



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CIVIL APPEAL . NO. E 3 OF 2020**

**NICHOLAS WASHINGTON.....APPELLANT/APPLICANT**

**-VERSUS-**

**KAROLI AUMA OULO.....RESPONDENT**

**RULING**

By the application dated 21/11/2020, the appellant/applicant **NICHOLAS WASHINGTON OKOTH** (formerly defendant) seeks the following orders against the Respondent **KAROLI AUMA OULO** (formerly plaintiff)

1. –

2. –

**3. That the execution of the decree No. Rongo PMCC 5/2020 between Karoli Auma Oulo vs Nicholas Washington Okoth be stayed pending the hearing and determination of Migori HCC E3 / 2020.**

**4. Costs of the application be provided for.**

The application is supported by the affidavit of **EDINAH KERUBO MASANYA**, a legal Associate with Brittam General Insurance Company Limited, the insurers of the applicant herein. The counsel deponed that Judgment was delivered on 8/10/2020 in which damages were awarded to the respondent to the tune of Kshs. 3,809,110/= together with costs and interest on 100%, liability against the applicant; that the applicant lodged the appeal case Migori E3 of 2020 on 23/10/2020; that the sum awarded is large and if paid to the respondent at this stage, it may not be possible to recover it from her in the event the appeal succeeds; that the appeal may therefore be rendered nugatory; that the application has been brought in good faith and without delay and that the applicant is willing to deposit the entire decretal sum in a joint interest earning account.

The application was opposed by the respondent who swore an affidavit dated 16/11/2020 in which she deponed that she had not commenced execution of the decree; that the application is meant to deny the respondent the fruits of her judgment and that an order of stay should not be granted just because the insurers of the applicant can afford to provide security; that the court should balance the rights of both the applicant and respondent. She urged that if the court is inclined to grant an order of stay, then the court should direct that half the decretal sum be paid to the respondent and the balance in an interest earning account of both counsel for the parties.

The applicant's counsel **M/s Omay and Company Advocates** filed their submissions on 2/12/2020, while the respondent's counsel filed theirs on 11/12/2020.

I have considered the rival submissions by counsel.

The principles that guide the court in considering whether or not to grant an order of stay of execution pending appeal are clearly set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.

The said order provides as follows;

**“(6) (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 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.”

The Court of Appeal in **Vishram Ravji Halai =vs= Turpin Civil Application No. 15 of 1990 (1990) KLR 365** held that the court’s power to grant stay pending appeal is discretionary but must be granted subject to the following conditions namely; -

1. The application was made without delay;

2. The applicant must demonstrate that he will suffer substantial loss if stay is not granted;

3. There must be sufficient cause.

4. The applicant should be ready; able and willing to provide such security as the court may order for performance of the decree.

In the instant case, the appeal arises from a judgment that was delivered on 8/10/2020. The appellant filed the memorandum of appeal on 23/10/2020 while the application was filed on 4/11/2020. I am satisfied that the application was filed without delay.

It is the duty of the applicant to prove that if stay is not granted, he will suffer substantial loss. The applicant has deponed that the decretal sum big i.e. Ksh. 3,807,450/= plus costs and if paid to the respondent, she is unlikely to refund it in the event the appeal succeeds.

In **Kenya shell Ltd =vs= Kibiru (1986) KLR 410 Ag J.A Platt** stated as follows;-

“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 cornerstone of both jurisdictions for granting stay. This is what it has to be prevented. Therefore, without this evidence is difficult to see why the respondents should be kept out of their money.”

-

In **Samvir Trustee limited =vs= Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** Warsame J faced with an application for stay of execution expressed himself as hereunder; -

“Every party aggrieved with a decision of the High court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be an overwhelming hindrance to the exercise of discretionary powers of the court. The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruit of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgment hence the consequence of the judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.....

...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if stay is not granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss. The court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation. At the stage of the application for stay of execution pending appeal, the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. “

As stressed by the above decisions, the grant or denial of an order of stay is an exercise of the courts discretion. In exercise of the said discretion, the court must be careful to balance the interests of both the applicant and the successful party who should not be impeded from enjoying the fruits of his judgment.

Once the money is forwarded to the respondent, it will be out of reach of the applicant. Once the applicant deponed that the respondent may not be able to repay the decretal sum in that event the appeal succeeds, the evidential burden shifted to the respondent to demonstrate that she is not a person of straw but able to repay the sum. It is because only the defendant knows her financial status. However, the Respondent did not allude her financial standing in the replying affidavit.

In **National Industrial Credit Bank Limited**, the court followed the decision in **Stanley Karanja Wainaina** where court held that;-

**“ This court has said before and it would be 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 liable to pay back the decretal sum, it is unreasonable to expect such on applicant to know in detail the resources owned by a 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.”**

In the instant case, the respondent never bothered to demonstrate her worth It is therefore only fair to conclude that if the decretal sum is paid to her, she may never be able to repay and the appeal would be rendered nugatory.

On the issue of security, the applicant is ready and willing to provide security and in fact the court ordered the applicant to deposit Kshs. One million (1000,000/=) in court when it granted temporary stay of execution. That order was complied with. It is also noteworthy that the applicant is keen on prosecuting the appeal which was filed without delay.

It is true that in such an application, the respondent is entitled to enjoying the fruits of her Judgment and the court must do its best in balancing the interests of both parties. In the instant case, the appeal has already been filed, a third (  $\frac{1}{3}$  ) of the decretal sum is safely deposited in court and in my view, the applicant is deserving of an order of stay and I hereby grant an order of stay of execution on condition that the Kshs. 1 million deposited in court be deposited in interest earning account of both advocates of the parties within fourteen (14) days hereof, pending the hearing and determination of the appeal. Costs of the application will abide the appeal.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 18<sup>TH</sup> DAY OF MARCH, 2020.**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of**

Mr. Odero holding brief Mr. Ouma for the Respondent

Omayya Advocate – Absent

Oloo

Court

Assistant