REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCSLLANEOUS APPLICATION NO. 50 OF 2015

MUTAHI KIRANGA ALIAS GEORGE MUTAHI KIRANGA.....APPLICANT

VERSUS

MARGARET WANGARI WAWERU

EPHANTUS MUGI WANYAGA(SUED AS THE LEGAL REPRESENTATIVES

OF THE ESTATE OF WILLY WANYAGA MUUGI.....RESPONDENT

RULING

By way of a notice of motion dated 12th November 2015, the applicant moved this court under certificate of urgency seeking orders *inter alia* prayers **(iii)**, **(iv)** and **(vi)** of the said application the rest having spent.

The application is expressed under **Order 42** Rule **6 (1)** (**2), Order 51** Rule **1** of the Civil Procedure Rules 2010, Section **3A** of the Civil Procedure Act[1] and all other enabling provisions of the law and is premised on the grounds enumerated on the face of the application and the annexed affidavit of the applicant sworn on 12th day of November 2015.

Essentially, the grounds relied upon are as follows:-

a. *That the applicant has an arguable appeal with a high probability of success and if the application is not granted the intended appeal will be rendered nugatory and the applicant will suffer irreparable damage.*
b. *That in the event of execution taking place, the applicant may not recover the money in the event of the appeal being successful.*
c. *That the applicant is ready, able and willing to abide by any conditions that the court may impose and as a price for stay, the applicant is ready to deposit the judgement sum in an interest earning account.*
d. *That the application was brought without unreasonable delay and the delay experienced was because the Insurance company was going through some re-organization.*
e. *That there is pending in this court an application for leave to file the appeal out of time.*
f. *That the respondent has already proclaimed the applicants goods.*

The respondent filed a replying affidavit on 2.12.2015 arguing *inter alia* that she is not a person of straw

and is capable of refunding the decretal amount in the event of the appeal succeeding, that the application has not been filed without delay, that it has not been shown that the applicant will suffer substantial loss, that order 42 envisages a situation whereby the applicant has already filed the appeal, and in the present case no appeal has been filed, and the application for leave to appeal out of time is still pending, that the applicant is determined to deny the respondent the fruits of her judgement, that the applicant was convicted of the offence of causing death hence liability was established.

At the hearing of this application counsel for the applicant stated that they are only seeking stay pending determination of their application for leave to appeal out of time and adopted the affidavits filed and reiterated that the applicant is ready to deposit the decretal amount in a joint interest earning account.

Counsel relied on the case of *Omar Sheikh Abdalla vs Corporate Insurance Co. Ltd***[2]** and the Court of Appeal decision in the case of *Gitahi & Another vs Warugongo***[3]** where the court cited and quoted the principles laid down by Parker LJ in the case of *Rosengrens Ltd vs Safe Deposit Centres Ltd*[4]where the learned judge in allowing an application of this nature subject to furnishing of security *inter alia* stated:-

"We are faced with a situation where a judgement has been given. It is subject to appeal. It may be affirmed. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiffs.....It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose it matters not whether the plaintiffs are secured in one way or another. If it would be easier for the defendants or if for any reason they would prefer to provide a bank guatrantee rather than by cash, i can see absolutely no reason in principle why they should not do so"

I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling.

As earlier mentioned, the application is expressed under Order **42** Rules **(1) & (2)** and Order **51** Rule **1** of the Civil Procedure Rules 2010 and Section **3A** of the Civil Procedure Act.[5]

Order **42** Rule **6 (1) & (2)** provides as follows:-

1. *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

2. *No order of stay 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 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*

There is pending in this file an application for leave to file the appeal out of time. The application was filed on 25.9.2015 and the same is yet to be determined. The said judgement in question was delivered

on 19.8.2015. The period allowed for filing an appeal is 30 days from the date of the judgement, hence the application for leave was filed after about six days.

Section **79G** of the Civil Procedure Act[6] it provides:-

"79G: Every appeal from a Subordinate court to the High court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time".

As mentioned above, the said application is still pending and in the event of the applicant satisfying the court that he had a good and sufficient cause, then it may be allowed, in which event if execution will have taken place then, the appeal may be rendered nugatory. I am not in any manner attempting to go into the merits of the said application but it will suffice for me to mention some relevant guiding principles in determining such applications, bearing in mind the period of delay mentioned above.

The Supreme Court of Uganda in the case of *G.M. Combined (U) Ltd vs A.K. Detergents (U) Ltd***[7]** following the Court of Appeal decision in *Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority***[8]** alluded to the principle to be applied in applications for leave to appeal out of time where their Lordships stated:-

"An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct".

Therefore for the said application to succeed, the applicant is required to show that there are grounds of appeal which merit serious judicial consideration. In practice judges and courts are probably not as reluctant to grant extensions of time as the authorities may suggest. Consideration will usually be given to the merits of the appeal before declining to grant an extension of time.

The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

I now proceed to discuss the considerations for granting applications for stay pending appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal***[9]** **(Madan, Miller and Porter JJA)** whole considering an application of this nature had this to say:-

i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

ii. *The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

iii. *A judge should not refuse a stay if there are god grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iv. *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

It is clear from the wording of Oder **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the above conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[10]What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto***[11]** where it was held *inter alia* that:-

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself , does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of ***Silverstein vs. Chesoni*****,[12]***…….the issue of substantial loss is the cornerstone of both jurisdiction of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"*

In my view, the application for leave and the present application were filed without delay.

