



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 67 OF 2018**

**NDERITU MATHU PETER.....APPELLANT**

**VERSUS**

**GERISHON MAINA WAMBUL.....RESPONDENT**

*(Being an Appeal from the Judgment of the Senior Principal Magistrate's court Wanguru given on 23<sup>rd</sup> July, 2108)*

**RULING**

1. The applicant has filed a Notice of Motion **Under Order 42 rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Article 50 and Article 159 (2) of the Constitution** and All enabling Provisions of Law dated 22<sup>nd</sup> August, 2018 seeking an order that there be stay of execution of the decree issued on 23<sup>rd</sup> July, 2018 by Hon. D. N. Nyaboke in Wanguru PMCC 99 of 2017 and all the consequential orders pending the hearing and determination of this appeal.

2. That this Hon. Court make such further orders as it may deem fit. The application was brought under Certificate of urgency and was based on **the following grounds;**

(a) **The judgment was delivered on 23<sup>rd</sup> July, 2018 by Hon.D. N. Nyaboke in Wanguru - PMCC No. 99 of 2017.**

(b) **The Applicant being dissatisfied with the said judgment filed High Court civil appeal No.41 of 2018 in Embu and filed an Application dated 22<sup>nd</sup> August, 2018 for stay of execution of the decree. The said Application is yet to be heard and determined.**

(c) **An order was made by Hon. Lady Justice F. Muchemi on 4<sup>th</sup> October, 2018 sitting in the High Court at Embu for transfer of the file to this Honourable court for hearing and determination.**

(d) **That we have been served with a Notice to show cause why warrant of arrests should not issue against the Appellant/ Applicant and it is coming up for hearing on 4<sup>th</sup> February, 2019.**

(e) **It is only fair and in the interest of justice that the Applicant be granted an order of stay of execution of the decree pending hearing and determination of the substantive Application dated 22<sup>nd</sup> August, 2018.**

(f) **The court has unlimited discretion and powers to grant the orders sought.**

(g) **Unless urgent orders of stay of execution of the decree are granted herein, warrant of arrest against the Applicant will be issued and the Applicant stands to suffer substantial loss of property as execution will issue soon after.**

3. It is also supported by the affidavit of Dominic Njuguna Mbigi sworn on 1<sup>st</sup> February, 2019.

4. The respondent opposed the application and filed a replying affidavit sworn by Peterson Kinyua Kiama contending that the application dated 22<sup>nd</sup> August, 2018 abetted for want of service upon expiry of 60 days.

5. The respondent opposed the application and further replying affidavit sworn Peterson Kinyua Kiama on 21<sup>st</sup> February, 2019. The contention by the Appellant is that the application dated 22<sup>nd</sup> August, 2018 abated for want of service upon expiry of 60 days of its filing since it was not served, heard and concluded within the stipulated period and consequently there is no application pending hearing.

6. The decree sought to be executed is a money decree and the Respondent can easily refund the money in the event of the appeal succeeding. That the Respondent is not a pauper and was the lawful owner of motor-vehicle registration KAG 163G Toyota Matatu at the time of the Accident and is currently the lawful owner of motor-vehicle registration KCB 930G Toyota Hiace Matatu.

7. The Judgment on liability in the Lower Court was by consent and the appellant had proposed an award of Kshs; 200,000/= which sum he has not paid to the respondent making the application lack any seriousness.

8. The respondent has taken out execution proceedings and therefore this Appeal is overtaken by events and that the applicant is guilty of laches as clearly manifested by his failure to serve and prosecute this application despite filing it under a certificate of urgency way back on 22<sup>nd</sup> of August, 2018. The parties agreed to canvass the application by way of written submissions.

9. I have considered the Application and the Submissions, the issue which arises for determination is Stay of execution. It is Trite that An appeal or a Second appeal shall not operate as a Stay of Execution or proceedings unless the court has issued an order staying the execution of the decree.

10. This is provided under **Order 42 rule 6, of the Civil procedure Rules,**

*“ 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”*

**The condition for the grant of stay of execution are that**

- (i) the applicant must satisfy the court that substantial loss will result from a refusal to grant a stay of execution.
- (ii) The application must be filed without unreasonable delay a
- (iii) The applicant must furnish security.

