



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 237 OF 2018

FRANCIS NJOROGE WANJOHL.....APPLICANT

VERSUS

JOSEPH NGETHE IKURO.....RESPONDENT

RULING

1. The Application dated 12/2/2021 seeks orders that:

1. Spent

2. Spent

3. This Honourable Court be pleased to order the Executive Officer, Milimani Commercial Chief Magistrates' Court to facilitate and avail the certified copies of Judgment dated 4/05/2018, orders dated 2/07/2018, proceedings and decree dated 6/12/2018 to the appellant herein.

4. This Honourable Court be pleased to stay any further execution of the Judgment dated 4/05/2018, orders dated 2/07/2018 and decree dated 6/12/2018 issued by Hon. G. A. Mmasi (Mrs) SPM for 30 days to allow the Appellant to prepare and file his record of appeal.

5. Pending hearing and determination of this appeal, this Honourable court be pleased to stay the execution of the Judgment dated 4/05/2018, orders dated 2/07/2018 and decree dated 6/12/2018 issued by Hon. G. A. Mmasi (Mrs) SPM.

6. Costs be in the cause.

2. The application is premised on the grounds set out in the application and the supporting affidavit. The Applicant's position is that the Judgment the subject of the Appeal herein was delivered on 4/5/2018. That the said Judgment and decree directed the Milimani Chief Magistrate's Court to pay the Respondent the decretal sum, yet the Milimani Chief Magistrate's Court was not party to the proceedings. The Applicant was aggrieved by the said Judgment and filed the Appeal herein.

3. It is further deponed that the Applicant retained a firm of Advocates to represent him and filed the Appeal herein, which Appeal was filed. That the Applicant thereafter fell ill and was not able to personally pursue this matter and the Advocates did not inform him of the status of the Appeal. That in the meantime, the Respondent proceeded with execution and attached and sold the Applicant's motor vehicle.

4. It is further stated that on 4/12/2020 the Lower Court lifted the interim orders of stay of execution. That the Applicant whose motor vehicle has already been sold stands to suffer substantial loss if the instant application is not allowed as his Appeal will be rendered nugatory.

5. The application is opposed. It is stated in the replying affidavit that the instant application has no merits and is aimed at delaying the Respondent from enjoying the fruits of the Judgment. It is averred that the Applicant stands to suffer no prejudice as there are interim stay of execution orders in the Lower Court file.

6. I have considered the application, the response thereof and the submissions filed by the Applicant's counsel. I have also considered the Respondent's submissions. The Respondent appeared in person.

7. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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. The Application herein was filed on 12/2/2021. The Judgment appealed from was delivered on 4/5/2018. The application has been filed after inordinate delay. The Applicant has however explained that he was taken ill.

9. On substantial loss, the Applicant has asserted that his motor vehicle has already been attached and sold. This position is not disputed. The Applicant has also stated that the interim orders of stay issued by the Lower Court have already been lifted. Although the Respondent has disputed this position, no documents have been exhibited herein to confirm whether there are any orders of stay of execution which are in force in the Lower Court file.

10. On the issue of deposit of security, the Applicant has stated that his motor vehicle has already been sold and that he is capable of paying the outstanding decretal sum. No security has been offered for the outstanding amount. No allegations have been made concerning the Respondent's capability to refund the decretal sum and neither has the Respondent said anything on the subject.

11. On the one hand, we have an Applicant who wishes to exercise his right of Appeal while on the other hand, the Respondent has his undoubted right to the enjoyment of the fruits of the Judgment. To balance the competing interests of the parties, I allow the application on condition that the Applicant do deposit the balance of the decretal sum in court within 30 days from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021

B.THURANIRA JADEN

JUDGE