



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**MISCELLANEOUS CIVIL APPLICATION NO. E062 OF 2021**

**STEPHEN WESONGA MAKOKHA.....1<sup>ST</sup> APPLICANT**

**MOSES ADEPA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**IGNATIUS OPEMA MALIBA (as the legal and personal representative of the Estate of**

**ANTONY GISIYE-DECEASED).....RESPONDENT**

**RULING**

1. What I am called upon to determine is the Motion, dated 25<sup>th</sup> March 2020, which seeks orders of stay of execution of the judgment delivered on 15<sup>th</sup> April 2019, in Mumias SPMCCC No. 188 of 2016, by Hon. Nyakundi, Resident Magistrate, and extension of time to file appeal in respect of the said judgment.

2. The principles governing stay of execution are provided for under Order 42 Rule 6 of the Civil Procedure Rules, and it reads:

“Stay in case of appeal [Order 42, rule 6.]

(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 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) Notwithstanding anything contained in subrule (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 subrule (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.”

3. Order 46 Rule 6, therefore, requires, in mandatory terms, that an applicant, who is seeking a stay of execution pending appeal. to demonstrate that substantial loss may result to the applicant unless the order is made, that the application was made without unreasonable delay, and that 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.

4. On what substantial loss amounts to, the court in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR (Gikonyo J), said:

“... the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

5. The next consideration is whether the application has been made without unreasonable delay. Judgment, the subject of this application, was delivered on the 15<sup>th</sup> April 2019. The subject application was filed in court on 25<sup>th</sup> March 2021. That is a span of almost two years. The applicant avers that the failure to file the application in good time was occasioned by a number of issues, including not being aware that judgment had been delivered. A copy of the judgment shows that it was delivered in open court, and that the advocates for the defendant, the applicant herein, were not present.

6. On security for costs, the law requires that they should order such security for the due performance of such decree the court order as may ultimately be binding on him has been given by the applicant, in appropriate cases. In an application for stay of execution of a decree or an order pending appeal, the applicant needs to provide security for due performance of the decree or, better still, propose his own to the court. This was the position of the court in *Kiambu County Council vs. Coffee Board of Kenya & Others* [2011] eKLR (Mwera J), where the court held:

“Security for due performance of the decree: The law states that an applicant should furnish such security as the court may order. But a prudent applicant will do well to propose of his own to the court and the respondent what will be attractive, as security.”

7. The purpose of security for costs was addressed in *Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR (Gikonyo J), where the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

8. Grant of orders of stay of execution of a decree pending appeal is discretionary, as was pointed out in *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR (Mativo J) and *Trishcon Construction Co. Ltd vs. Avtar Singh Bahra* [2017] eKLR (Onguto J).

9. On whether the application for extension of time is merited, it will be noted that the time limit, for filing an appeal from a subordinate court to the High Court, is thirty days, as provided for in section 79G of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

10. I have looked at the record from the trial court, and the averments made in the application before me. It would appear that the applicants were not aware that judgment had been delivered, and it would be in the interests of justice to allow them to appeal out of time, and to stay execution of the decree, to facilitate that.

11. In the circumstances, I shall allow the Motion, dated 25<sup>th</sup> March 2021, in the terms proposed in prayers 3 and 4. The appeal shall be filed and served in the next twenty-eight days. The applicants shall deposit the total decretal sum as security with the court, in the next fourteen days of date of delivery of this ruling, in default of which the orders given herein, to extend time to file appeal out of time and to stay execution, shall lapse automatically. The respondent shall have the costs of this application.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**W. MUSYOKA**

**JUDGE**

**In the presences of:-**

**Erick Zalo – Court Assistant’**

**Ms. Nafunye for Mr. Shifwoka for Applicant**