



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E329 OF 2021**

**JOSEPH KIIRU MUGAMBI.....<sup>ST</sup> APPELLANT/APPLICANT**

**KYALO MULIWA.....<sup>2<sup>ND</sup></sup> APPELLANT/APPLICANT**

**VERSUS**

**FAITH WAYUA MUTHIANI .....<sup>RESPONDENT</sup>**

**RULING**

The applicants filed a notice of motion dated 3<sup>rd</sup> June 2021 and it is brought pursuant to Section 3A of the Civil Procedure Act, Order 42 Rule 6 Sub rule (1) (2) and (3), Order 51 Rules 1 and 3 of Civil Procedure Rules 2010 for orders;

**1. Spent**

**2. That this honorable court be pleased to stay any further proceedings in Milimani Chief Magistrates Court Civil Case No. 8434 and in particular the execution of judgment delivered on 26<sup>th</sup> May 2021 pending the hearing and determination of this application.**

**3. That this honorable court be pleased to stay any further proceedings in Milimani Chief Magistrates Court Civil Case No. 8434 and in particular the execution of judgment delivered on 26<sup>th</sup> May 2021 pending the hearing and determination of the appeal herein**

**4. That the costs of the application be in the cause**

**5. Any other and/or further orders this honorable court deems fit to grant.**

The application was supported by the affidavit of Kevin Ngure. He avers that judgement was delivered by the subordinate court in favour of the respondent on 16<sup>th</sup> April 2021 as follows:-

- a. Liability - 100%
- b. General Damages - Kshs 1,400,000
- c. Special Damages - Kshs. 3,350
- d. Costs and interest.

Counsel for the applicants submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules stipulates:-

**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 1st 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.**

It was submitted that judgement was delivered on 26<sup>th</sup> May 2021 and this application was filed on 10<sup>th</sup> June 2021 barely two weeks later. The application was filed without undue delay.

On the issue of substantial loss, the applicants argued that the respondent's means are unknown and it is highly unlikely that she will be capable of refunding the decretal amount in the event that the appeal succeeds. The respondent has not disclosed any financial standing.

Counsel for the applicants further argued that in applications for stay pending appeal, it is not a requirement to show that the appeal has high chances of success. The appellants only need to show that they have an arguable appeal. The appellants consider the awarded damages as excessive.

The application was opposed by the replying affidavit of Faith Wayua dated 21<sup>st</sup> September 2021 where she contended that the applicants have not satisfied the laid down conditions to warrant grant of stay of execution pending appeal.

Counsel for the respondent further submitted that on the issue of substantial loss the applicants indicated that the loss they are likely to incur is the decretal sum if it is paid to the respondent, but the process of execution does not itself amount to substantial loss as it is a lawful process.

Counsel for the respondent argued that the applicants did not demonstrate any peculiar circumstances that necessitate withholding of the decretal sum from the decree holder nor did they state that they would suffer any substantial loss which is the corner stone in granting of an application for stay and without any evidence the respondent should not be kept out of her money. Reliance was placed on the case of **Equity Bank Ltd v Taiga Adams Co. Ltd [2006] eKLR** where it was held;

**“In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.”**

#### **Analysis and Determination**

The issue for determination is whether to grant stay of execution of the trial court's decree pending the hearing and determination of the appeal?

The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows

**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.**

In the case of **BUTT –V- RENT RESTRICTION TRIBUNAL (1982) KLR 417** the court held as follows: -

**“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

Judgement was delivered on 26<sup>th</sup> May 2021. The present application is dated 3<sup>rd</sup> June 2021 and was filed on 10<sup>th</sup> June 2021. It is therefore clear that there was no unreasonable delay in filing the application.

On substantial loss the applicants have argued that the respondent's means are unknown and it is highly unlikely that the respondent will be

capable of refunding the decretal amount in the event that the appeal succeeds. They are willing to furnish security through a bank guarantee.

The court, in **RWW vs. EKW [2019] eKLR**, it was stated as follows:-

**“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.**

**Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”**

I do find that the appellants are likely to suffer substantial loss given the fact that the respondent has not disclosed how she will pay the decretal sum if the appeal succeeds. The application was filed without undue delay. The appeal is challenging the assessment of quantum of damages by the trial court. The upshot is that the application dated 3<sup>rd</sup> June 2021 is merited and is hereby granted as follows:-

- 1. Execution is hereby stayed pending the hearing and determination of the pending Appeal.**
- 2. The applicant to provide a bank guarantee of the entire decretal sum within 45 days hereof.**
- 3. In default of order two (2) above, the orders of stay of execution shall stand vacated and the Respondent shall be at liberty to execute.**
- 4. Costs shall follow the outcome of the Appeal.**

**DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2021.**

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**S. CHITEMBWE**

**JUDGE**