



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. E041 OF 2021**

**DAMACLIN KAMBOKA KUNGA.....APPELLANT/APPLICANT**

**=VRS=**

**CAROLINE MORAA OGATA & WILLIAM MANGURA NYAMWAYA**

**(Both suing as Personal Representatives and Legal Administrators of the estate of the late**

**LAWRENCE OGATA MANGURA (Deceased)).....RESPONDENTS**

***(Being an Appeal against the Judgement of Hon. M. B. Kimtai (Mr.) – PM Keroka***

***dated and delivered on the 11<sup>th</sup> day of May 2021 in the original Keroka***

***Principal Magistrate's Court Civil Case No. 98 of 2019)***

**RULING**

By the Notice of Motion dated 25<sup>th</sup> May 2021 filed herein on 10<sup>th</sup> June 2021 the appellant/applicant seeks an order for stay of execution of the decree obtained in the lower court pending hearing and determination of this appeal. The application is expressed to be brought under **Order 22 Rule 22, Order 42 Rules 4 and 6, Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 3, 3A, 100 of the Civil Procedure Act**.

The gist of the application as can be discerned from the grounds on it as well as in the affidavit of Damacline Kwamboka Kunga sworn in support of the application is that the appellant/applicant has lodged an appeal with high chances of success and that the respondent may execute against the appellant/applicant thereby rendering the appeal nugatory. It is also contended that the decretal sum of over Kshs. 2 million is colossal and the respondent would not be in position to refund the same were the appeal to succeed. Further, that the respondent has not furnished this court with documentary evidence to prove his financial standing and therefore the applicant will suffer irreparable loss if the order is not granted. The appellant/applicant has averred that she is ready, able and willing to deposit the entire decretal amount in court as security and the respondent shall not suffer any prejudice were the application to be allowed.

The application is vehemently opposed. In a replying affidavit sworn on 20<sup>th</sup> June 2021 the respondent deposes that the application is merely intended to deny her of the fruits of her judgement as the applicant has not demonstrated what prejudice he will suffer if orders sought are not granted. She deposes that she will on her part suffer prejudice and that allowing the application will be a contravention of **Article 159 (2) (b)** of the **Constitution** that provides that justice shall not be delayed. She further deposes that should the application be granted then the applicant should be ordered to pay to her half the decretal amount and deposit the other half either in court or in a joint interest earning account otherwise the application should be dismissed for want of merit.

On 1<sup>st</sup> July 2021 this court gave directions that the application would be canvassed by way of written submissions and gave Counsel for the parties fourteen (14) days to file their submissions. However, only Counsel for the respondent has filed submissions and it is her contention that the appellant has not demonstrated to this court that she has met the conditions set out in **Order 42 Rule 6 (2) of the Civil Procedure Rules** to warrant this court to grant the orders sought. Counsel cited several cases in her submissions and reiterated that should the application be granted the applicant should be ordered to pay to the respondent half of the decretal sum and deposit the balance either in court or in an interest earning account in the names of the advocates appearing in the appeal.

As I have stated the advocates for the appellant/applicant did not file their submissions. This despite their being present in court when directions were taken. In my view the effect of failure to file submissions is that the application was not prosecuted. My so saying finds support in the case of **Joseph Kiprepeli Lotukei v Stephen Toroitich Korkou [2021] eKLR** where the court observed: -

**“10. It is an inescapable fact and indeed it is the correct position that paragraph 5 of the impugned ruling states that the applicant in that application, who is also the applicant herein never filed submissions.**

.....

**11. The respondent states that the submissions would not have had any impact on the decision the court made since the substance of the matter was contained in the supporting and other affidavits. However, as this court has stated before in many other cases previously brought before it, an applicant who has failed to file his submissions on an application as ordered by the court has been deemed as a person who has failed to prosecute his application and that application is liable to dismissal. Indeed, many an application have been dismissed on that account.....”**

In the case of **Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd [2018] eKLR** the court refused to grant an order for review to an applicant whose advocate did not comply inter alia with an order to file written submissions within seven days. Be that as it may I note that in the case of **John Abuko Dianga v Forange Auto & Allied Suppliers Ltd [2021] eKLR** the Court of Appeal proceeded to determine an application even though the applicant failed to file his submissions despite a reminder by the Deputy Registrar of the Court. In the instant case the respondent does not seriously oppose the appellant’s application for stay of execution but states that the same should only be allowed upon a condition that half the decretal sum be paid to the respondent and the other half be deposited in a joint interest earning account. That being the case I see no good reason not to allow the application and it is therefore granted. However, the order that best commends itself to me is that **the application shall be allowed on condition that the appellant/applicant shall within thirty days of this order deposit the decretal sum (the entire sum) either in court or in an interest earning account in the joint names of the advocates on record for the parties.** The appellant/applicant shall also bear the costs of this application. It is so ordered.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA MICROSOFT TEAMS IN NYAMIRA ON THIS 29<sup>TH</sup> DAY OF JULY 2021.**

**E. N. MAINA**

**JUDGE**