



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. E021 OF 2021**

**ZACHARIA NGIGE WAITITU.....1<sup>ST</sup> APPELLANT/APPLICANT**

**MATUNDA (FRUIT) BUS SERVICE LTD.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**IRENE ANYANGO OGECHÉ.....RESPONDENT**

**R U L I N G**

1. The Application coming for consideration in this ruling is the one dated 22/7/2021 seeking the following orders.

**(i) SPENT**

**(ii) That this Honourable Court be pleased to order a stay of execution of the Judgement/Decree dated 29/06/2021 vide KERICHO CMCC No. 326 of 2018, IRENE ANYANGO OGECHÉ -vs- MATUNDA (FRUITS) BUS SERVICES LTD pending the hearing and determination of this application *inter partes*.**

**(iii) That this Honourable Court be pleased to order a stay of execution of the Judgment/Decree dated 29/06/2021 vide vide KERICHO CMCC No.326 of 2018, IRENE ANYANGO OGECHÉ -vs- MATUNDA (FRUITS) BUS SERVICES LTD pending the hearing and determination of KERICHO HCCA No. 21 of 2021.**

2. The Application is based on the grounds on the face of it and supported by the Affidavit of ZACHARIA WAITITU sworn on 22/7/2021 in which it is deposed that on 29/6/2021, the Trial Court delivered a judgment awarding the Respondent General Damages of Kshs. 200,000/= and Special Damages of Kshs. 8,885/= plus interest at Court rates.

3. The Appellant has since lodged HCCA No. 21 OF 2021 and he is now seeking stay of execution pending appeal.

4. The Respondent filed a Replying Affidavit sworn of 10/9/2021 in which it is deposed that the Applicant is unfairly denying the Respondent the fruit of her judgment and further that the appeal does not demonstrate sufficient case as the same is on the ground that the award is excessive and yet the quantum of damages of Kshs. 208,885 is not inordinately high.

5. The parties were directed to file written submissions in the application which I have duly considered.

6. The applicants submitted that their application for stay of execution pending appeal is pegged on the appeal lodged vide KERICHO HCCA No. 21 of 2021 before this court contending both liability and quantum.

7. The applicants further submitted that unless a stay of execution of the judgment/decree dated 29/6/2021 is granted they will suffer irreparable loss.

8. The applicants submitted that they have an arguable appeal with high chances of success and therefore if stay of execution is not granted the said appeal would be rendered nugatory.

9. The respondent was opposed to the application and submitted that it took more than three (3) years to get the award that is being challenged. The respondent submitted that the applicants were merely trying to delay the fruits of her judgment.

10. The respondent further submitted that it was in the best interest of justice for the court to order that a substantial amount of the decretal sum be released to the respondent if stay of execution pending appeal was granted.

11. The issues for determination in this Application are as follows;

**(i) Whether the Applicant is entitled to stay of execution pending appeal**

**(ii) Who pays the costs for the application**

12. The Application is brought under order 42 rule (6) of the Civil Procedure Rules which 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 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.*

*(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(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.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

13. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner.

14. The Court is expected to balance the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoying the fruits of its judgment.

15. In **SAMVIR TRUSTEE LIMITED VS. GUARDIAN BANK LIMITED NAIROBI MILIMANI HCCC 795 OF 1997** Warsame J. (as he then was) stated as follows:-

*“At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”*

16. In the current case, I grant the Applicant stay of execution pending appeal on the following conditions:-

**(i) THAT the applicant deposits the entire decretal sum in an interest earning account held jointly by the Advocates for both parties within 60 days of this date.**

**(ii) THAT the applicant pays the costs of this application.**

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 19TH DAY OF NOVEMBER, 2021.**

**A. N. ONGERI**

**JUDGE**