



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MERU**

**CIVIL APPEAL NO. 42 OF 2020**

**STEPHEN MURATHI.....APPELLANT/APPLICANT**

**VERSUS**

**BRENDA MAKENA(Suing as the legal representative**

**of the estate of Andrew Muthuri-deceased)..... RESPONDENT**

**RULING**

1. The court is called upon to determine a Notice of Motion under certificate of urgency dated 15<sup>th</sup> June 2021 by the applicant, brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, and all other enabling provisions of the law. In it, the applicant seeks that he be granted stay execution of the judgement and decree in Maua CMCC No.44 of 2020 pending the hearing and determination of an intended appeal to the court of appeal.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the applicant sworn on 15/6/2021 and can be summarised to be that the intended appeal has high prospects of success and will be rendered nugatory if the respondent is allowed to proceed with execution, because to the applicant, the respondent is an impecunious individual who will be unable to refund the decretal sum in the very likely event that the appeal succeeds. The applicant expresses his readiness to comply with any reasonable conditions imposed by the court in satisfaction of the decree. He is firm that he has made the application without unreasonable delay and that respondent will not be prejudiced if the orders sought are granted.

3. The respondent, Brenda Makena, opposed the application through her replying affidavit sworn on 22/7/2021 in which she avers that her many children have been sleeping on empty stomachs due to the applicant's insistence on frustrating her efforts to enjoy the fruits of her protracted litigation. She laments that she is within her rights to execute, as the applicant has not demonstrated what substantial loss he will suffer if stay is denied.

4. The court on 29/7/2021 heard oral submissions from Mr. Kariuki for the applicant and Mr. Mutembei for the respondent. In the submissions, and with prompting from the court, both sides agree that the respondent will be at the end of this litigation be entitled to a portion of the decretal sum. In those submissions the applicant proposed that a half of a Million be paid to the respondent and the balance to remain in the joint account while the respondent was of the view that her right to enjoy her judgement should be respected and protected.

5. Being an application for stay pending appeal, the only issue for determination is whether the applicant has satisfied the thresholds and prerequisites under Order 42 Rule 6 grant of the orders sought. That prayer invokes the discretionary powers of the court, which of course must be exercised judiciously. The prerequisite conditions to be met before stay is granted are provided under the law to be that; the application be made promptly, the applicant satisfies the court that it stands to suffer substantial loss unless stay is granted and that security for the due performance of the decree as may be binding upon the applicant at the conclusion of the matter is provided.

**6. I understand the applicant to say that he will suffer irreparably if execution is allowed to proceed. The position of the law has always been that the commencement of the process of execution, in itself does not amount to substantial loss. That is so because execution is a legal process. The applicant has to establish other factors which show that, the execution will create a state of affairs that will irreparably negate the very essential core of the applicant as a successful appellant. That is what substantial loss, said to be the bedrock of every application for stay, entails. See *James Wangalwa & anor v Agnes Naliaka Cheseto (2012) eKLR***

7. I have noted the applicant's complaint that the respondent, being a poor widow, will be unable to refund the decretal sum in the event the appeal succeeds, together with the offer to release to the respondent a sum of Kshs 500,000. The court faced with a similar question, in *Antoine Ndiaye v African Virtual University (2015) eKLR*; had the following to say:-

**“The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the**

**appeal succeed.”**

8. Whereas the applicant must demonstrate inability by the respondent to refund the decretal sum, an applicant can do no more than say that the respondent is a person of the straw. Once he does that, the respondent is then called upon to rebut that assertion by asserting and demonstrating the ability to pay. Here, instead of asserting otherwise the respondent corroborated the applicant's position by pleading her need for money due to poverty. While poverty may not be the reason to deny her access to her property in the decree, it is a consideration to be made in an application of this nature. See **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**

9. I do appreciate the applicant's undisputed right to appeal and the consequent expectation that after the appeal, if successful, the resultant decree needs to remain real and substantial and not merely academic, and I have to balance that right with the corresponding right of the respondent to enjoy the fruits of her judgement.

**10. It is not disputed that the entire decretal sum was deposited in an interest earning account following the trial court's directions on 30/7/2020. It is also conceded that the respondent is entitled to a portion of the decretal sum. Without preempting the outcome of the intended appeal, with full appreciation that it might as well reverse my judgment, and while balancing the right to access justice with that to own property and not be deprived arbitrarily, I find that with the conceded inability to effect a refund, a stay is merited. Accordingly, the application is allowed, stay granted but on condition that the respondent is paid Kshs 1,800,000, out of the sums held in the escrow account. The balance is to be retained in the said account pending the hearing and determination of the intended appeal to the court of appeal or further orders of the court.**

11. On costs, I order that each party bears its own costs of the application.

**DATED SIGNED AND DELIVERED AT MERU VIRTUALLY VIA MS TEAMS THIS 27TH DAY OF SEPTEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**IN PRESENCE OF MR. MUTEMBEI FOR RESPONDENT**

**MR. KARIUKI FOR THE APPELLANT**

**PATRICK J.O OTIENO**

**JUDGE**