



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. E281 OF 2020**

**MARY GAKUHA .....APPLICANT**

**VERSUS**

**HENRY NJENGA KIHUNA.....RESPONDENT**

**RULING**

1. The Application dated 4/11/2020 seeks orders that:

**This Honourable Court be pleased to stay the execution of the Judgment/Decree obtained herein pending the full hearing and determination of the Appellants/Applicants Milimani Civil Appeal No. E281 OF 2020.**

2. The application is premised on the grounds set out in the application and the affidavit in support. It is stated that the *ex-parte* Judgment was entered on 13/2/2020 against the Applicant. That the Applicant filed an application to set aside the *ex-parte* Judgment but the same was dismissed in a ruling delivered on 23/10/2020. The Applicant is dissatisfied with the said ruling and has filed an Appeal.

3. It is further averred that if the instance application is not allowed, the Applicant stands the prejudice of being condemned unheard. That her Appeal which is stated to have high chances of success will be rendered nugatory and thereby suffer substantial loss. It is added that the Applicant is apprehensive that the Respondent would not be in a position to refund the decretal sum if the Appeal is successful as his means remain unknown to the Applicant. The Applicant is willing to deposit security for the due performance of the decree.

4. The application is opposed. It is stated in the Replying Affidavit that the affidavit in support of the application is sworn by the Insurer instead of by the Applicant. That the Applicant had filed a similar application in the Lower Court and that the application is intended to delay the Respondent from the realization of the Judgment. It is further stated that the Applicant's apprehension of the Respondent's financial status is not anchored on factual basis. The court was urged to have the decretal sum deposited in a joint account of the parties' Advocates in the unlikely event that the application is allowed.

5. I have considered the application, the response thereof and the rival submissions filed.

6. The deponent of the Affidavit in support is the Insurer of the Applicant's motor vehicle and has explained their claim herein was brought under the rights of subrogation under the Policy of Insurance. The affidavit is properly on record.

7. Order 42 Rule 6(1) of the Civil Procedure Rules states that: -

**No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.**

8. The said provision does not bar the Applicant from filing a similar application before this court.

9. 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.*

10. The application at hand was filed on 19/11/2020. The ruling on the subject of the application was delivered on 23/10/2020. There was no unreasonable delay.

11. On the issue of substantial loss, the Applicant has expressed fears that the Applicant's financial position is unknown. The burden therefore shifted on the Respondent to demonstrate his capability to refund the decretal sum in the event that the Appeal is successful.

12. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

**“This court has said before and it would bear 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 unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear 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 – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

13. The Applicant has offered security for the due performance of the decree.

14. In the upshot, to balance the competing interests of the parties, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date hereon.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of June, 2021**

**B.THURANIRA JADEN**

**JUDGE**