



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 272 OF 2019**

**MOIBI MOIBI JARED.....APPELLANT**

**VERSUS**

**TJ (A minor suing through mother and next**

**friend ENM).....RESPONDENT**

**RULING**

1. In their Notice of Motion application dated and filed on 14<sup>th</sup> June 2019, the Appellants sought an order for stay of execution of the judgment issued in **Nairobi CMCC No 4092 of 2017 Moibi Moibi Jared vs TJ (A Minor Suing Through Mother And Next Friend ENM)** pending the hearing and determination of the appeal herein. His said application was supported by the Affidavit of his advocate, Moses Olando Ngaywa. The same was sworn on 14<sup>th</sup> June 2019.

2. The Appellant contended that on 26<sup>th</sup> April 2019, Hon D.O. Mbeja (RM) granted him an order for stay of execution on condition that he deposited the decretal sum Kshs 803,550/= within twenty one (21) days of the said Ruling. He deposited the said amount after the said date as a result of which the order for stay of execution lapsed. He attributed part of the delay in depositing the monies to negotiations between his advocates and those of the Respondent, which collapsed.

3. He pointed out that the Learned Magistrate dismissed his application to enlarge time within which to deposit the said decree sum. Having been aggrieved by the decision to summarily dismiss his application seeking a stay of execution and enlargement of time to deposit the said decretal sum, he had now appealed to this court.

4. In opposition to the said application, on 25<sup>th</sup> June 2019, ENM swore a Replying Affidavit. The same was filed on 27<sup>th</sup> June 2019. She contended that the process of execution was a lawful process and because the Appellant had not demonstrated how his Appeal would be rendered nugatory, his present application ought not to be granted.

5. All the parties were agreed on when the court could exercise its discretion to grant an order for stay of execution pending appeal. Indeed, for an applicant to succeed in being granted an order for stay of execution, he has to demonstrate the following conditions as has been set out on Order 42 Rule 6(2) of the Civil Procedure Rules, 2010:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**

**c. Such security as the court orders for the due performance of the decree has been given by the applicant.**

6. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

7. In addition, under Order 42 Rule 6 (1) of the Civil Procedure Rules, the appellate court has power to grant an order of stay of execution if such order had not been granted by the court from which the appeal had been preferred.

8. The court carefully considered the Written Submissions and the case law that each of the party relied upon and determined that the Respondent had not filed an Affidavit of Means to demonstrate that she was financially able to refund the Appellant the decretal sum if the same was paid to her before the Appeal herein could be heard and determined.

9. In the absence of proof to demonstrate her ability to refund the Appellant the decretal sum, this court was satisfied that he would suffer substantial loss. He had thus satisfied the first condition of being granted a stay of execution pending appeal.

10. The decision the Appellant intended to appeal against was delivered on 26<sup>th</sup> April 2019. He filed his Memorandum of Appeal dated 20<sup>th</sup> May 2019 on 22<sup>nd</sup> May 2019. The present application was filed on 14<sup>th</sup> June 2019. A period of about two (2) months could not be said to have been inordinate.

11. This court therefore took the view that the present application was filed without undue delay and hence the Appellant had satisfied the second condition for the granting of an order for stay of execution pending appeal.

12. The Appellant had deposited the entire decretal sum. This was sufficient security for the due performance of the decree as could be binding upon him. It would be quite prejudicial for him not to exercise his right of appeal if the Respondent executed against him because the issue in contention was whether or not the Learned Magistrate exercised his discretion judiciously in dismissing his application for stay of execution of time and enlargement of time to deposit the cheque for the decretal sum in a joint account in the name of his advocate and that of the Respondent.

13. It was therefore the considered opinion of this court that the Appellant had demonstrated that he had complied with the third condition of being granted an order for stay of execution pending appeal.

### **DISPOSITION**

14. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application that was dated and filed on 14<sup>th</sup> June 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

**1. THAT there shall be a stay of execution of the decree in Nairobi CMCC No 4092 of 2017 Moibi Moibi Jared vs TJ (A Minor Suing Through Mother And Next Friend ENM) pending the hearing and determination of the Appeal on condition the Appellant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the sum of Kshs 803,550/= within thirty (30) days from the date of this Ruling i.e. by 10<sup>th</sup> April 2020.**

**2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 14(1) hereinabove, the conditional stay of execution shall automatically lapse.**

**3. Either party is at liberty to apply.**

**4. Costs of the application will be in the cause.**

15. It is so ordered.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of March 2020**

**J. KAMAU**

**JUDGE**