section 72(1) (b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and or neglected to pay ……To conform with that high standard proof , the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon he judgment debtor to appear in court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed , strictly, that is to say mandatorily that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the first instance issue a notice to the judgment debtor to appear in court and show cause why he should not firstly be arrested, and secondly committed to prison. That is the first step towards the execution of a decree for payment of money……The second step is the examination of the judgment debtor when he appears in court . Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgment debtor may be detained in prison pending his appearance in court and may be released upon provisions if security too ensure his attendance or appearance in court………..if however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21 Rule 35, or pursuant to the arrest and appearance before he can be committed to prison, it is the duty if the decree holder (who has sought the arrest and committal of judgment debtor to prison to satisfy the court that the judgment debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that:-

(1) the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree:

(a) Is likely to abscond or leave the local limits or jurisdiction of the court;

(b) Has after the institution of the suit, in which the decree was passed, dishonestly transferred, concealed or removed any part of this property or committed any other act of bad faith in relation to his property; or

(1) the judgment debtor has or has had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, but in calculating such means there shall be left out of account any property which is exempted from attachment in execution of the decree or

(ii) that a decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account (trustees or persons holding monies in a professional capacity or in trust)…………..In essence, the judgment debtor should be examined in the manner envisaged in Order 21 Rule 36 as to the debtors total wealth and indebtedness to determine the judgment debtor's total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the court is satisfied of those matters, after subjecting the judgment debtor to due process in the manner construed , the requirement of mandatory notice, before a warrant of arrest may be issued for the arrest and compulsion to attend or appear before a court can a decree for payment of a money debt be executed upon a judgment debtor by way of arrest and committal to prison. The execution of a judgment decree by way of arrest and committal to civil jail is extreme

I nature. It deprives a citizen of his liberty, to do so, the highest standards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgment debtor as a first step and as a second step a due inquiry and satisfaction to the court, by the decree holder, as to judgment debtor's ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty……It is clear under both Section 38 of the Civil Procedure Act and Order 21, Rule 35 (1) that no judgment debtor will , on account of his inability from poverty or other sufficient reason, be arrested and committed to prison…….The Section is not vindictive and the court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment …..The provisions of Sections 38,40, 42 of the Civil Procedure Act and Order 21 Rules 32 and 35 of the Civil Procedure Rules are neither inconsistent with the provisions of the relevant provisions of the Constitution nor are they in conflict with any of the provisions of the International Bill of Human Rights. It is further held that provided the procedure under the Civil Procedure Act and Rules is followed in the manner outlined herein, the requirements of due process comparable to that in Section 77(1) and 77(a) of the Constitution guaranteed."

It is clear to me from the above decision by which I am persuaded that the Constitution and other laws including execution proceedings protect both the judgment creditor and the judgment debtor. The committal to civil jail is one of the available remedies available in our statutes and as long as its applied procedurally without any abuse of due process then it is legitimate (see **Kisumu CA 43/2006 Paul Ojigo Omanga vs Japheth Angila** (per Chemitei J).

It therefore follows that the constitutionality of the execution procedure by way of committal to prison would not be in question as long as the safeguards under the relevant provisions of the Civil Procedure Act and Rules are complied with.

In this case, the appellant/applicant has not demonstrated that there were any flows in the manner in which the court below intended to enforce the decree. A Notice to show cause perse is not a committal to civil jail. The appellant could still contest that mode of execution before the court enforcing decree. That being the case, I do not agree with the appellant/applicant's contention that the attempt to enforce a decree by way of Notice to Show Cause why the appellant should not be committed to civil jail is unconstitutional.

Therefore, if substantial loss anticipated by the appellant is that associated with his committal to civil jail, then he missed the point. What was expected of the appellant in this case, was to demonstrate that execution of decree will create a state of affairs that will irreparably affect or negate the very essential core of the appellant/applicant as the successful party in the appeal and that is what substantial loss would entail. (see **James Wangalwa and Another vs Agnes Naliaka Cheseto HC MISC APP 42/2011.**

The appellant must demonstrate that if the decretal sum is paid to the 1st respondent, he is unlikely to repay as he is a man of straw hence the appeal even when successful will be a barren result.

In the end, I find that the appellant has not demonstrated any substantial loss that he is likely to suffer should stay be declined and the appeal is successful and that the appeal if successful shall be rendered nugatory.

The second condition that must be fulfilled for stay to be granted pending appeal is that the application must have been filed without unreasonable delay. The appellant claims that after judgment was delivered in the lower court in August 2014 he was requested and advised by his advocates that it was appropriate to make an application for stay but that he could not do so because, by his own admission, he was required to deposit security for due performance of decree as the judgment was a money decree, which condition he could not fulfill then. The appellant only filed the application on 3rd February 2014 after filing the initial appeal on 5th September 2014 and amended appeal on 9th October 2014. This was also after the 1st respondent had now set in motion the process of execution

and filed an application dated 28th October 2014 seeking to strike out the appeal. In **Benson M. Kibia & 2 Others vs Francis Maina Kanumbi and 2 Others** (suing as the officials of **Mwanzo Self Help Group (2014) e KLR.**

The court held that

"……… To be said to be timeous, I hold the view that an application for stay should be filed within the statutory time given for lodging an appeal in the High court, that is within 30 days of the order sought to be appealed against………..The question is whether the delay is unreasonable . To my mind, unreasonable delay is that which is likely to prejudice the respondent beyond monetary compensation………………"

Unlike in the above case where application for stay was made within 19 days from the date of delivery of the impugned judgment, in this case before me, judgment was delivered on 8th August 2014 and the application for stay made on 3rd February 2015, nearly 6 months after the impugned judgment. The delay of 6 months has not been satisfactorily explained as I am not prepared to accept the deposition that he was advised that being a money decree, it was a requirement of the law that he had to furnish security sufficient to cover decree and costs and that he did not have money.

