REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2373 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

KENNEDY OMONDI...CLAIMANT

VERSUS

CHARLES NEW NYAMOTE.......................RESPONDENT/APPLICANT

RULING

The Respondent/ Applicant filed its Notice of Motion on 27th August 2018 seeking the following Orders:

1. That this application be certified as urgent and it be heard ex-parte in the first instance

2. Pending inter-partes hearing and determination of this Application-, this Honourable Court be pleased to issue an interim order of stay of execution of the decree given on 19th May 2017 and issued on 3rd August 2017, all subsequent orders and warrants of attachment of movable property in execution of decree of money given on 1st September 2017 to M/S Front Bench Auctioneers.

3. Pending appeal to the Court of Appeal, this Honourable Court be pleased to issue an order to stay of execution of the decree money given on 1st September 2017 to M/s front Bench Auctioneers.

4. That the costs if this application be in the cause.

The Application is supported by the Affidavit of Charles New Nyamote and is premised on the following grounds:

1) The Respondent/Claimant distrained the Applicant/Respondent's goods on the 7th of September 2017 pursuant to an ex-parte judgment given by this Court on the 19th May 2017.

2) The Applicants/Respondent on becoming aware of the existence of the suit and judgment and decree, filed an application seeking stay of execution, setting aside the ex-parte judgment and leave to defend the Claim, Interim Orders of stay were granted by the Ndolo J. on the 20th September 2017.

3) By a Ruling dated 20th July 2018 and delivered on 10th August 2018, the Honourable Court dismissed the Applicant's application for setting aside the ex-parte judgment and discharged the interim orders on record.

4) The Respondent/Applicant being dissatisfied with the Court decision commenced the process of Appeal by taking out Notice of Appeal to the Court of Appeal as well as applying for certified copies of the proceedings, Judgement and Ruling to enable him appeal against this Court's decision.

5) The Respondent/Applicant is in danger of execution at any time and has still not been allowed a chance to argue his defence.

6) The Respondent/Applicant's fundamental right to a fair hearing has been infringed and were execution to proceed, the Respondent/Applicant will suffer substantial loss.

7) The Application is brought without undue delay and the Respondent/Applicant's is willing to provide such security and/or meet such conditions as his Honourable Court may decide.

The Claimant filed his Replying Affidavit to the Notice of Motion opposing the Application for the following reasons:

1. The Application for stay had been determined and subsequently dismissed by the Court on August 2018.

2. Prayers 2 and 3 in the application dated 23rd August 2018 are similar and in all favours with the ones in the application dated 19th September 2017 to which the Court delivered its Ruling on 10th August 2018. Therefore, any other application is res judicata.

3. This Court became functus officio upon its delivery of Judgement and subsequent Ruling. This Court therefore lacks jurisdiction to deal with any issue of stay.

4. There is no pending appeal except for a notice of appeal, and if any orders were to be granted, the appropriate forum would be the Court of Appeal.

5. No reason has been given to move the Court into reopening the cause when the same was procedurally heard and determined after the Court entered interlocutory judgement resulting to the matter proceeding to formal proof.

6. Any indication to deposit a title deed is an afterthought and should not be entertained.

7. The draft defence did not disclose any triable issue and was considered and dismissed by the trial Court.

8. Should the Court grant stay of the decree, then the applicant should deposit the entire decretal amount in a joint interest earning account of both lawyers.

The Respondent filed a Further Affidavit sworn by Charles New Nyamode arguing that the Court is well seized of the matter as the Ruling delivered on 10th August 2018 was with respect to an Application for setting aside the default Judgment entered by the Court. In addition, that he was willing to avail his title deed as a security for the grant of stay of execution.

The application was disposed of by way of written submissions.

Respondent/Applicant's Submissions

The Respondent submitted that he had no knowledge that the suit had been instituted against him and determined. This led to the filing of the Notice of Motion on 18th September 2017 seeking stay of execution which Matthews Nduma J. dismissed.

