



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. E066 OF 2021**

**IRENE MBENGE MUSYA.....APPELLANT/APPLICANT**

**VERSUS**

**FIDELIS MARY KATITHI.....RESPONDENT**

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **31<sup>st</sup> May, 2021**. The same is brought under **Sections 1A, 1B and 3A and 65**, all of the **Civil Procedure Act** and **Order 42 and 51**, both of the **Civil Procedure Rules** and enabling provisions of the law. By the Application, the Appellant/Applicant seeks the following orders: -

**1. Spent;**

**2. Spent;**

**3. THAT this Honourable Court be pleased to Order a stay of execution of the orders made the [sic] 13<sup>th</sup> April, 2021 pending the hearing and final determination of this Application of the Applicant's Appeal;**

**4. Spent;**

**5. Spent;**

**6. THAT the costs of this Application be provided for.**

2. The **Motion** is supported by the grounds presented on its body and the Affidavit of **Irene Mbenge Musya**, the Appellant/Applicant herein sworn on **31<sup>st</sup> May, 2021**. She has averred that on the **13<sup>th</sup> April, 2021**, a Ruling was made in a summary Judgment application against her in **Mombasa RMCC No.915 of 2020** whereby she was ordered to pay the Respondent a decretal sum of **Kshs.377,000/=** together with costs and interest of the suit.

3. **Ms. Irene Mbenge**, depones that being aggrieved and dissatisfied with the said order issued on **13<sup>th</sup> April, 2021**, she has filed a **Memorandum** and **Notice of Appeal**. She further contends that the Respondent has instructed **Kilimanjaro Auctioneers** to proclaim her goods of trade and she thus stands to suffer irreparable loss.

4. Further, the Appellant has stated that if execution proceeds, her intended appeal will be rendered nugatory and she will suffer irreparable loss and damage.

5. The Application was opposed vide a **Replying Affidavit** sworn on **7<sup>th</sup> June, 2021** by **Fidelis Mary Katithi**, the Respondent herein. She has averred that **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** requires that it be made in the first instance before the court where the appeal comes from and thus the application herein should be dismissed.

6. Also, that the decree herein being a money decree which is owing from **1<sup>st</sup> May, 2017**, and that it will be in the best interest of the Respondent that the sums as owed be paid.

7. The Respondent's contention is that the Applicant herein, as the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** require, has neither provided the threshold of substantial loss nor provided security for the due performance of the decree and or order. The Respondent has stated that no particulars of substantial loss have been stated by the Applicant.

8. This court has been urged by the Respondent, that in the event it is inclined to exercise its discretion in favor of the Appellant, it be pleased to direct that the Stay be conditional and the Appellant be asked to deposit the decretal sum in a joint interest earning account in the names of both advocates for the parties with the costs incurred in the process so far, being auctioneer costs, court fees, additional court fees be payable to the Respondent.

9. Parties relied on their pleadings as filed and no party filed any written submissions.

#### **Analysis and Determination**

10. Having considered all the pleadings by the parties, I find that the issue that arises for determination is whether this court can issue Stay of Execution of the Ruling and Orders granted on **13<sup>th</sup> April, 2021** pending the hearing of the intended Appeal.

11. **An application for stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010** which specify the circumstances under which the court may order a for Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

*a) Substantial loss may result to the applicant unless the*

*order*

**JUDGE**

In the presence of:

Mr. Mwangunya counsel for Respondent

No appearance for and by Appellant

Court Assistance - Winnie