



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL CASE NO. E003 OF 2021**

**NANCY KIBET.....PLAINTIFF/RESPONDENT**

(Suing as the legal representative and as Administrator

of the Estate of **BRIGIT JEPKORIR KIMUTAI – Deceased)**

**VERSUS**

**KING'ORI MUNENE ERASTUS.....DEFENDANT/APPLICANT**

**RULING**

1. By an amended notice of motion dated 09/06/2021, the Applicant sought orders that ruling dated 27/05/2021 in Nyahururu CMCC 18/2019 and subsequent orders be stayed pending hearing of instant application. That the judgment in **Nyahururu CMCC 18/2019** and subsequent orders be stayed pending hearing and determination of the Appeal lodged herein plus costs.
2. The application is based on the provisions of **Order 1A, 1B, 3A, Cap.21 and Order 42 Rule 1 Civil Procedure Rules, 2010.**
3. It is grounded on the facts that; via a ruling delivered on 27/05/2021 the Applicant was granted conditional stay of execution of degree in **Nyahururu CMCC 18/2019.**
4. The annoying condition according to the Applicant was the order for paying of Kshs. 1,350,352.50/- with Respondent's within 30 days from 27/05/2021.
5. He describes the condition as oppressive and defeatist of the instant appeal, thus will render appeal nugatory and also that Appellant to ruinous difficulties.
6. The amount sought to be paid constitutes 50% of the decretal sum which will be substantial satisfaction of the decree. The Appellant aver that the Respondent is a woman of stray and is not capable to reimburse the amount in event appeal succeeds thus the appellant will suffer irreparable damage, substantial loss and render appeal nugatory.
7. Therefor the court is urged to vary the severe conditions of stay to avoid instant appeal being compromised.
8. The Appellant states that she is ready to deposit bank guarantee or deposit ½ of decretal sum in a joint account of parties' advocates to secure the amount pending hearing and determination of the appeal.
9. The amended notice of motion is supported by affidavit of King'ori Munene Erastus which reiterates the content of the grounds above. The Respondent opposed the application and filed replying affidavit sworn by Nancy Kibet on 16/06/2021.
10. The parties were directed to file submissions to canvass the application. The Respondent filed and served the submissions but to date of preparing the instant ruling, the court has not seen the Applicant's submissions.

**ISSUES AND DETERMINATION**

11. The core issues in the instant matter herein are;

***“If this court has jurisdiction to entertain the application for stay after Applicant was granted conditional stay by trial court and has not complied with the same? If above in affirmative, whether the Appellant has justified the grant of the stay of execution of judgment of trial court with favourable conditions as proposed by the Applicant. And finally the order as to costs.”***

12. It is not contested that the Respondent was awarded Kshs. 2,700,705/- as special, general damages, costs and interests by the trial court thus instigating the instant appeal.

13. Upon application for stay of execution pending appeal, the court granted same on condition that 50% of the decretal amount above is paid to the Respondent within 30 days from 27/05/2021. This triggered the filing of the instant application.

14. The Respondent depones that, she works for Baringo County Government and thus according to her replying affidavit capable of reimbursing the ½ the decretal amount in event appeal succeeds. She also does farming and thus capable of refunding the decretal amount in event appeal succeeds.

15. The Respondents submits that the order of stay issued on 27/05/2021 is not subject of the appeal thus cannot be stayed as sought herein. She relies on the cases of **Capital Reality Ltd vs Housing Finance & Another 2020 eKLR** ,**Raymond Omoboga vs Augustine Pyan Maranga Kisii HCCA 15/2020.**

16. The Respondent also relies on the case of **Shadrack Ayieya Mosoti vs Daniel Ndeve Gatumo 2020 eKLR** which was of the view that;

***“...it is improper for an Appellant who has been successful on an application in the lower court to approach the High Court for similar order.....”***

17. However, other authorities have held different view on whether a party who gets a conditional stay can approach a higher court for similar stay orders pending appeal.

18. In the case of **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** it was held by Meoli, J that:

***“For the purposes of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at liberty...to consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof...***

***So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court. I believe that was part of the distinction that the Court of Appeal was making in the Githunguri Case concerning the court’s original jurisdiction, vis-à-vis the appellate jurisdiction and the innovation behind Rule 5 (2) b (as it is now). The foregoing has a bearing on the interpretation of Order 42 Rule 6 (6) of the Civil Procedure Rules and in particular the highlighted phrased therein.***

***Similarly, the jurisdiction of the High Court in this case was invoked when the substantive appeal (itself a fresh pleading separate from the suit in the lower court) was filed. It is true that the application for stay of execution was allowed with conditions in the lower court. The wording in Order 42 Rule 6 (1) however does not preclude the Applicant from approaching this court as it has done.***

***I would venture to add that the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules effectively grants the same jurisdiction to this court as an appellate court as Rule 5 (2) (b) does to the Court of Appeal: to entertain an application for stay whether or not the same has already been heard by the lower court and dismissed. The only salient difference is that in the case of the High Court the rule makes it clear that it matters not whether the earlier application for stay in the lower court has been allowed or rejected in the lower court. That is my reading of Order 42 Rule 6 (1).***

***It suffices, in my opinion, in this case, in view of the nature of the application before me, that there is an existing substantive appeal against the judgment of the lower court. To insist in this case that the Applicant must first file a separate appeal on the ruling of the lower court, apart from the judgment would in my view not only lead to confusing duplication of proceedings in respect of the same matter but also cause delay. The provisions however must be applied under the guiding principles of Article 15 9 (2) d) of the Constitution.***

***In the circumstances of this case, I consider that driving the Applicant from the seat of justice when there exists a substantive appeal, and in disregard of the full import of Order 42 Rule (6) (1) would amount to raising a technicality, namely, the filing of an appeal on a supplemental matter that actually touches on the appeal where a substantive appeal already exists, above purpose and substance. There may arise in certain cases allegations of abuse of procedure but that must be established.”***

19. The court held that the higher court seized of the appeal has original jurisdiction as pertains to grant of stay pending appeal and can grant stay pending appeal notwithstanding that there were conditional stay issued by the trial court. Of course the higher court stay orders would supersede that of the trial court.

20. I am inclined to be of the later school since the higher court is in control of the appeal, it can grant stay order and proceed to hear appeal depending on the circumstances of the case.

21. In the premises, I will re-look at the circumstances of the instant matter.

22. The Applicant view is that the respondent is a woman of straw and cannot reimburse the 50% of the decretal amount if paid to him and appeal succeeds.

23. The court has perused the service contract between Respondent and Baringo County Government. The salary is indicated to be Kshs.6,000/- per month. The contract is for 3 years from 01/02/2014 and there is no evidence of renewal of the same.

24. The Respondent has not annexed any evidence of the farming activities and income if any arising from such economic activities.

25. Thus the court is inclined to agree with the Applicant that if Kshs. 1,350,352.50/- is paid to her and the appeal succeeds, the Respondent will not be capable of reimbursing the same thus the appeal may be rendered nugatory in event it succeeds.

26. Thus the court holds the view that the order which recommends itself herein is that the conditions of the trial court be varied to be in tandem of this court's order to the following effects.

*(i) The Applicant is granted orders of stay of execution of decree in Nyahururu 18/2019 on condition that the entire decretal amount shall be deposited in joint account of the parties' advocates within 30 days from date herein.*

*(ii) Alternatively, the same amount be deposited in court within 30 days from dates herein.*

*(iii) Costs in the main cause*

**Dated, Signed and Delivered at NYAHURURU this 24<sup>th</sup> day of June, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**