



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL MISC. APPLICATION NO. 86 OF 2019**

**LILI JOYCE.....APPELLANT/APPLICANT**

**VERSUS**

**ANNAH ITUMBI BENJAMIN & BENJAMIN MUTUA NGOVI**

(Suing as the Legal Representatives of the Estate of the late

**JOSHUA MUSINDO MUTUA – DECEASED).....RESPONDENTS**

**R U L I N G**

1. The application dated **26<sup>th</sup> August, 2019** seeks orders as follows:

i) .....

ii) That this Honourable Court be pleased to order a stay of execution of the amount/balance of the Judgment/Decree issued by the Honourable Magistrate **J. Munguti** in Kitui Chief Magistrate's Court **Civil Suit No. 488 of 2015** delivered on the **5<sup>th</sup> September, 2018** pending the hearing and determination of the application herein.

iii) That this Honourable Court be pleased to stay execution of the Judgment/Decree issued by the Honourable Magistrate **J. Munguti** in Kitui Chief Magistrate's Court **Civil Suit No. 488 of 2015** delivered on the **5<sup>th</sup> September, 2018** pending the hearing and determination of the Appeal herein.

iv) That the costs of this application be in the cause.

2. The application is premised on grounds that on the **6<sup>th</sup> March, 2019**, the Court delivered a Ruling following the Applicant's application seeking stay of execution of the Judgment/Decree of the trial Court in **Civil Suit No. 488 of 2015** granting stay of execution on the terms that:

i) **Kshs. 500,000/=** be released to the Respondent within 30 days.

ii) **Kshs. 1,000,000/=** be deposited in a joint interest earning account.

3. That the Applicant did comply with the condition attached to the stay order by transferring the **Kshs. 500,000/=** to the Respondent's Advocates within the stipulated 30 days; subsequently the Applicant made an application for extension of stay orders and variation of the orders by consent to allow the Applicant to deposit the amount of **Kshs. 1,000,000/=** in costs, an application that was dismissed on the ground that the Court was *functus officio*.

4. Consequently, the Respondent has moved to execute the balance of the decretal amount and that the Respondent will not suffer any prejudice.

5. In the Replying Affidavit dated **5<sup>th</sup> September, 2019 Benjamin Mutua Ngovi** the 2<sup>nd</sup> Respondent with authority from his fellow Respondent depones that the Applicant declined to comply with orders of stay of execution as the thirty (30) days period lapsed on the **5<sup>th</sup> April, 2019** before compliance. That the **Kshs. 500,000/=** was deposited in his clients account on **12<sup>th</sup> April, 2019** without leave of the Court and/or knowledge of his lawyers. He alluded to bad faith on the part of the Applicants and urged that no substantial loss would be

suffered as he was an employee of the Teachers Service Commission with a salary and properties that were adequate to enable him repay the decretal sum in the unlikely event that the Appeal succeeds.

6. In a Supplementary Affidavit dated **26<sup>th</sup> September, 2019** the legal counsel of Directline Assurance Company Limited, the insurers of the Appellant deposed that the delays in making of the payments was regretted and explained to the Respondents' Advocates.

7. It is urged by the Applicant that the Appeal filed is arguable which called upon the Court to exercise its discretion to ensure the due performance of the decree. She also sought an order allowing her to deposit the **Kshs. 1,000,000/=** in Court.

8. Conditions to be satisfied by a party applying for stay of execution are provided for by **Order 42 Rule 6** of the **Civil Procedure Rules** that states as follows:

*“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”*

The Court must be satisfied that substantial loss will result if the order sought is not granted; the application has been made without unreasonable delay and the Court should consider ordering security to be given for the due performance of the decree.

9. In the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 417** the Court of Appeal stated that:

*“The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal ... 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. ...”*

10. The Applicant relied on the case of **Elena Doudoladova Korir vs. Kenyatta University (2014) eKLR** where the Court set out a four-part test to be satisfied by an Applicant seeking for stay of execution pending appeal, he must demonstrate that:

*“a) The appeal he has is arguable;*

*b) He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;*

*c) The application was made without unreasonable delay; and*

*d) He has given or is willing to give such security as the Court may order for the due performance of the decree which may ultimately be binding on them.”*

11. In that regard, it was urged that the Applicant had met conditions required to grant stay of execution and particularly having partially complied with the Court order of **6<sup>th</sup> March, 2019** which was a sign of good faith.

12. The Applicant purports to demonstrate good faith on its part but has not endeavoured to demonstrate if any substantial loss shall be suffered.

13. In the case of **Sewankambo Dickson vs. Ziwa Abby HCT-OO-CC MA 0178 of 2005** the Court stated thus in respect of substantial loss:

*“Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal; insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals especially in a commercial court, such as ours, where the underlying transactions typically tend to lead to colonial decretal amounts. In order for the appellant to satisfy this element one has to persuade the court that he will suffer substantial loss unless discretion is exercised to grant stay of execution of the judgement.”*

14. The peculiar circumstances of this case are that an application for stay of execution pending Appeal was made in the Lower Court. The order was granted with conditions attached and she was granted thirty (30) days to comply. A sum of **Kshs. 500,000/=** was to be released to the Respondent within the stated thirty (30) days. The Ruling was delivered on the **6<sup>th</sup> March, 2019**. Partial compliance of the order (transfer of **Kshs. 500,000/=** to the Respondent's Advocates) was made out of time, on the **11<sup>th</sup> April, 2019** and without leave of the Court.

15. It is submitted that the Applicant is apprehensive that a sum of **Kshs. 1,000,000/=** may not be recovered if deposited in joint interest earning account of both advocates as ordered by the Lower Court. Consequently, through submissions this court is asked to vary the order made by the Lower Court to allow her to deposit the sum in Court.

16. The allegation by the Applicant was not a formal prayer and it has not been suggested that in the event that the Appeal succeeds if the sum will have been released to the Respondents they may not pay back.

17. It is averred and demonstrated that the 2<sup>nd</sup> Respondent is a man of means who may be capable of refunding the decretal sum if the Appeal succeeds. In the case of **Lucy Nyamu Kimani vs. Lawrence Mburu Muthiga (2006) eKLR** it was stated that:

***“An Applicant demonstrates substantial loss by showing that the Respondent is not a person of means and payment of decretal sum prior to Appeal would put the same beyond reach of the Applicant.”***

18. In this case, a consideration of the conduct of the Applicant shows that she had no intention of complying with the conditions set and there is no evidence at this stage to show substantial loss that will be suffered. In the result, I find the application lacking merit which I dismiss with costs to the Respondents.

19. It is so ordered.

**Dated, Signed and Delivered at Electronically via Skype this 27<sup>th</sup> day of May, 2020.**

**L. N. MUTENDE**

**JUDGE**