The Respondent submitted that Order 42 Rule 6 of the Civil Procedure Rules grants this Honorable Court the jurisdiction to issue any orders for stay sought herein. The Respondent relied on the cases of ***G. N. Muema P/A (SIC) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another*** Civil Appeal No. 20 of 2016. The Respondent further relied on the case of ***Stanley Karanja Wainaina & Another –V- Ridon Ayangu Mutubwa Nairobi H.CCA 427 of 2015*** where the Court held:

> *"It is not enough for the Respondent to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in* ***National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) C.A. 238/2005*** *stated:-*
>
> *This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."*

The Respondent submitted that in ***Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another,*** Civil Appeal No. 22 of 2017 the court held that the burden of proof lies on a Respondent to demonstrate that he/she is able to refund the decretal sum should an appeal succeed. The Court in this case discussed the issue at length as follows:

> *"It has been stated that substantial loss lies in the inability of the 1st respondent to refund the decretal sum. I have stated that the 1st respondent has failed to prove that she is in a position to refund. This was held in* ***Lucy Nyamu Kimani -V- Lawrence Mburu Muthiga (2006) eKLR*** *–*
>
> *An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant."*
>
> *This was also held on* ***Antoine Ndiage -V- African Virtual University (2015) eKLR.***
>
> *The case of* ***Socfinac Company Limited -V- Nelphat Kimotho Muturi (2013)eKLR,*** *and* ***Van Den Berg (K) Limited -V- Charles Osewe Osodo (2015) eKLR*** *which stated that it is the applicant who has the burden to prove that the decree holder is a man of straw are persuasive decisions. Once the applicant alleges that the respondent is a man of no straw who cannot refund the decretal sum, the evidential burden shifts to the respondent as stated by the Court of Appeal in the case of* ***National Industrial Credit Bank***

> ***Limited -V- Aquinas Francis Wasike & Another–*** *supra. The applicant has discharged the burden of proof that he is likely to suffer substantial loss. This is what has to be prevented by the Court by ordering stay of execution. It is the corner stone which determines whether the Court should exercise discretion to order stay. I am of the view that there is need to order stay so that the appeal is not rendered nugatory.*
>
> *The applicant has argued that the appeal has reasonable chances of success. All what the applicant needs to show are the three grounds under Order 42 rule 6 Civil Procedure Rules (supra). The law does not require this Court to determine the application based on the merits or otherwise of the appeal.*
>
> *The second consideration is security. The applicant has deponed that he is ready to provide security. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree. It is therefore sufficient to depose that he is ready to provide security. The applicant has submitted that he has ability to provide security as will be ordered by the Court as it is a company with substantial investments in the County and once called upon by the Court will avail such security. In* ***Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates*** *Gikonyo J. the Court stated that:*
>
> *"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor………Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."*
>
> *Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."*

The Respondent further submitted that Order 42 Rule 6 of the Civil Procedure Rules vests the Court with power to stay the execution of the Court's decree or Order. The Respondent submitted that it had demonstrated that it stands to suffer substantial loss.

The Respondent further submitted that the Claimant's Response merely raises procedural issues and matters or merit that touch in the substratum of the Applicant's appeal but has not rebutted the allegations in the Supporting Affidavit to the Application.

Claimant's Submissions

The Claimant in his written submissions argued that the Court in determining the matter should take into consideration the age of the matter and the ruling of the Court on a similar application for stay delivered on 10th August 2018.

The Claimant submitted that the Application was brought under the wrong rules and provisions of the law as Order 22 Rule 51 and 52 only govern objections raised by non-parties. Further, that the Respondent/Applicant should have moved the court under Order 22 Rule 22 of the Civil Procedure Rules which expound on the rules relating to stay of execution. The Claimant submitted that the conditions stipulated under Order 22 Rule 22 (1) should be met before the Court grants the stay of execution and the applicant must demonstrate he will suffer substantial loss if stay is not granted. That the Respondent/Applicant did not demonstrate the loss that he would incur. The Claimant relied on the case of **Antoine Ndiaye v African Virtual University [2015]eKLR** where the Court held:

> *"And substantial loss in the sense of Order 42 rule 6 has been described; see the following rendition in a work of Ogola J in* ***Tropical Commodity Suppliers Ltd*** *(Supra) that:-*
>
> *"…Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…"*

The Claimant submitted that the security ought to be furnished before orders for stay are granted under Order 22 Rule 22(2) of the Civil Procedure Rules. That the Respondent had not furnished any security to safeguard the interest of the litigant. The Claimant relied on the case of ***Anne Njeri v Musafee Essajee & Another***.

The Claimant further testified that the draft Memorandum of Appeal did not disclose any triable issues and relied on ***Primebank Limited v Paul Otieno Nyamodi [2014] eKLR***.

