



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO 384 OF 2019**

**STEPHEN W CHEGE.....1<sup>ST</sup> APPLICANT**

**MANOAH LEVIS OMOLLO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOSEAH KIPKIRUI LANGAT.....RESPONDENT**

**RULING**

1. In their Notice of Motion application dated 18<sup>th</sup> October 2019 and filed on 22<sup>nd</sup> October 2019, the Applicants sought an order for stay of execution of the judgment that was delivered by Hon I. Orange on 13<sup>th</sup> June 2019 pending hearing and determination of the appeal herein. Their said application was supported by the Affidavit of Caroline Kimeto, the Legal Officer of their insurer, Britam General Insurance Co Limited, which she swore on their behalf on 18<sup>th</sup> October 2019.

2. They stated that they were dissatisfied with the whole judgment and wished to appeal against the same. They pointed out that their application in the lower court seeking an order for stay of execution was dismissed on the ground that they did not offer security and did not demonstrate that substantial loss would occur.

3. It was their contention that they had in fact indicated in the affidavit in support of their said application that they were willing to abide by any terms as to security and that they were equally willing to deposit the entire decretal sum into the advocates joint interest earning account pending the hearing and determination of the appeal herein.

4. They further averred that the Respondent's financial status was unknown while their insurer was a financially stable insurance and would be able to pay him the decretal sum in the event it was unsuccessful in its appeal herein. In this regard, they asserted that they were ready and willing to deposit the entire decretal sum into an interest earning account. They further pointed out that they had filed their application without undue delay and hence they had satisfied all the conditions of being granted an order for stay of execution pending appeal.

5. It was their contention that if they were not granted the said order, that would fly in the face of the overriding objective of civil litigation and thus urged this court to grant them the said order.

6. In opposition to the said application, the Respondent swore a Replying Affidavit on 14<sup>th</sup> November 2019. The same was filed on 15<sup>th</sup> November 2019.

7. He stated that the Appellants had filed a similar application in the lower court which was dismissed and consequently, the present application had not reached the threshold for an order for stay of execution to be granted and was thus an abuse of the court process and thinly veiled to deny him the enjoyment of the fruits of his judgment.

8. He pointed out that there had been inordinate delay in filing the present application and that in the event they had been keen on offering security, then they should have already opened a joint interest earning account. He contended that they had not demonstrated that he would be unable to refund them the decretal sum if they succeeded in their Appeal.

9. He thus urged this court to dismiss the present application with costs.

10. The Appellants relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** and the Respondent placed reliance on the cases of **John Gachanja Mundia vs Francis Muriira alias Francis Muthika & Another [2016] eKLR**, **Grace Wangui Ngenye vs Capital Group Limited [2019] eKLR** and **Machira t/a Machira & Co Advocates vs East African Standard [2002] eKLR** in support of their respective cases.

11. All parties were agreed all on the circumstances under which an applicant could be granted an order for stay of execution. Notably, before a court can grant an order for stay of execution, it must be satisfied that the applicant has demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows:-

**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.**

12. 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.

13. An appellate court can entertain an application for stay of execution pending appeal whether an application for such stay shall have been granted and/or refused by the court appealed from. Notably, Order 42 Rule 6 (1) of the Civil Procedure Rules stipulates that:-

**“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, (emphasis court) 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.**

14. It was therefore the view of this court that notwithstanding that the lower court had refused to grant the Appellants’ application in which they had sought an order for stay of execution pending appeal, this court could still consider the present application which was therefore properly before this court. The Respondent’s submissions that the present application was an abuse of the court process did not therefore find favour with this court.

15. The decretal sum herein was a sum of Kshs 253,550/= as was evidenced in the Appellant’s advocates letter dated 14<sup>th</sup> June 2019 to the Respondent’s advocates and annexed to the Respondent’s Replying Affidavit. It was not a colossal amount of money. However, the Respondent did not file an Affidavit of Service to demonstrate his ability to refund the Appellants the money in the event they were successful in the intended appeal.

16. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

17. In the absence of proof that the Respondent would be able to refund the Appellants the decretal sum without any hardship, this court was satisfied that they would suffer substantial loss. The Appellants had thus satisfied the first condition of being granted a stay of execution pending appeal.

18. Judgment in the lower court was delivered on 13<sup>th</sup> June 2019. The present application was filed on 22<sup>nd</sup> October 2019. It was the view of this court that a period of four (4) months could not be said to have been inordinate. This court therefore determined that the present application was filed without undue delay and thus the Appellants had satisfied the second condition for the granting of an order for stay of execution pending appeal.

19. The Appellants had indicated that they were willing to provide security and consequently, it was therefore the considered opinion of this court that they had demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal.

20. Weighing the Appellants’ right to have their dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent’s fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted.

## **DISPOSITION**

21. For the foregoing reasons, the upshot of this court’s decision was that the Appellants’ Notice of Motion application dated 18<sup>th</sup> October 2019 and filed on 22<sup>nd</sup> October 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

**1. There shall be a stay of execution of the decree in CMCC No 3219 of 2017 Joseah Kipkirui Langat vs Stephen W Chege & Another that was delivered on 13<sup>th</sup> June 2019 on condition that the Appellants shall deposit into an interest earning account in the joint names of their counsel and counsel for the Respondent, the sum of Kshs 253,550/= within forty five (45) days**

from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 21(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.

22. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**