IN THE COURT OF APPEAL

AT NAIROBI

(Coram;Hancox JA, Platt & Gachuhi Ag JJA)

CIVIL APPLICATION NO. NAI 97 OF 1986

BETWEEN

KENYA SHELL LIMITED .....APPLICANT

AND

BENJAMIN KARUGA KIBIRU

RUTH WAIRIMU KARUGA.....RESPONDENTS

(In an intended appeal from a judgment of the High Court, Shields J)

JUDGMENT OF HANCOX JA.

We heard application for a stay of execution of the judgment and decree of Shields J dated May 13, in High Court Civil Case No 540 of 1980 as a matter of urgency. The judge awarded the two respondents, respectively, damages of Shs 201,380.00 and Shs 5,000.00 for the appellant's negligence (which he found proved) in respect of an accident involving a gas cylinder on June 28, 1977.

The accident occurred as a result of an explosion at the home of the respondents, who are husband and wife, after the second respondent (the wife) had obtained a replacement gas cylinder filled with gas in return for the empty one she had returned to the Kamkunji Service Station (who were the appointed agents of Kenya Shell Ltd) on the day in question. The second respondent had unloaded the cylinder and proceeded to connect it to the cooker when it exploded, causing a serious fire which destroyed the respondent's house at Kangundo Road, Embakasi which was constructed of wood, and virtually all its contents. It is relevant to state that the housegirl had lit a *jiko* in the same room (it is not stated which room) as that in which the gas cylinder and the cooker were, and it was about ten feet away from the cooker. This was one of the particulars of negligence pleaded by Kenya Shell, who are the present applicants (and the appellants in the main intended appeal) in their defence, denied in the reply and impliedly rejected by the judge in his judgment. Doubtless, in due cause, Kenya Shell will attack the judge's finding of negligence, or at any rate full negligence, against them and the stated application of the doctrine *res ipsa loquitur*.

However, we are not presently concerned with this aspect, but with the application for the stay, which, I note, is made only under rule 5 of the Court of Appeal Rules, and not under order XLI rule 4(1) of the Civil Procedure Rules as Mr Kwach, appearing on behalf of Kenya Shell, said at the beginning of this submissions. 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 XLI 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, which Kenya Shell did as on May 19, 1986, six days after the decision of Shields J, and well within time. Nevertheless, I apprehend that it has been usual for this court to require such security as the price of a stay, or of an injunction, as the case may be, and Mr Kwach has at once said that there is no intention on the part of his clients to delay or avoid payment of the decretal amount, and that he is prepared to offer any reasonable security that might be thought appropriate, including, as I understand him, a deposit in the joint names of the parties, subject to suitable conditions – hence the reference, to order XXVI rule 8 of the Civil Procedure Rules.

The main ground on which the stay is sought pending the determination of the appeal is that if the respondents proceed to execute their decree the proposed appeal will be rendered nugatory, because, as I understood Mr Kwach's submissions, if the decretal sum is paid over, Kenya Shell will have the utmost difficulty in recovering it back from the respondents at a later date if the appeal is successful. The same ground was, in effect, relied on in the application for the stay before the learned judge, as is evident from the first paragraph of his ruling dated June 17, 1986, in which he refused the application.

Mr Kwach criticised this ruling in stringent terms. He said it was apparent from it that the learned judge was prejudiced in his approach and biased against his client. Furthermore, he alleged that at the trial the judge had rejected his contention that a plaintiff must not only plead but must prove his special damage, just as any other averment made in his claim. In passing I would say that this is, of course, perfectly true, and this court has recently so held, in *Idi Ayub Omar Shabani v City Council of Nairobi and Anothe*r Civil Appeal 52 of 1984, when the following passage from Lord Goddard, LCJ's judgment in *Bohham-Carter v Hyde Park Hotel Ltd* (1948) 64 Times Law Reports, 117 at p 178 was approved:-

> "Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages.' They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory."

Mr Kwach finally submitted, on this aspect of the case, that a litigant, whether it is Kenya Shell or anyone else, is entitled to exercise their constitutional right of a proper hearing and due account to be taken of their contentions without obstruction. With that last proposition I would also respectfully agree. However, there is no material, as yet, to enable anyone to say whether or not this particular allegation, as regards the special damages, has any substance. The record of the proceedings, though applied for, is, in the nature of things, not yet available, so it is equally impossible to assess the chances of the success of the appeal, which are stated in the affidavit in support of the present motion to be overwhelming. This is presumably in reply to the notice of objection filed in the High Court by the respondents that there was, as then, no indication as to the chances of success in the proposed appeal.

However, the first respondent, Mr Benjamin Karuga Kibuku, who, though not an advocate, spoke on behalf of both of them, has advanced as his main contention the same as he put forward in the High Court application, in reply to the suggestion that he will not repay the decretal amount if the appeal succeeds, namely that there is no evidence that Kenya Shell, as the proposed appellant, will suffer substantial loss or that they will have difficulty, in that event, of recovering the money, as, indeed, the learned judge found. Mr Karuga emphasised that he holds a good position with Agip, who are in the same business as Kenya Shell, that he is the Sales Manager and as such a Senior Executive, with good pensionable prospects after a minimum of ten years' service. This much was not disputed by the appellant.