Regarding substantial loss, the applicant fears that he may not recover the money if paid while the respondent insists she is not a person of straw. Whereas the applicant has not proved his claim that the applicant may not repay the said sum, the respondent has equally not demonstrated that she can repay if execution proceeds because she has not demonstrated her financial ability to repay by way of evidence. The court is left guessing whom to believe. In *Equity Bank Ltd vs Taiga Adams Company Ltd*,**[13]** the court stated a follows:-

"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."

In *Elena D.Korir vs Kenyatta University***[14]Justice Nzioki Wa makau** had this to say:-

*"the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd***[15]** *where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.*

*In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd***[16]***(2013) as follows:-*

"In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

On whether or not the application was brought without undue delay, I have already observed that in my view a delay of 6 days is not inordinate. Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit& Another***[17]** the court held:-

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter. In the case of ***Christopher*** *Kendagor vs Christopher Kipkorir,***[18]** *the applicant had been given 14 days to vacate the suit land. He filed a application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land"*

I find that there has not been inordinate delay in both filing the application and prosecuting it.

Apart from proof of substantial loss the applicant is enjoined to provide security.[19] The applicant states that he is ready to deposit the entire judgement sum in a joint interest earning count. There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay.[20] However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others.***[21]**

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd*[22]it was held that:-

"……of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought…….let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay…" which principle was also emphasized in ***Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others.*****[23]**

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)***[24]** where it was held that:-

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

Having carefully considered the application before me and the law, I a persuaded that the applicant has satisfied the conditions stipulated under Order 42 Rule 6 and in the circumstances I allow the application.

I am fortified in my finding by the following excerpt from *Halsburys Laws of England***[25]** wherein the learned writers observe that:-

"The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."

In the case of *Global Tours and Travels Ltd***[26]** it was held that:-

".....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously." (Underlining provided)

In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd*[27] had this to say:-

"The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./ However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."

In this application, what appears to be at stake is recovery of judgement sum if it is paid to the respondent. Whereas the applicants alleges that the respondent may not repay the money in the event of the intended appeal succeeding, I am persuaded that the respondent did not fully demonstrate her ability to repay the said sum.

Having fully considered the facts of this case, the arguments submitted by both parties and the relevant law and authorities, I am persuaded that the position adopted in the above cited case of *Butt vs Rent Restriction Tribunal***[28]** **(Madan, Miller and Porter JJA)** while considering an application of this nature is good law, that is; **(i)** *The discretion of the court should be exercised in such a way as not to prevent an appeal.**(ii)** The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.* ***(iii)*** *A judge should not refuse a stay if there are god grounds for*

granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. (v)The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

The upshot is that applying the above principles, I hereby allow the application before me and order as follows:-

(a) That there be stay of execution of the judgement and decree issued in PMCC No 228 of 2013 and all the consequential orders subject the following conditions.

(i) That that applicant shall deposit the entire decretal sum as per the decree in PMCC No 228 of 2013 inclusive of the principal sum, costs and interests in a joint fixed deposit interest earning account to be opened in the joint names of the applicants advocates namely ***M/S J. K. Kibicho & Co*** *and the respondents advocates* ***M/S Wagita Theuri & Co.***

(ii) That the said account shall be opened within 30 days from the date of this order time being of essence.

(iii) That the applicant shall ***fix a date for hearing*** *the application dated* ***21.9.2015*** *within* ***21 days*** *from the date of this order provided that the said application must be heard and determined within the next 45 days from the date of this order time being of essence.*

(v) That in the event of leave to appeal being granted pursuant to the above application, the intended appeal ***must be filed within seven days*** *from the date of granting of the said leave time being of essence.*

(vi) That in the event of leave to file the intended appeal being refused or in default of any of the above conditions, the stay herein granted ***shall automatically lapse and execution shall proceed.***

(b) That the applicants shall pay to the respondents the costs of this application.

Right of appeal 30 days

Dated at Nyeri this **18 TH** day of **December** 2015

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya

[2] {2000}eKLR

[3]{1988} KLR

[4] {1984} 3ALL ER 198 at page 200

[5] Supra

[6] Cap 21, Laws of Kenya

[7] *Civil Appeal No. 23 of 1994*

[8] *Civil Application No. 16 of 1996*

[9]Civil App No. NAI 6 of 1979

[10] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[11] HC Misc No. 42 of 2012 OR {2012} eKLR

[12] {2002} 1 KLR 867

[13] {2006}eKLR

[14] {2012}eKLR

[15] {1993} KLR 365

[16] {2013}eKLR

[17] High Court ELC No. 200 of 2012 or {2014} eKLR

[18]HC ELC 919 of 2012, Eldoret

[19] See judgement in Republic vs Commissioner for Investigations & Enforcement,Misc App no 51 of 2015 (NBI),

[20] Ibid

[21] Civil Appeal No. 291 of 1997

[22] Supra note 6

[23] Supra note 14

[24] {2002} KLR 63

[25] 4th Edition, Vol 37 pages 330-332

[26] WC No. 43 of 200 (UR)

[27] Civil Application number NAI 322 of 2006 (UR)

[28]Civil App No. NAI 6 of 1979