11. The applicant has relied on the case of : **THE ATTORNEY GENERAL -VS- LAW SOCIETY OF KENYA & ANOTHER ( Civil application No. 133 of 2011)** where it was stated that;

*“ sufficient cause or a good cause in Law means the burden placed on a litigant usually by court rule or order to show why a request should be granted or an Action excused ( See Black’s Law Dictionary 9<sup>th</sup> Edition Page 521) sufficient cause must rational, plausible, logical, convincing, reasonable and truthful.*

*It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”*

12. The substantial loss is the major consideration while granting stay of execution as the issue of providing security as it may be ordered by the court. A party must also establish that the application has been brought without undue or unreasonable delay.

13. The grant of stay of execution is discretionary. The court exercises discretion judiciously. The Court of Appeal in the case of; **Butt -vs- Rent Restriction Tribunal ( 1982) KLR 417** gave guidance on how a court should exercise discretion and held that;

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

*(ii) The general principle in granting or refusing a stay is if there is no other overwhelming hindrance are; A stay must be granted so that an appeal should not be rendered nugatory so that Appeal Court refers the Judge discretion.*

*(iii) 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.*

*(iv) 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 in dispute and the appellant had an undoubted right of appeal.*

**- The court in exercising its powers under 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 laps. “**

14. The Authority captures the applicable principles to be considered when determining whether or not to grant a stay of execution.

15. The duty is on the applicant to prove that he is likely to suffer substantial loss and the appeal would be rendered nugatory. See Court of Appeal decision in the Case of: NATIONAL INDUSTRIAL CREDIT BANK LTD as followed by the High court in the case of; STANLEY KARANJA WAINAINA where it was held that;

**“ this court has said before and it bear repeating while the legal duty is on the applicant to prove that the allegation would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it Is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”**

16. In this case the respondent has not disclosed his source of income that he would use to refund the applicant the decretal amount should the appeal succeed, indeed the respondent’s averments is that he is entitled to enjoy the fruits of Judgment.

17. He has not demonstrated that he is not a man of straw and this is a money decree in excess of 1.4 million. The agreement which he has relied on dates back to 2018 and has not demonstrated that he would be able to refund 1.4 million once if ordered to refund.

18. The amount involved is substantial and if the Judgment is executed and the appeal succeeds the applicant is likely to suffer substantial loss and the appeal may be rendered nugatory.

19. On the issue as to whether the application has been filed without unreasonable delay this application was filed under a certificate of urgency on 22<sup>nd</sup> August, 2018 barely a month after the judgment of the trial magistrate was delivered.

20. There was no delay, which can be stated to be inordinate.

The applicant has shown that by bringing the application expeditiously he is interested in pursuing the appeal. Therefore, this application is not meant to delay the execution of the Judgment. There was no delay in filing the application on the part of the applicant.

21. The applicant has indicated that he is ready to provide security as may be ordered by the court. The contention by the appellant that he has not taken out execution proceedings, does not mean that he cannot seek execution at any time and has not stated that he will not execute until the Appeal is heard and determined and to be on the safe side, the applicant moved the court seeking an order for the stay of execution. The concerns by the respondent that he is entitled to enjoy the fruits of the Judgment would be pre-judiced by an order of stay because the court can issue such orders as would ensure that he will get the decretal sum immediately upon the appeal been determined.

22. A perusal of the Memorandum of Appeal shows that the appellant is challenging the award of Special damages which were not pleaded and failure by the trial magistrate to consider that the accident motor-vehicle was owned by somebody else.

23. The appeal cannot be said to be frivolous and the court in case of; Butt -vs- Rent Restriction Tribunal ( supra) has stated that;

**“the grant of stay of execution is discretionary and that such discretion should be exercised in a manner that would not prevent an appeal.”** The court should therefore exercise discretion in this matter in a manner that ensures that the Appeal is not rendered nugatory.

24. The application has merit and I allow it, and I order that there be a stay of execution pending the hearing and determination of the appeal.

25. The appellant shall provide security by depositing half the decretal amount in court or a security worth half the decretal amount within 14 days from today.

26. Failure to comply with the order to provide security, the respondent shall be at liberty to execute the judgment.

27. Costs of the application shall be in the cause.

**Dated, signed at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L. W. GITARI**

JUDGE