Mr Karuga continued that there was no reason shown why Kenya Shell would not recover their money if the decree is executed. On the contrary, he alleged that there had been procrastination on their part in supplying him with their report on the accident, which had led to the delay in his filing the suit until February, 1980, over two and half years after the accident. In this connexion I would observe that the report was made fairly promptly, on October 28, 1977, but that there is nothing in law to compel or oblige one party to litigation (or to threatened or contemplated litigation) to disclose his confidential information

to the other side, save on an order for discovery, which does not appear to have been made. Neither, astute in the handling of his case as Mr Karuga has been, almost, I may say, without disrespect, to a highly professional standard, did the respondents insert in their pleading that the maxim *res ipsa loquitor* applied.

It is also true to say that, in consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory. This is shown by the following passage from the judgment of Cotton LJ in *Wilson v Church* (No 2) (1879) 12 Ch D 454 at p 458, where he said;-

> "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

That passage was cited with approval by Megarry J, as he then was, in *Erinford Properties v Cheshire County Council* [1974] 2 All ER 448 at p 454, in which case he was considering whether, having refused an interlocutory injunction to the plaintiffs on the expiry of the undertaking previously given by the Council, he yet considered whether he had jurisdiction to grant what was in effect the same relief pending the plaintiff's appeal from the dismissal of their application with costs. It was the opposite situation from an application for a stay, because, the injunction having been refused, there was nothing left, so it was submitted, to stay. Megarry J rejected that contention and held that there was nothing inconsistent with the two orders because as he said:-

> "A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal."

As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.

I am bound to say that in the instant case I deprecate the comments of the learned judge in dismissing the High Court motion for a stay. He referred to the defendant's (the appellant's) singular lack of interest in the case, and to their "laxity' in producing witnesses, and to Kenya Shell using their position to frustrate those who were impertinent enough to sue them. I think this led to Mr Kwach's justifiable complaint in this court that there would exist some ground in the mind of his clients that they had been unfairly treated. I entirely agree with the utmost respect, with that which Madan JA (as he then was) had to say in the passage to which Mr Kwach referred us, namely *MM Butt v The Rent Restriction Tribunal* Civil Application NAI 6 of 1979, at p 2 of his ruling.

I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.

Accordingly, while I have considerable sympathy for Kenya Shell on this application, I consider there is no other course consistent with the material on record, and with the justice of the case, than to refuse the application for a stay made before this court.

I would therefore dismiss the motion with costs. As the other members of the court agree it is so ordered.

Platt Ag JA. This is an application for a stay of execution of a decree of the High Court. The latter refusal a stay pending an appeal from that court's judgment. The application is brought directly under this court's original jurisdiction to be found in rule 5 (2) (b) of the Court of Appeal Rules.

The appeal is to be taken against a judgment in which was held that the present respondents were entitled to claim damages due to the negligence of the present applicant. It is a money decree. An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts. It was however, suggested that at least the decretal sum could be placed in an interest-bearing account. All this the applicant proposed to accept in this court and to give an undertaking as to security.

The respondents nevertheless stood firm. There was no ground for a stay at all, they argued, and therefore they declined to offer to deposit the decretal sum in any account.

I am bound to say that the respondents are right, on the basis of order XLI rule 4 of the Civil Procedure Rules. There was no evidence of substantial loss, and such loss cannot be inferred in this case.

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances, but the information that was forthcoming did not confirm the applicant's misgivings.

It is usually a good rule to see if order XLI 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. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

Accordingly, while certain passages in the judgment and ruling gave offence to the applicants, in fact there is no substance to this application, and I would dismiss it with costs.

Gachuhi Ag JA. The applicant applies to this court under rule 5(2)(b) of the Court of Appeal Rules for stay of execution pending appeal for which a notice of appeal has been filed but no appeal has yet been filed. The main ground in the application is that if the applicant pays the decretal amount to the respondents or if the respondents execute the decree in their favour, the pending appeal will be rendered nugatory. There is nothing else in the application before this court. The facts of the case are contained in the judgment of Hancox JA which I entirely agree with.

The respondents are a husband and wife who obtained a money judgment in the High Court in damages. The applicant, I think, knows the first respondent better since he is a Sales Manager with Agip, an oil company which is a similar business with the applicant. He holds an executive position that may attract a good pension. There is no evidence to show that he is not a man of means. In his argument the states that the applicant has not shown why the court should grant the order sought while the applicant has not stated the loss it would suffer if the money is paid to the respondents.

The respondents maintain that if money is paid, and the appeal succeeds, the respondents would repay the money. They hesitantly would accept the money being deposited in their joint deposit account where the money will be earning interest.

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

would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.

On my part I cannot find possible evidence to persuade me to grant the order prayed for. It is unfortunate that the High Court passed remarks that may have annoyed the applicant, but that by itself would not be sufficient reason to grant the stay.

I too would dismiss the application with costs.

Dated and delivered in Nairobi this 2nd day of July 1986.

A.R.W.HANCOX

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR