



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO E083 OF 2021

DUKE MASIOMA BIKERI.....APPELLANT

VERSUS

ELIJAH KIPKURUI.....RESPONDENT

RULING

INTRODUCTION

1. In his Notice of Motion dated 19th November 2021 and filed on 22nd November 2021, the Appellant sought an order for stay of execution of the judgment/ decree in **Nyamira CMCC NO E15 OF 2020** that was delivered on 28th October 2021 pending the hearing and determination of his appeal be granted.
2. He further sought an order that he does provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the judgment herein of Kshs1,314,414/=. He swore an affidavit in support of the application on 19th November 2021.
3. He contended that he was aggrieved by the entire judgment of the Learned Trial Magistrate and had instructed his advocates to appeal against the same. He stated that he had an arguable appeal which had a high chance of success. He was apprehensive that he would not be able to recover the decretal sum from the Respondent, who was a person of straw, if he paid her the decretal sum and was successful on appeal. He was also apprehensive that if the Respondent executed against him, it would render the present application and his Appeal nugatory.
4. He further averred that he was willing, ready and able to furnish security in form of a bank guarantee and thus urged this court to allow his application.
5. In opposition to the said Application, on 26th November 2021 the Respondent swore a Replying Affidavit. The same was filed on even date. He deponed that he was not opposed to the application being allowed on condition that, the entire decretal amount be deposited as security in a fixed joint interest-earning account in the names of both counsels on record within twenty-one (21) days from the date of this court's ruling.
6. The Appellant's Written Submissions were dated 6th December 2021 and filed on 8th December 2021. The Respondent did not file any Written Submissions. He informed the court that he would rely on his Replying Affidavit.
7. The Ruling herein is therefore based on the affidavit evidence and the Appellant's Written Submissions which they both relied upon in their entirety.

LEGAL ANALYSIS

8. The present application was brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which empowers a court to stay execution of its own orders or an appeal court to stay orders from the court whose decision was being appealed from.
9. Under the said Order 42 Rule 6 of the Civil Procedure Rules, an applicant had to demonstrate the following:-
 - a. **That substantial loss may result unless the order is made.**
 - b. **That the application has been made without unreasonable delay.**

c. Such security as the court orders for the due performance of the decree has been given by the applicant.

10. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

11. Having said so, this court did not find it necessary to analyse the affidavit evidence and the Appellant's Written Submissions thought it noted the same as the Respondent was not opposed to the Appellant's application provided that he deposited the decretal sum as aforesaid.

12. This court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of a bank not honouring the bank guarantee as the bank issuing the same would not be a party to the suit therein making it difficult for a successful appellant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.

DISPOSITION

13. For the foregoing reasons, the upshot of this court's ruling was that the Appellant's Notice of Motion application dated 19th November 2021 and filed on 22nd November 2021 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein on the following conditions:-

1. THAT there shall be a stay of execution of Judgment that was delivered by Hon W.C.Waswa (RM) on 28th October 2021 in Nyamira Civil Suit No E15 of 2020 Elijah Kipkurui vs Duke Masioma BIKERI pending the hearing and determination of the appeal on condition the Appellant shall deposit in a joint interest earning account the sum of Kshs 1,314,414/= within thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 13(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Appellant be and is hereby directed to file and serve his Record of Appeal within thirty (30) days from the date of this Ruling.

4. This matter will be mentioned on 2nd June 2022 to confirm compliance and/or for further orders and/or directions.

5. Costs of the application herein shall be in the cause.

6. Either party is at liberty to apply.

14. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF APRIL 2022

J. KAMAU

JUDGE