



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.75 OF 2020**

**1. MICHAEL MURIITHI MUTHII**

**2. JOWAKA SUPERLINK LIMITED**

**3. FRANCIS MACHARIA T/A**

**PLATINIUM AUCTIONEERS.....APPELLANT/APPLICANTS**

**VERSUS**

**1. ALEM SEYOUM**

**2. ABDULLATIIF IBRAHIM ABDALA**

**3. JOSEPH MURIUKI MIKWA T/A JMK ENTERPRISES**

**4. PENINAH GATURI NJERI.....RESPONDENTS**

**RULING**

1. The subject of this Ruling is a **Notice of Motion** application dated **17<sup>th</sup> November, 2020** and filed on the **26<sup>th</sup> November, 2020** by the Appellant (hereinafter the Applicant). The applicant seeks for the following orders:

**1. Spent;**

**2. Spent;**

**3. Spent;**

**4. THAT this Honorable Court be pleased to order a Stay of Execution of the Judgment and Decree delivered by Honorable F. Kyambia, Senior Principal Magistrate Mombasa, on the 5<sup>th</sup> June, 2020, in MOMBASA CMCC No.1273 OF 2017, pending the hearing and determination of this Appeal;**

**5. THAT the costs of this Application abide the outcome of the intended Appeal.**

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit** of **Michael Muriithi Muthii**, the director of the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant's Principal. He averred that a Judgment was delivered in **Mombasa CMCC No.1273 of 2017**, whereby the Judgment decree sum was **Kshs.3,000,000/=** plus costs and interest of the suit which is a colossal amount outside the financial capability of the Applicants, and if he is forced to, it will occasion it financial ruin. It was stated that if execution is allowed to proceed, the Applicants will be out of business.

3. It has been deponed that the Appeal herein has a high chance of success. Further, the Applicants are apprehensive that if he settles the decree, and yet the 1<sup>st</sup> Respondent's income and wealth is unknown to him, he is unsure that he will be able to refund the same incase the Appeal succeeds.

4. The 1<sup>st</sup> Applicant stated that the delay in bringing the application herein was occasioned by the restrictions and inconveniences brought

about by the Covid-19 Pandemic since **March, 2020**.

5. The 1<sup>st</sup> Applicant has stated that he is willing and ready to comply with any terms and conditions that may be imposed by this Honourable Court.

6. Lastly, the 1<sup>st</sup> Applicant stated that the Application for stay herein will not occasion any prejudice to any of the Respondents noting that the 1<sup>st</sup> Respondent also intends to Appeal against the same Judgment by Hon. F. Kyambia. The Applicants pray that this Court allows the application dated **17<sup>th</sup> November, 2020** in the interest of Justice.

7. In response, the 1<sup>st</sup> Respondent filed a **Replying Affidavit** sworn by **Alem Seyoum** on the **7<sup>th</sup> December, 2020**. He has stated therein that the Applicants' Application is misconceived for the reasons that it has been irregularly filed before the High Court without having been filed in the Trial Court first; the Applicants are guilty of laches and inordinate delay in the filing of the instant application; the Judgment of the trial court was delivered with Notice to all parties including the Appellants as they were able to file the Appeal by **17<sup>th</sup> June, 2020** and that the inability to settle a decretal amount is not a ground for not settling the decree.

8. **Mr. Seyoum**, averred that he is financially stable and is able to refund the decretal sum in the unlikely event that the Appellant's Appeal succeeds.

9. The 1<sup>st</sup> Respondent has averred that one of the requirements for stay to issue is that the Applicant must offer to pay security for costs, but the same has not been done in the case herein.

10. It has been deponed that the Applicants have not attached any Bank Statements or Tax returns for the court to determine their inability to raise the decretal amount, thus the claim that the amount is colossal is a mere afterthought.

11. The 1<sup>st</sup> Respondent has further stated that the Applicants have not taken any steps to prosecute the Appeal since filing it on the **17<sup>th</sup> June, 2020** which shows that they have no intention of prosecuting the Appeal if the orders sought in the Application herein are granted.

#### **Directions of the Court**

12. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on the said written submissions. The Applicants' submissions are dated the **7<sup>th</sup> June, 2021** and filed on **9<sup>th</sup> June, 2021** while those of the Respondents are dated the **23<sup>rd</sup> April, 2021** and filed on **28<sup>th</sup> April, 2021**.

#### **The Applicant's Submissions**

13. The Applicant submitted that their Application is properly before the court as provided for under **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010** which gives the court the liberty to consider an application for stay of execution where an appeal is preferred.

14. It has been submitted that for a Court to determine this application it needs to be satisfied that there is an Appeal which has been lodged; the application has been made without unreasonable delay; substantial loss may result to the applicant unless an order of stay of execution is granted and that the court may order for a condition for the stay such as a deposit of security for the due performance of a decree or Judgment.

15. The Applicant submitted that they have an arguable Appeal with high chances of success and that the same was filed on the **17<sup>th</sup> June, 2020** as evidenced by annexure "**MMM-2**" in the Applicant's Supporting Affidavit. It has been stated that the learned trial Magistrate erred in law and fact by misapprehending the evidence, misapplying and misunderstanding the correct legal principles and judicial precedents in its Judgment. Thus, the Applicant submitted that there are serious legal issues to warrant the prayers sought.

16. It was stated that whereas the 1<sup>st</sup> Respondent has a valid Judgment, the Applicants also have the right to Appeal noting that the trial court was not the final arbiter.