In conclusion, the Claimant submitted that the Respondent has not demonstrated sufficient reasons/evidence to qualify for the grant of the prayers. The Claimant therefore prayed that the Court finds favour in the Claimant and direct the Respondent to comply with the Judgment relying on the case of **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR**.

Determination

The Claimant's Application seeks stay of execution and is brought under Rule 17 of the Employment and Labour Relations (Procedure) Rules 2016 and Order 42 (6) of the Civil Procedure Rules.

Issues for determination

1. Whether the Application is *res judicata*.

2. Whether the Application is grounded on the wrong provisions.

3. Whether the Respondent/Applicant is entitled to the Orders sought.

1. Whether the Application is res judicata

The parties both agree that the Ruling delivered on 20th July 2018 dismissed the Respondent's Application dated filed on 18th September 2017. The Claimant in its submissions urged the Court to consider that both the Application filed on 18th September 2017 and the Application filed on 27th August 2018 seek the same orders and therefore the application is res judicata.

A perusal of both applications confirms that both applications seek the stay of execution. In particular prayer 2 of the two applications are similar both seeking that this Court does issue an interim order for stay of execution of the decree and all the orders and warrants of attachment of the movable property. The departure in the two applications is that the application filed on 18th September 2017 is grounded under Order 22 Rule 51 and 52 of the Civil Procedure Rules while the application filed on 27th August 2018 is grounded under Order 42 Rule 6 of the Civil Procedure Rules.

The two applications are thus not similar as the first one sought stay of execution pending determination of an application setting aside ex parte proceedings and judgment while the present application seeks stay of execution pending appeal. The principals to be considered in either case are different; in an application for setting aside the consideration are sufficient cause for default, delay, adequate defence, prejudice, among others.

In an application for stay pending appeal the principals applicable are that the appeal is arguable, whether the appeal would be rendered nugatory if the orders are not granted and that the applicant provides security.

The application herein is thus not *res judicata*.

2. Whether the Application is grounded on the wrong provisions

The Claimant argues that the Application was brought under the wrong rules and provisions of the law as Order 22 Rule 51 and 52 only governs objections raised by non-parties. Further, that the Respondent/ Applicant should have moved the court under Order 22 Rule 22 of the Civil Procedure Rules which expounds on the rules relating to stay of execution. As stated herein above the Application has been brought under Order 42 (6) of the Civil Procedure Rules and not Order 22 Rule 51 and 52 as submitted by the Claimant. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending appeal while Order 22 Rule 22 provides for stay of execution to a court other than the court that issued the decree. This is a procedural issue that does not prejudice the claimant and cannot be a reason to deny the applicant his constitutional right of appeal.

3. Whether the Applicant is entitled to the Orders sought

The right of appeal is enshrined in the right to a fair hearing. A party has a right to seek justice to the highest court in the land. Both Order 42 Rule 6 of the Civil Procedure Rules and Rule 5(2)(b) of the Court of Appeal Rules provide for stay of execution pending appeal.

In ***Socfinac Company Limited v Nelphat Kimotho Muturi [2013] eKLR*** the Court held:

> *"I have considered the foregoing. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In* ***Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365****, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.*
>
> *It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality."*

The Respondent in his Supporting Affidavit stated that he would suffer substantial loss should the sums herein be paid to the Claimant without affording him an opportunity to be heard and that he stands to lose a colossal amount of money. Further, that the Claimant is not in a position to refund the money should the Respondent succeed in the appeal. In **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR** the Court of Appeal held:

> "*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.*"

In the case of ***National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another*** citied by the High Court in ***Stanley Karanja Wainaina and Another –V- Ridon Anyangu Mutubwa (2016) eKLR***, the court stated as follows –

> "*This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.*"

In the instant application the claimant has not demonstrated that he will be able to refund the decretal sum should the appeal succeed and that would mean that the applicant risks losing the sum of Kshs.1,353,137, (being the sum in the application for execution as at September 2017) together with interest accrued since then.

For the foregoing reasons I will allow the application conditionally and make the following orders –

1. Stay of execution of judgment and decree in this suit is granted pending appeal.

2. This is conditional upon the applicant depositing the sum of Kshs.1,353,137 in a joint interest earning account held jointly by counsel for the parties within 30 days from date of this ruling.

3. There shall be no orders for costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE