IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU JA, CHESONI & COCKAR Ag JJ A)

CIVIL APPLICATION NO NAI 15 OF 1990

HALAI & ANOTHER …….... APPLICANTS

VERSUS

THORNTON & TURPIN (1963) LTD……. RESPONDENTS

(Application for stay of execution in an intendwed appeal from a judgment and decree of the High Court at Nairobi, Shields J, dated 6th February, 1990 in HCCC No 4811 of 1986)

RULING

On February 6, 1990, the High Court (Shields, J) gave judgment for the respondent against the applicants for Kshs 2,429,340 plus costs. The respondent was a sub-contractor to the applicants in a construction development in Nairobi. Out of the sum of Kshs 11,738,000 certified by the architects as due to the respondent by the applicants the latter had paid Kshs 9,442,800 leaving a balance of Kshs 2,295,200 to which the special damages of Kshs 134,140 were added.

The applicants first applied to the superior court for a stay of execution on February 27, 1990, and on March 28, 1990 the learned judge granted a stay for three weeks from that date on condition that if by the end of the three weeks the applicants would have deposited the decretal amount into a joint interest bearing account in the names of MA Khan and Anthony Gross, the stay would continue until the determination of the appeal to this court.

The applicants were dissatisfied with the learned judge's ruling and hence they applied to this court under rule 5(2)(b) of the Court of Appeal Rules for stay of execution. The application is supported by an affidavit sworn by Mohamed Akram Khan. Mr Anthony Gross for the respondents swore a replying affidavit in opposition to the application. We heard the application during the vacation as a matter of urgency.

The application before the superior court was made under Order XLI rule 4. In sub-rule (1) the order provides that the court appealed from may for sufficient cause (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause. Subrule (2) of the same rule reads:

"(2) No order for stay of execution 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 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."

Thus, the Superior Court's discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.

Mr Lakha for the applicants submitted that the learned judge found that there would be substantial loss to the applicant if the order for stay were not made. With respect, we agree with that proposition because in his ruling the learned judge had this to say:

"On the one side I must bear in mind that it has been established that if the appeal is successful the defendants will experience great difficulty in recovering the money paid in satisfaction of the plaintiff decree and thereby the defendants' statutory right of appeal will be rendered nugatory."

The second requirement of the applicant furnishing security would be met by the applicant's offer of their immovable property LR No 209/118/ 36 Galla Lane, Nairobi and Mombasa Block/IIXI/628 Tudor valued at Kshs 6 million and 10 million respectively. The second property had a charge against it for Kshs 2 million. There was also a banker's bond for Kshs 600,000. The application for stay had been made without unreasonable delay. Mr Lakha did not address us on whether he established a sufficient cause in the Superior Court, but since this is not an appeal from the learned judge's ruling we shall not involve ourselves in a search for one.

Mr Lakha criticised the learned judge for setting onerous terms which was tantamount to refusing the stay of execution. He added that the judge was driven to that conclusion because of the assumption of lack of *bona fides* on the applicant's part. The reasons for *mala fides* were that Mr Khan applied for an adjournment at the hearing and when it was refused he sought to withdraw which was also refused after which he left the court. Secondly, that Mr Lakha had not been fully briefed. We have not been able to infer *mala fides* on the part of the applicants from the limited record before us.

We were referred by Mr Lakha to the cases of *Rasiklal Somabhai Patel v Parklands Properties Ltd* Civil Application No NAI 38 of 1980 and *Nation Newspapers Ltd v Mohinder Singh Kambo*, Civil Application No NAI 88 of 1987.

In *Rasiklal Somabhai Patel v Parklands Properties Ltd* the court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters.

Firstly, that substantial loss may result to the applicant unless the application is granted, which *prima facie* means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior court and not those to this court, although in sub-rule (1) of the same rule reference is made to the court to which the appeal is preferred. It is, however, worth noting that as to the court to which the appeal is preferred it is at liberty to consider the application made to it and make such order thereon as may, to it, seem just. Application for stay of execution is made to this court under rule 5(2)(b) of the Court of Appeal Rules and this court's discretion under that rule is unfettered. It is wide and while the court will take into account matters like substantial loss the applicant may suffer unless a stay is granted, provision of adequate security and expeditious filing of the application, this court is not prevented from granting stay of execution where no substantial loss is established and no security is forthcoming, if it

seems just to the court for such order to be made upon application.