I decline to accept that explanation because the deposition relates to one of the essential conditions that the law requires an applicant for stay to satisfy before being granted stay pending appeal. Even then, todate, the applicant has not demonstrated what effort he has made to fulfill that condition to invoke the court's discretion. He has not shown that within the said period, he managed to save the 1/3 of his salary that he wishes this court to allow him to commit to pay to settle the decree or deposit as security for the due performance of decree herein.

In my view, the applicant's application for stay came too late in the day and the same was precipitated by the 1st respondent's motion to enforce or execute decree by way of Notice to Show cause why the appellant/judgment/debtor could not be committed to civil jail, which must have been an act that threatened him and hence, the wish to file the application under certificate of urgency.

Accordingly, I find that the application was brought with unreasonable delay which delay has not been explained satisfactorily ; and which delay is prejudicial to the 1st respondent decree holder, as it was intended to scuttle the process of execution that had been put in motion.

On the third condition of security for the due performance of decree being deposited, the appellant contends that he is a conductor in matatu (PSV) vehicles plying Ongata Rongai and that he earns 300/- per day hence is unable to raise security for costs just like he is unable to settle decree unless he is allowed to commit kshs 100/- per day towards settlement and or security for costs.

That may be so, but the message the appellant is sending to the decree holder and this court is clear, that he cannot settle the decree whether or not the appeal is successful. The appellant invites this court to ask, but should the respondent then incur more costs preparing to respond to the appeal which if it fails then there are no prospects of collecting any costs awarded. Secondly will the appellant's financial circumstances change since he has not disclosed any other source of income. Thirdly, can this court dismiss the appeal where there is failure to comply with the order for security? Forth, what happens where the appeal as filed is unsuccessful? Is the appellant going to resort to bankruptcy?

This court is alive to the fact that court orders or decree are not made in vain. They are intended to be enforced. I am also conscious of the fact that the 1st respondent has a valid judgment, and that the appellant has an unfettered right of appeal which is the cornerstone of the rule of law.

However, the appellant has not demonstrated that he is impecunious and that he was forced in court by the 1st respondent to defend himself.

In my view, the appellant who appears to be ably represented in this court and in the lower court had every available opportunity to seek exemption from security requirement by way of seeking and obtaining leave of court for him to defend the suit or the appeal as a pauper. There is no evidence on record to show that his advocates on record are acting on a *probono* basis for the appellant.

In my view, the appellant's application for stay was intended to stifle a valid claim and he appears confident that he can escape from justice. I find him to be one of those extremely stubborn judgment debtors who have the means but who are unwilling to settle the decree or deposit security for the due performance of the decree, not for impecuniousness, but by deliberately avoiding the path of justice.

I do not find any compelling reasons why the appellant should be exempted from the legal requirement . One third of 300/- is 100- which cannot guarantee due performance of decree of over 278,000/-. This court did on 18th February 2015 order for a conditional stay of execution of degree herein for 30 days and directed the appellant to deposit in court the whole decretal sum in 30 days and in default, the temporary stay to lapse. Todate, I have not seen any attempt to comply with that order. In the premises, the appellant's conduct of disobeying court orders betrays him. The orders of stay sought are equitable orders and are in the discretion of the court. The applicant must demonstrate good faith and approach the court with clean hands. He has not demonstrated any of these values that would entitle him the discretion of this court.

In **Sankale Ole Kantai T/A Kantai & Company Advocates vs Housing Finance Company (K) Ltd (2014) e KLR** the court held:

"….Given the finding of this court that the applicant has not shown it will suffer substantial loss, it is necessary to order provision of security? I am not sure where the court finds that no substantial loss would occur, ***it will be feasible to order security to be furnished. Except, however in peculiar or exceptional circumstances of a case, the court may still order a stay of execution and call for security from an applicant even where it has found there is no substantial loss which will occur. This is not uncommon and it happens where the court nonetheless orders half of the decretal sum to be paid over to the respondent and the other half to be deposited as security or to be secured by such security as the court may order the type of security to be given depends on the circumstances of the case and the judicious exercise of judicial discretion based on defined legal principles"***

In this case, there is no deposition or demonstration of the appellant's willingness to comply with the requirement for deposit of security for the due performance of the decree. It would be futile for this court to make any other or further order on security as that would be a mere academic exercise.

In the end, following my analysis of the application for stay pending appeal, I find that the appellant/applicant's application for stay lacks merit and I dismiss it.

Final orders:

1. The 1st respondent's application dated 6th November 2014 is hereby dismissed.
2. The appellant's application dated 3rd February 2015 is dismissed.
3. Costs of both applications to abide the court outcome of the appeal and in any event, payable to the successful party.

Date, signed and delivered in open court at Nairobi this 10th day of June 2015.

R.E. ABURILI

JUDGE

10.6.2015

Coram Aburili J

C.A: Simiyu

Miss Badia for respondent

No appearance for appellant

COURT- The date was given in court in the presence of both parties.

Ruling read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

10.6.2015