



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**PETITION NO. 33 OF 2019**

**NORMAN TOLA AMANI.....PETITIONER**

**VERSUS**

**1. SHAIB VICTORY KATANA**

**2. REGISTRAR OF BIRTHS AND DEATHS MOMBASA**

**3. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

**Introduction**

1. The Notice of Motion herein dated the 6/05/2021 prays for the following orders:

*(a) Spent*

*(b) THAT there be a stay of execution of the decree/order of Hon. Justice E.K. Ogola issued on 15<sup>th</sup> July 2020 pending and determination of this application.*

*(c) THAT there be a stay of execution of the Decree/Order of Hon. Justice E.K Ogola issued on 15<sup>th</sup> July 2020 pending the hearing and determination of the appeal.*

*(d) The costs be in the cause.*

2. The motion is premised on grounds set out in the Motion and Supported by the Petitioner's/Applicant's Affidavit sworn on 6/05/2021. The Applicant avers that a decree was issued on 15/07/2020, and there is a threat of execution from the Respondent, which if allowed to proceed would render the Appeal No. 67 of 2020 before the Court of Appeal nugatory.

3. The application is not opposed. Mr. Makuto Senior State Counsel for the Attorney General indicated to the court that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would not be filing any submission. On the part of the 1<sup>st</sup> Respondent, **Mr. Kitur** counsel for the 1<sup>st</sup> Respondent on 13/5/2021 informed the court that the 1<sup>st</sup> Respondent had filed Grounds of Objection to the application. However, the said Grounds of Objection was not on record. This court gave directions on 13/5/2021 that Mr. Kitur should serve the alleged Grounds of Opposition to all parties within 3 days and this instant application was to be heard on 17/6/2021. Currently the alleged Grounds of Opposition are still not on record and consequently, the application stands unopposed.

**The Determination**

4. I have considered the application and submissions by the Applicant. In my view, the only issue for determination is whether an order of stay of execution pending appeal should be granted.

5. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules. The relevant part thereof states 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***

*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.*

(3) ...

(4) *For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”*

6. From the foregoing, an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University [2015] eKLR*.

7. Similarly, in *Butt vs. Rent Restriction Tribunal [1979]*, the Court of Appeal stated:

*“...If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.*

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”*

8. In the instant case, it is the Applicant’s case that the matter before Court is a sensitive matter, which involves the rights of a minor. Further, the Applicant avers that his Appeal is ongoing at the Court of Appeal and therefore, if the orders being sought were not granted, his Appeal would be rendered nugatory.

9. In view of the of the above, and since the application for stay of execution is not opposed, the Court grants the Applicant stay of execution pending appeal on the condition that the Applicant shall within 21 days from the date hereof deposit half the decretal amount into an interest earning account in the joint names of his advocates and those of the 1<sup>st</sup> Respondent.

10. For the avoidance of doubt, in the event the Applicant shall default on Paragraph 9 hereinabove, the conditional stay of execution shall automatically lapse.

11. Costs to abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Kaingu for Respondents

Ms. Mwenzi for Petitioner

Ms. Peris Court Assistant