



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

*Coram: D. K. Kemei - J*

**CIVIL APPEAL NO. E60 OF 2021**

**STEJES AGENCIES LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**EDWARD NYINGI MAKALI.....RESPONDENT**

(Being an appeal against the Judgment/Decree of Hon. Benard Kasavuli (P.M))

at Chief Magistrate's court at Mavoko in CMCC No. 957 of 2019

delivered on 1<sup>st</sup> April, 2019)

**RULING**

1. The applicant's application is dated 18/6/2021 seeking for an order of stay of execution of judgement and decree entered against it and delivered on **01/04/2021** in **Mavoko Civil Suit No. 957 of 2019** pending the hearing and determination of the appeal.
2. The Application is supported by an affidavit by Sarah Weru, senior legal officer of Saham Assurance Company, insurers of the Applicant/Appellant sworn on even date where she averred inter alia; that the applicant is aggrieved by the judgement of the trial court and has already lodged an appeal; that the applicant stands to suffer substantial loss if the stay is not granted because the respondent will not be in a position to refund the decretal sums in the event of success of the appeal; that the application has been filed without unreasonable delay; that the applicant is willing to furnish security in the form of an insurance bond for the performance of the decree.
3. The Application is opposed. The Respondent filed a replying affidavit dated 29/6/2021 wherein he contended that the applicant has not demonstrated that the appeal has any chances of success as it lacks merit and has no arguable grounds. It was further proposed that should the court grant the prayer sought then half the decretal sums be paid to the respondent while the balance be deposited into an interest earning account in joint names of both advocates.
4. The application was canvassed by way of written submissions. The applicant filed submissions on 27/7/2021 while the respondent filed his submissions on 23/7/2021.
5. I have considered the rival affidavit and the submissions by learned counsels. As the matter relates to orders of stay of execution pending appeal, I find the singular issue for determination is whether the Applicant has satisfied the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules.
6. It has been submitted by counsel for the applicant, that the applicant will suffer substantial loss as there is a likelihood that it will not recover the decretal amount from the Respondent whose means are unknown as no documentary evidence has been attached to prove his financial standing. To rebut the applicant's assertion, the respondent avers that his financial incapability alluded to by the Applicant has no justification since the applicant has not placed any evidence to prove substantial loss and further that the execution process has not been put in motion.
7. The applicant's application is premised on **Order 42 Rules 6** of the Civil Procedure Rules, 2010 which stipulates as follows: -

***“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 sub rule (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.*

8. Order 42 Rule 6 of the Civil Procedure Rules provides three conditions to be met by an Applicant seeking an order of stay of execution pending appeal namely: that the Application has been made without unreasonable delay; that substantial loss may result to the applicant unless the order for stay of execution is made; that security is furnished for the due performance of the decree.

9. As to whether the application was filed without undue delay, it is noted that the judgement complained of was delivered on the **01/04/2021** and the appeal lodged by the **03/05/2021**. The present application was filed on **25/06/2021** which is just within the stipulated period. I find there was no inordinate delay by the applicant and hence that threshold has been met.

10. On the issue of substantial loss, the applicant has averred that it stands to suffer loss and damage if it is compelled to pay up **Kshs. 405,000.00/=** before the appeal is canvassed. Indeed, the decretal amount is a tidy sum by any standards. The loss of such a sum will definitely cause a dent on the applicant's Insurer's finances. I note that the respondent has claimed that he is being prevented from accessing the fruits of the judgement. However, the Respondent has failed to show that he has the means with which to refund the sums in the event the appeal succeeds. If the sums are paid, then it will put the applicant in in hardship as it will have to institute recovery proceedings against the respondent upon success of the appeal. This in my view is evidence that the applicant stands to suffer substantial loss if the order for stay is not granted at this stage. Hence I find the applicant has met the threshold.

11. On the issue of security, the applicant has stated that it is ready and willing to abide by conditions to be imposed by the court. The applicant has promised to provide an insurance bond as security. Indeed, security is a pre-requisite for a grant of stay of execution of a judgement or decree. The applicant's Memorandum of Appeal is mainly on the issue of quantum of damages but not on liability. If that is the case, then I find that the Respondent is not likely to leave the court empty handed at the determination of the Appeal. The Respondent has sought for the release of half of the decretal sum to be released to his counsel on record while the balance is to be deposited into a joint interest earning account in the names of both Advocates. The Applicant did not file a further affidavit in response to the said suggestion thereby implying that it has no objection thereto. However, that notwithstanding, I find the amount suggested by the Respondents Counsel to be on the higher side since the appeal is yet to be heard and determined. Further it can go either way in that the quantum might be reduced somewhat and hence a reasonable figure ought to be given. I find a sum of **Kshs. 150,000/=** would be adequate as security and which is to be deposited with the Respondent's Advocates on record while the balance be deposited into a joint interest earning account in the names of both advocates pending the determination of the appeal. That arrangement takes care of the concerns of the parties.

12. In the result, I find the Applicants applications dated **25/06/2021** has merit. The same is allowed in the following terms:

*(i) An order of stay of execution of judgement and decree in **Mavoko Civil Suit No. 957 of 2019** is hereby granted upon the applicant depositing the sum of **Kshs. 150,000/=** with the Respondent's Advocates on record while the rest of the decretal sums be deposited in a joint interest earning account in the names of both Advocates for the parties within the next Fourty five (45) days from the date of this ruling failing which the stay shall lapse.*

*(ii) The costs of the application shall abide in the appeal.*

It so ordered.

Dated and delivered at **Machakos** this **24<sup>th</sup>** day of **September, 2021**.

**D. K. Kemei**

**Judge**