

REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MERU

CIVIL APPEAL NO.14 OF 2020

ISAAC GICHUNGE LEAKEY.....APPELLANT

VERSUS

NJOGU TITUS GICHURU.....RESPONDENT

RULING

1. The Appellant/Applicant herein by an application under certificate of urgency dated 27th February 2020 asked the court to issue orders of stay of execution of the judgement delivered on 5th of February 2020 by Hon.E.Tsimonjoro (Mr) Resident Magistrate in Meru Chief Magistrate's Court Civil Case No.40 of 2019 where judgement was entered for the respondent in the sum of Ksh.200,000 for good will agreed, Ksh.500,000 being liquidated damages for breach of the agreement and interest at court rates from the date of judgement as well as costs of the suit.

2. The orders of stay of execution were to await the hearing and determination of the application interpartes as well as the hearing and determination of the appeal herein. The application was supported by the grounds on the face of the notice of motion as well as the supporting affidavit sworn by the Appellant on 27th February 2020.Njogu Titus Gichuru opposed the application by his replying affidavit sworn on 10th March 2020.The application was canvassed by way of oral submissions in open court by the advocates on record.

3. I have considered the grounds supporting the application by the Appellant as well as the objection by the Respondent and the submissions ably made by respective advocates and the authorities relied upon namely; **Dr JN Muema P/A Mt View Maternity and Nursing home Vs Miriam Maalim Bishar [2018] eKLR** and **Jimale Rashid Hassan and Amal Hauliers Ltd Vs Abdul Nassir Abukar Hassan [2017]eKLR** and the issues that fall for determination are;

1.Whether the applicant has complied with the provisions of Order 42 Rule 6 of the Civil Procedure Rules

4. In his submissions the Applicant's counsel Mr.Rimita argued that if the application for stay for execution is not allowed the applicant will suffer substantial loss because the properties proclaimed may be sold at a throw away price and the Respondent had not attempted to show that he will able to pay the decretal sum if paid to him or replace the properties proclaimed. It was also submitted that the application for stay of execution had been brought without undue delay and the applicant was ready and willing to abide by the court's orders in terms of providing security.

5. Mr.Karanja for the Respondent while relying in the holding in **Amar Hauliers and Abdul Nassir Abukar Hassan[2017] eKLR** submitted that failure to issue security for costs as provided for under Order 42 Rule 6(2) will jeopardize the Respondent and that the award of the lower court has to be protected. He urged the court to dismiss the application because the applicant had not met the test in Order 42 Rule 6(2).

6. In consideration that the Applicant brought the application without undue delay and in consideration that the Applicant had already filed an appeal against the decision of the trial Magistrate a right enshrined in the Constitution of Kenya 2010 and in consideration that the Applicant is ready to deposit security pending the hearing and determination of appeal this court hereby issues orders in the following terms:

1.Stay orders are hereby allowed pending the hearing and determination of the appeal on conditions that the Applicant deposits Ksh. 700,000 being the decretal sums in a joint interest earning account in the names of the advocates on record for the parties within 30 days of the date of the ruling herein.

2.The Auctioneers agreed/assessed legal fees to be paid by the Applicant within 30 days from date of such agreement and/or assessment.

3.The costs of the application to be in the cause.

HON.ANNE ADWERA ONGINJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 27TH DAY OF APRIL 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.ANNE ADWERA ONGINJO

JUDGE