



**REPUBLIC OF KENYA**

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

**Coram: Hon. D. K. Kemei – J**

**CIVIL APPEAL NO. E028 OF 2020**

**MERCELINE REHEMA MBAGO ALIAS**

**MERCELINE REHEMA.....APPLICANT/APELLANT**

**VERSUS**

**FRIDAH KALUKI ALIAS MUTHINI KALUKI**

**ALIAS KALUKI MUTHINI .....RESPONDENT**

**RULING**

1. The Appellant has filed an application dated 12/12/2020 seeking for an order of stay of execution of the judgement and decree in **CMCC 179 of 2019** pending the hearing and determination of the appeal.
2. The application is supported by the grounds set out on the face thereof and the affidavit of Njoroge Caroline sworn on 4/12/2020. The Applicant's case is that she is dissatisfied with the lower court judgement and has lodged an appeal which has high chances of success. It is the Applicant's case that the Respondent is likely to execute the decree thereby rendering the appeal nugatory. Finally, the Applicant states that she is ready and willing to provide a Bank Guarantee as a security for the due performance of the decree.
3. The application is opposed. The Respondent filed grounds of opposition dated 15/12/2020 wherein learned counsel for the Respondent raised several issues *inter alia*: that the application has been filed outside the statutory period of thirty (30) days; that the application has been filed for the sole purpose of buying time and denying the Respondent from enjoying the fruits of the lawfully obtained judgement; that the Applicant has not demonstrated how the appeal will be rendered nugatory if stay is not granted as costs in the lower court are yet to be assessed; that half of the decretal sums be paid to the Respondent while the balance be deposited into a joint interest earning account in the name of the parties Advocates.
4. Parties canvassed the application by way of written submissions.
5. Learned counsel for the Applicant submitted that the Applicant has duly complied with the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. On the issue of substantial loss, it was submitted that the Respondent's financial means is unknown and hence the Applicant might not recover the monies once the appeal succeeds and will suffer substantial loss. On the issue of delay, it was submitted that the application was filed timeously. On the issue of security, it was submitted that the balance of the decretal sums will be secured by a bank guarantee.
6. Learned counsel for the Respondent submitted that the applicant has not satisfied the conditions provided by Order 42 Rule 6(2) of the Civil Procedure Rules and that should the court be inclined to grant an order of stay of execution, then half the decretal sum should be paid to the Respondent while the balance be deposited into a joint interest earning account in the names of both Advocates.
7. I have given due consideration to the Applicant's application, grounds of opposition and the submissions by learned counsels. The conditions upon which an Applicant must satisfy in order to be granted orders of stay of execution of decree pending appeal are found in Order 42 Rule 6 (2) of the Civil Procedure Rules 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.***

***(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. Even though the Applicant was under a duty to satisfy the above conditions, parties recorded a consent on the 12/03/2021 as follows:-

**“(1) the sum of Kshs. 150,000/- be released to the Respondent within thirty (30) days from today.**

**(2) The court to determine the issue of whether the balance of Kshs. 124,167/- be deposited in a joint interest earning account or into court or by way of a bank guarantee by the Applicant”.**

The aforesaid consent by the parties clearly compromised the application dated 12/12/2020 leaving the court to determine clause (2) of the aforesaid consent.

9. Learned counsel for the Applicant has submitted that the Applicant is ready to furnish a bank guarantee for the balance of the decretal sum and to that extent has already secured a bank guarantee of Kshs. 30,000,000/-. It was the view of counsel that depositing the money into an interest earning account will be difficult for the Applicant’s underwriters due to the negative effects on its business by Covid – 19 pandemic that has led to depletion of funds.

10. A perusal of the Applicant’s memorandum of Appeal shows that the appeal is on quantum of damages since liability was agreed by consent and hence the Respondent is not likely to come out empty handed at the determination of the appeal. This position seems to have informed the parties leading to the entry of the consent dated 12/03/2021. The Respondent who is to receive half of the decretal sum should now allow the Applicant to furnish a bank guarantee for the balance pending determination of the appeal. This in my view is appropriate for the parties herein as no prejudice is suffered by either of them.

11. In light of the foregoing, the Applicant’s application dated 12/12/2020 is allowed in the following terms:-

***(a) An order of stay of execution of the decree in Machakos CMCC No. 179 of 2019 is hereby granted pending determination of the appeal upon the Appellant paying the sum of Kshs. 150,000/- to the Respondent while the balance thereof to be secured by the Appellant furnishing a bank guarantee thereof within thirty (30) days from the date of this ruling failing which the stay shall lapse.***

***(b) The costs hereof to abide in the appeal.***

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF JUNE, 2021.**

**D. K. Kemei**

**Judge**