



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 123 OF 2019

BENSON DULO.....APPELLANT

-VERSUS-

JOSEPH WAIRE NJOROGE.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

J.M Kimani & Co. Advocates for the respondent

Kitiwa & Co. Advocates for the appellant

R U L I N G

What is before the court is a Notice of Motion Application dated 28th February 2022 expressed to be brought under Order 42 rule 6 of the Civil procedure rules and section 3A of the Civil Procedure Act. The applicants sought the following order as the rest are spent;

· There be an order of stay and execution of the judgment and decree of this Honourable court pending the hearing and determination of the appeal to the court of appeal.

The application is based on the grounds therein and the affidavit in support of said application. In a nutshell, the applicant having been dissatisfied with the decision of the court in Eldoret HCCA 123 of 2019 has preferred an appeal against the said decision and therefore seeks stay of execution pending the determination of appeal.

Upon perusing the pleadings and submissions therein I have identified one issue for determination; Whether stay of execution should be granted.

Order 42 Rule 6(2) provides the principles guiding stay of execution as follows;

(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.

In the case of *Halai & Another vs Thornton & Turpin (1963) Ltd (1990) KLR 365* the court held;

The High Court's discretion to order a stay of execution of its order or decree 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 stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

With regards to substantial loss, in the case of *Kenya Orient Insurance Co Ltd vs Paul Mathenge Gichuki & Another [2014] eKLR*, the court held that;

The burden of proof that the respondent is not a man of straw and can refund the decretal sum of the appeal succeeds shifts to

the respondent once the appellant states that it is not aware of the respondent's resources.

The respondent has not proven that he will be able to refund the decretal amount should the appeal succeed.

The application was filed on 28th February 2022, 14 days after the decision was delivered therefore it is evident that the application was filed without unreasonable delay. With regards to security, the applicant has already deposited the entire decretal amount in a joint interest earning account in the names of both of the parties' advocates on record.

In the premises, I find that the application is merited and grant the orders of stay of execution pending the hearing and determination of the appeal. The security deposited in the joint interest earning account of the parties' advocates shall suffice as security.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 25th DAY OF MARCH, 2022.

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R. NYAKUNDI

JUDGE