17. The Applicant submitted that the Application herein was filed promptly and that any delay that may have occurred has been sufficiently explained to enable the Court reach a just conclusion.

18. On substantial loss, the Applicants have indicated that the 1<sup>st</sup> Respondent is hell bent on levying execution which the Applicant indicates will greatly prejudice with if stay is not granted. It was stated that the 1<sup>st</sup> Respondent will be at liberty to execute the decree and render the Appeal nugatory.

19. It has also been submitted that the Respondent has not explained his worth or his economic ability to refund the Applicants should the Appeal succeed noting that the decretal sum is **Kshs.3,300,000/=**.

20. On security for costs, the Applicant has submitted that it is willing to comply with conditions of stay as may be imposed by this Honorable Court.

#### **The Respondent's Submissions**

21. The Respondent submitted that the Judgment by the trial court was delivered on **5<sup>th</sup> June, 2020** while the Application herein was filed on the **28<sup>th</sup> November, 2020**. The Respondent states that there has been a six (6) month delay that has not been explained.
22. It has been submitted that the Applicants have not demonstrated the substantial loss they will suffer if they settle the decree as awarded as there is no evidence before court to substantiate their claims. It has been stated that execution cannot be a basis for grant of an Order of Stay of Execution as there is no proof that the Appeal will be rendered nugatory and that the Applicants will suffer substantially.
23. It is further submitted that the Appeal as filed by the Applicant has no reasonable chance of success as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants have clearly admitted in the primary suit that the suit Motor Vehicle not only belonged to the 1<sup>st</sup> Respondent but that the Applicants colluded and sold it illegally.
24. The 1<sup>st</sup> Respondent submitted that **Order 42 Rule 6(1)** of the **Civil Procedure Rules** requires that the Applicant first files an Application for Stay of Execution before the Trial Court before filing it in the Court of Appeal.
25. On security for costs, it was submitted that the Applicants have not placed before court any security as required under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** to warrant grant of the orders sought.

### **Analysis and Determination**

26. After perusing all the pleadings and the written submissions filed by the parties in this case, I find that the main issue for determination is *whether this court can issue stay of execution of the Judgment delivered and Decree issued on 5<sup>th</sup> June, 2020 pending the hearing and determination of the Appeal*

27. Stay of Execution is provided for under **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules, 2010** which states that: -

*“(1) 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.*

*(2) 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.*

28. The above Rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the Appeal, it must be satisfied that there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the Applicant is ready to provide such security as the court may impose.

29. The Applicants raised two grounds on substantial loss. The first being that they will be greatly prejudiced if stay is not granted as the 1<sup>st</sup> Respondent will be at liberty to execute which will render their Appeal nugatory. The second ground is that they cannot ascertain if the Respondent will be able to refund the decretal sum in case the Appeal succeeds.

30. It is now settled that execution is not a ground enough to warrant Stay of Execution as the 1<sup>st</sup> Respondent as a matter of right is entitled to enjoy the fruits of his successful Judgment. (See the case of **Awale Transporters Ltd –vs- Kelvin Perminus Kimanzi [2020]eKLR**).

31. The Applicants have raised a concern of the Respondent being unable to pay the decretal amount in case they succeed on Appeal and as held in the case of **Ujagar Singh –vs- Runda Coffee Estates Limited [1966]EA 263**, the burden to prove whether they can refund the said money is now on the 1<sup>st</sup> Respondent to show his capability to refund the amount in the decree in case the Appeal is successful. In this case, the 1<sup>st</sup> Respondent has not brought any proof on how he intends to settle the decretal sum in case the Appeal succeeds. He has instead placed the burden of proof on the Applicants contrary to the law.

**32. On whether the Application herein has been brought without undue delay, the Ruling of the trial court was delivered on 5<sup>th</sup> June, 2020, a Memorandum of Appeal filed on the 17<sup>th</sup> June, 2020 and the Application herein was filed on the 26<sup>th</sup> November, 2020. I find that there has been a seven (7) months and nine (9) days delay that has not been explained by the Applicant. The Applicant has only attached various court notices on Covid-19 Pandemic, but has not explained how the same occasioned the delay herein.**

33. The final requirement for Stay of Execution to issue is the willingness of the Applicant to provide security for costs **for the due performance of the Judgment and decree. The Applicants have stated that they are willing to comply with any conditions on security as may be imposed by this Honourable Court.**

**34. It is evident from above that the Applicants have fulfilled two requirements for an order of Stay of Execution to be granted which is that they stand to suffer substantial loss and their willingness to offer security of costs.**

**35. The upshot is that the Application dated 17<sup>th</sup> November, 2020 is therefore allowed and the Judgment and Decree issued on 5<sup>th</sup> June, 2020, by Hon. F. Kyambia be and is hereby stayed pending the hearing and determination of the Appeal on the following conditions, that:-**

*a) The Applicant do pay the 1<sup>st</sup> Respondent half of the decretal amount being Kshs.1, 650,000/=.*

*b) The other half being Kshs.1, 650,000/= be deposited in a joint interest earning account in the name of both Advocates of the parties herein.*

*c) Orders (a) and (b) above be complied with within forty (45) days of the date of the Ruling hereof.*

*d) If the Appellants do not comply with (a) and (b) above their application dated 17<sup>th</sup> November, 2020 shall stand dismissed with costs to the 1<sup>st</sup> Respondents.*

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**IN THE PRESENCE OF:**

**M/S ABWAO COUNSEL FOR THE APPLICANT**

**M/S TAKAH COUNSEL FOR 1ST RESPONDENT**

**COURT ASSISTANT - WINNIE**