



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 113 OF 1995**

**IN THE MATTER OF THE ESTATE OF ELIUD NGICHU GITHIRE (DECEASED)**

**ARTHUR NDURU GITHIRE.....APPLICANT**

**VERSUS**

**RUTH WANJA OTSYULA.....RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion Application dated **30<sup>th</sup> June 2021** by which **ARTHUR NDURU GITHIRE (the Applicant)** seeks the following orders:-

**“1. Spent**

**2. Spent**

**3. THAT the Honourable court be pleased to issue a stay of execution of the Ruling dated 18<sup>th</sup> June 2021 pending the hearing and determination of the appeal.**

**4. THAT the cost of this application be provided for”**

2. The application was premised upon **Article 48 of the Constitution, Section 1A, 1B 3A and 79-G of the Civil Procedure Act, Order 42 Rule 76 and Order 51 Rules 1 – 3 and 10 of the Civil Procedure Rules 2010** and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **RUTH WANJA OTSYULA** opposed the application through the Grounds of opposition dated **18<sup>th</sup> June 2021**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **19<sup>th</sup> July 2021**. Whilst the Respondent relied upon her written submissions dated **26<sup>th</sup> July 2021**.

**BACKGROUND**

4. The genesis of this application is a Ruling delivered by this court on **18<sup>th</sup> June 2021**, which Ruling dismissed in its entirety the Notice of Motion dated **22<sup>nd</sup> October 2020** which had been filed by the Applicant. The Applicant being aggrieved by the Ruling of **18<sup>th</sup> June 2021** filed a Notice of Appeal dated **25<sup>th</sup> June 2021**. The Applicant now seeks a stay of execution of the said Ruling pending the hearing and determination of her appeal.

**Analysis and Determination**

5. I have carefully considered the present application, the Ground of Opposition filed by the Respondent as well as the written submissions filed by both parties. The Ruling in question was delivered on **18<sup>th</sup> June 2021**. The Applicant filed a Notice of Appeal on **25<sup>th</sup> June 2021**. A copy of the said Notice of Appeal is annexed to the Supporting Affidavit dated **30<sup>th</sup> June 2021** (Annexure ‘ANG-3’)

6. **Order 42 Rule 6** of the **Civil Procedure Rules** provides as follows-

**Order 42 Rule 6** which sets out the principles for stay of execution provides 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.**

**(c) .....**”

7. Therefore in order to merit grant of orders of stay pending appeal the Applicant must demonstrate the following: -

(1) That the application has been made without unreasonable delay.

(ii) That the Applicant is likely to suffer substantial loss in the event

the orders being sought are not granted.

(iii) That the Applicant is ready to provide security for the performance of the decree or order.

8. The court ought to exercise its discretion to grant a stay in such a manner as to ensure that the intended appeal is not rendered nugatory. In **BUTT – VS – RENT RESTRICTION TRIBUNAL (1982) KLR** the court held as follows: -

**“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 out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory... The court will grant a stay where special circumstances of the case so require...”**

9. The ruling which is the subject of the Applicant appeal was delivered on **18<sup>th</sup> June 2021**. The present application seeking stay of execution was filed on **30 June 2021** barely **two (2)** weeks after delivery of said judgment. In the circumstances, I find that the application was filed in a timeous manner.

10. In this case as has been stated earlier the court vide its Ruling of **18<sup>th</sup> June 2021** dismissed in its entirety the application that had been made by the Applicant. The court did not make any orders directed to either party for compliance. The court in dismissing the application made what is often referred to as a ‘**negative order**’ **Hon Justice Milton Makhandia** (as he then was) expounded on the meaning and effect of a ‘**negative order**’ in the case of **RAYMOND M OMBOGO – VS – AUSTINE PYAN MARANGA [2010] eKLR** states as follows

**“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order... The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise....”**

11. Similarly in the case of **TITUS KENYA – VS – NORTH EASTERN WELFARE SOCIETY [2016]eKLR** it was held thus

**“I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that need to be stayed” I am unable to see any such threat.... The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: “This is the order against me. It commands me to do a, b & c within this time and if I failed to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn.”**

12. The fact of the matter is that the ruling of **18<sup>th</sup> June 2021** did not direct either the Applicant or the Respondent to perform any act. There is therefore no order capable of being stayed. I find no merit in the application and accordingly the Notice of Motion dated **30<sup>th</sup> June 2021** is dismissed in its entirety.

Each party shall pay their own costs.

**DATED IN NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.**

.....

**MAUREEN A. ODERO**

**JUDGE**