



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. E008 OF 2021

APHIA WAMBUA.....APPELLANT

VERSUS

ONESMUS MAITHYA NZILE.....RESPONDENT

An Appeal from a Judgement that was delivered on 20th January, 2021 by Hon. F. Nekesa in Kitui CMCC Civil Case No. 115 of 2018.

RULING

1. By a Notice of Motion dated 24th March 2021, Aphia Wambua, the Applicant herein has moved this court under the provisions of **Order 42 Rule 6** and **Order 51** of the **Civil Procedure Rules** in seeking for the following reliefs namely: -

(i) *Spent*

(ii) *Spent*

(iii) *That this Hon. Court be pleased to issue an order staying the prosecution of the Notice to Show Cause scheduled for 31st March, 2021 and/or any further proceedings in the judgement delivered vide Kitui CMCC Civil Suit Number 115 of 2018 pending the hearing and determination of this appeal.*

2. The grounds for the above reliefs are listed as follows: -

a) That the Applicant was aggrieved by the judgement delivered on 20.1.2021 by Hon. F. Nekesa in Kitui CMCC Civil Case No. 115 of 2018 and has preferred an appeal herein.

b) That unless there is a stay of execution, the success in the appeal will be rendered nugatory.

c) That the best interest of justice will be served if execution of judgement is stayed.

3. The Applicant has further relied on an affidavit sworn on 24th March 2021 where he has reiterated the above grounds adding that she has applied for certified copy of the proceedings and judgement to facilitate the process of his appeal.

4. The Applicant avers that he has brought this application timely and has expressed fear that if the money is paid to the Respondent, he will not be in a position to pay.

5. In her written submission dated 14th September, 2021, the Applicant contends that the execution process against her would prejudice her as her appeal may be rendered nugatory.

6. She claims that the matter in trial court arose out of a friendly loan and that the Respondent was unable to repay that loan. She has expressed fears that if the amount awarded is paid out, the Respondent is unlikely to pay.

7. She expresses her willingness to deposit the amount or comply with any condition imposed by this court as a condition for stay.

8. The Respondent has opposed this application through a replying affidavit sworn on 30th April, 2021.

9. The Respondent avers that he is a teacher by profession and does butchery business at Kabati Market.

10. He claims that the award of costs to him in Kitui CMCC Number 115 of 2015 was fair and that the only issue remaining in this application is payment of costs awarded in the dismissed suit.

11. He avers that the Applicant did not present this application timely and that she has not been shown that she would suffer irreparable or substantial loss.

12. The Respondent disputes the contention that the Appellant has high chances of success. He claims that the application for stay is a ploy to delay him from enjoying fruits of judgement.

13. He has cited the provisions of **Order 42 Rule 6** where it is provided that an order for stay shall not be granted unless the court is satisfied that a substantial loss may result.

14. He has cited the decision in **Congress Rental South Africa versus Kenyatta International Convention Centre Cooperative Bank of Kenya Ltd & Another (Garnishee) 2019 eKLR**.

15. He submits that the execution being stayed is in respect of costs assessed at Kshs. 97,050 and that he is in a position to refund the same if he is ordered to do so.

16. He contends that the Applicant in an Application of this nature must offer security for due performance of Order or decree.

17. This court has considered this application and the response made. This application and the one preferred in Kitui High Court Civil Appeal No. E009 of 2021 are similar in nature and therefore the determination of this application will apply to the latter application dated the same day as this instant application in this appeal.

18. The Applicant has invoked the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** which provide: -

“6. (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.”

19. A relief of stay of execution pending appeal, is a discretionary matter. An Applicant seeking stay must satisfy the court that he/she has a “good cause” for stay for example demonstrate that he/she has an arguable appeal.

20. Besides the above under **subsection 2 of Rule 6**, this court’s discretion is fettered by three (3) conditions namely: -

(i) The court must be satisfied that a substantial loss may result.

(ii) The application is made without undue delay.

(iii) Security for due performance of such decree or Order that may be required after determination of the appeal.

21. This court has considered the above conditions and I am satisfied from the response made by the Respondent that he cannot be described as a pauper particularly in this instance because he has shown that he is employed as a teacher.

22. I am also alive to the fact that a party should be accorded a chance to advance and escalate his/her grievance on appeal unhindered. But this only applies where a good cause as contemplated under the above cited rule under **Order 42 Rule 6** is shown. The Applicant is seeking a stay of execution of assessed costs in the dismissed suit.

23. The Applicant has failed to satisfy this court that she has a good cause to warrant this court exercise its discretion in her favour by granting her stay. I am also not persuaded by her claim that she stands to suffer a substantial loss unless stay of execution is granted.

In the premises, the application dated 24th March 2021 is found unmerited and the same is disallowed. As I have observed above, this ruling will apply to the application dated 24th March 2021 in Civil Appeal E009/2021.

Costs shall be in the appeal.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE R.K. LIMO

JUDGE