Indeed in the *Nation Newspaper Ltd v Mohinder Singh Kambo*, this court found that the applicant had not demonstrated that it would suffer a substantial or any loss unless execution was stayed. But what the court did in that case was to consider the factors to be taken into account as we have said herein above. We are fortified in this line of thinking by the clear pronouncement by this court of the correct position when in *Consolidated Marine Contractors Ltd (formerly known as Diving Contractors Ltd) Divecon Ltd v Bernadette Nampijja & Anije Else Koehler* – Civil Application No NAI 93 of 1989 it said:

"..... in dealing with an application under rule 5(2)(b) the Court exercises original jurisdiction which it is accorded by the lodging of a Notice of Appeal in accordance with rule 74."

This court becomes seized of the matter only after the Notice of Appeal has been filed under rule 74. In other words where no appeal is filed this court has no jurisdiction to entertain an application for stay of execution even on assurance of an intending appellant that an appeal will be filed. We, in fact had to adjourn the application until the applicants had included a copy of the Notice of Appeal in the record.

We fully agree with what Hancox JA (as he then was) said in *Kenya Shell Ltd v Kibiru & Another* Civil Application No NAI 97 of 1986 that:

"there is no requirement under rule 5, that the applicant for a stay shall give security for the due performance of the decree, as order 41 rule 4(1) provides. All that is required as a pre-condition for the exercise of our discretion under rule 5 is that a notice of appeal has been filed."

The Court may require such security to be provided and it also addresses its mind to the question of whether by not granting a stay the intended appeal, if successful, would be rendered nugatory.

Although Mr Khan stated in his affidavit that the intended appeal has a good prospect of success, it is impossible at this stage with only the notice of appeal before us to assess the chances of the appeal succeeding. This, however, as we already have said, is not a requirement under rule 5 in considering an application for a stay. It is equally important to remember that a successful litigant is entitled to the enjoyment of the fruit of his judgment, which he can be deprived only for a just cause.

Mr Gross for the respondent relied on the case of *Consolidated Marine Contractors Ltd v Nampijja and Koehler* ibid and submitted that although the learned judge's terms were stringent, they were not onerous and they were intended to make the appellant prosecute the appeal expeditiously. While admitting that this court had to look at the matter *de novo*, he maintained that the difference between the sum in banker's bond and the total decretal amount should be deposited in cash as the applicants had used every device to delay payment. What was lost sight of is that even if the applicants deposited in court or in a joint account the full decretal sum, that money would still not be available to the respondent for use till after the appeal is determined and the respondent is successful. What is important is that enough security is provided to ensure that should the appeal fail the respondent will get its money without undue delay. As Mr Lakha correctly pointed out the expedition with which the applicants can prosecute their appeal is not entirely in their hands but depends on other factors especially the court diary.

The applicants according to Mr Khan's affidavit, undertake not to alienate or otherwise encumber their two immovable properties mentioned earlier in this ruling until the determination of the appeal, and in paragraph 15 of the supporting affidavit Mr Khan deponed that the applicants are ready and willing to furnish such security as the court may order. It was Mr Lakha's contention that the properties offered were adequate security and there was no ground for blocking a large sum of cash. He, therefore, submitted that a stay be granted against the security of the applicants' property plus the banker's bond of Kshs 600,000, instead of the onerous terms imposed by the superior court.

There was neither search abstracts nor copies thereof from the Lands Registry attached to Mr Khan's affidavit showing that the said properties belonged to the applicants as deponed to in his affidavit nor valuation reports or copies of such reports supporting the estimated value. The court finds it difficult, in

the absence of such important information, to assess the value of the property offered, and in the circumstances it would be too risky to accept the applicants' property as security for a sum now over Kshs 3 million. The court ought not to place a successful litigant in such disadvantageous position that should the appeal not be proceeded with or withdrawn or fail the respondent would find it difficult to realise the fruits of his litigation due to the inadequacy of the security ordered. If the two properties in question are of the values deponed to by Mr Khan, then they should form a good basis or security for a bank to issue a banker's bond for the sum due to the respondent.

In an application under rule 5(2)(b) the Court does not only exercise jurisdiction but it has inherent power to grant a stay of execution pending an appeal, its determination, discontinuation or withdrawal of which a notice of appeal had already been filed in court.

Accordingly, for the reasons we have given, there shall be a stay of execution of the decree in the HCCC No 4811 of 1986 pending the determination of the appeal therefrom on condition that the applicants deposit in Court a banker's bond for Kshs 3 million besides the banker's bond for Kshs 600,000 already given. If the said bond is not deposited within thirty days from the date of this order the respondent to be at liberty to execute the decree. The costs of and incidental to this application shall abide the result of the intended appeal. So we order.

Dated and Delivered at Nairobi this 8th Day of May, 1990

J.E. GICHERU

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

A.M. COCKAR

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Ag JUDGE OF APPEAL