



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO 181 OF 2021**

**BETWEEN**

**MICHAEL KAMAU KURUMAH**

**AUSTINE MUTARA VUNZA**

**DOMINIC MWANGI THUO.....APPELLANTS/APPLICANTS**

**-VERSUS-**

**AGNES MWIKALI MALONZA.....RESPONDENT**

**RULING**

1. By a Motion on Notice dated 4<sup>th</sup> November, 2021, the Applicant herein substantially seek stay of execution of the Judgment and/or Decree issued by Honourable E. H. Keago, Chief Magistrate on 21<sup>st</sup> October, 2021 pending the full hearing and determination of this Appeal.

2. According to the applicant, in the said judgement, the subject matter of this ruling, the Appellants were found to be 100% liable in the sum of Kshs. 2,000,000/= general damages, Kshs. 805,261/= (sic) and Kshs 345,000/- special damages with costs and interest. Being aggrieved by the said judgement, they instructed M/S Kimondo Gachoka & Company Advocates to appeal against the said judgment, which appeal they were informed by their advocates has a high chance of success as the Respondent neither proved liability against the Appellant nor deserve the quantum awarded.

3. The Applicants are however apprehensive that if the decretal amount is paid over to the Respondent, the said Respondent would be in no position to refund the same if the Appeal is successful as the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.

4. The Applicants disclosed that their insurer, Directline Assurance Company Limited, is ready, willing and able to furnish the Court with a Bank Guarantee from DTB Bank as security to the court. It was however, their position that unless stay of execution is granted he is likely to suffer injustice and irreparable loss. It was averred that this application was made in good faith and the same will not occasion any prejudice to the Respondent and that it is in the interest of justice the application be granted as prayed.

5. On 7<sup>th</sup> December, 2021, I issued directions in this matter in which I directed the Respondent to respond to the application by 16<sup>th</sup> December, 2021 after which the parties were at liberty to file and exchange their respective submissions. Those directions were not complied with by any of the parties, at least not by the time of writing this ruling which was after the said date of 16<sup>th</sup> December, 2021.

**Determination**

6. I have considered the application and the affidavit in support of and in opposition to the application.

7. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

***“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 to 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 for stay of execution shall be made under subrule (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.”*

8. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 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 of the ***Civil Procedure Rules*** 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. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is ait over to him.

9. In this case, the ground upon which the application is based is that the Respondent is a person of unknown means. However, the mere fact that the Respondent’s means are unknown to the Applicant does not necessarily mean that if the appeal succeeds, he will not be able to refund the decretal sum. It is upon the Applicant to positively and satisfactorily prove that the consequences of releasing the decretal sum to the Respondent, would be that the same would be out of reach of the Applicant and would be irrecoverable or at least very difficult to recover in the event of the successful appeal.

10. There is however no averment by the Respondent that the Applicants’ apprehensions are unfounded. Accordingly, the order that commends itself to me and which I hereby grant is that there shall be a stay of execution of the subject decree pending the hearing and determination of this appeal on condition that the Applicants furnish a Bank Guarantee for the decretal sum specific to this matter. The said condition to be complied with within 30 days and in default the application shall be deemed to have been dismissed with costs.

11. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JANUARY, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties.**

**CA Susan**