



KTLNO. 681/2020

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 94'B' OF 2019

(FORMERLY HCC.A 54 OF 2019)

ZAKAYO MATENG'U NGUKU.....APPELLANT/APPLICANT

VERSUS

KATHEU MBONI.....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated **4th October, 2019**, the Applicant seeks a stay of execution of the Judgment and Decree pending hearing and determination of the Appeal herein or in the alternative, the Applicant be allowed to deposit non-cash security commensurate with the demands of justice and the circumstances of the Appeal.
2. The application is based on grounds that following the Judgment that was entered against the Applicant on **22nd August, 2019**, the Respondent has commenced execution. That the Applicant's defence was struck out and Judgment entered; the Appeal that has been filed is arguable and will be rendered nugatory. The Appellant who is 85 years old is likely to be arrested and committed to civil jail if the orders sought are not granted.
3. The Applicant swore an affidavit in support of the application where he deposed that; the Respondent by a suit instituted on **13th March, 2019**, sought refund of **Kshs. 908,609/=**, interest and costs. The defence filed was struck out and a Judgment entered summarily despite the denial of existence of a debt; an Appeal has been lodged but the execution process has commenced whereby the Applicant is likely to be arrested and committed to jail and if the decretal dues are paid, in event the Appeal succeeds, the Respondent may be unable to refund the same which will render the Appeal nugatory.
4. The Respondent dismissed the application as an afterthought and misconceived as it lacks merit. That the claim was for a friendly loan that the Applicant received, signed for and offered his plot in **Changamwe** as security hence there was no defence to the claim hence the Court rightfully dismissed the claim. On the issue of capability to refund the money the Respondent argued that she was a woman of means capable of refunding the cash hence the Applicant would not suffer any substantial loss. She listed properties in her name and availed her statements of accounts at the bank which had several millions.
5. The Appeal was canvassed by way of written submissions.
6. It was urged by the Applicant that if the orders sought are not granted execution which is by way of committal to civil jail will not be compensated by whatever sum of money. That the Applicant is an old man aged 86 years, is frail hence will be affected and will not recover. That when the Applicant moved the Court he was granted stay of execution on condition that he deposits **Kshs. 300,000/=** which has been deposited in Court in compliance with the Court order. He urged the Court to maintain the same amount as security.
7. Further, it was argued that an order for security ought not to be onerous or prohibitive as it could amount to taking away a right of appeal granted to parties.
8. Regarding the averments of the Respondent that she is a woman of means, it was argued that the allegations of owning property and money in banks was not substantiated and there was no evidence to confirm if the properties listed and bank accounts were encumbered in any way.
9. The Respondent argued that no substantial loss had been established as it had not been demonstrated that the Respondent was a woman of

straw who will not be able to repay the decretal sum. And, that the Respondent has proved through bank account statements and properties that she is wealthy and able to refund the decretal sum herein having given **Kshs. 908,609/=** to the Applicant in **2018** and a year later she is still running good accounts.

10. I have considered rival submissions for both parties.

11. The principles of granting a stay of execution are stipulated in **Order 42 Rule 6** of the **Civil Procedure Rules** which provides 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.”

12. The Court is required to interrogate if the application has been made without unreasonable delay; whether substantial loss will result to the Applicant unless the order sought is granted and security for due performance of the decree has been given by the Applicant (**Also see Kiambu Transporters vs. Kenya Breweries (2000) eKLR**).

13. In the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 417**, it was held that the power to grant stay of execution is discretionary and should be exercised in such a way so as not to prevent an appeal especially if successful so as to be rendered nugatory.

14. It is however important to note that granting such an order though a matter of discretion should be made in the interest of justice.

15. The impugned order was made on the **27th August, 2019** and the application was filed on **20th September, 2019** hence there was no delay in filing it.

16. It is urged that the Applicant will suffer substantial loss if the application is not allowed. In the case of **Kenya Shell LTD vs. Kibiru & Another (1986) KLR 410** it was held that:

“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

17. The nature of loss alluded to by the Applicant is loss of personal liberty as the Applicant may be incarcerated and no money may compensate him in that event. He is stated to be an old man, aged 86 years. The argument raised by the Respondent is that she is not a woman of straw, therefore capable of refunding any sum of money that the Applicant will have paid. The sum in question is **Kshs. 908,609/=**. The Respondent has demonstrated that she is capable of refunding such an amount of money. She has possessions including property and liquid assets too.

18. It is averred that following the Respondent’s claim a Judgment was entered against the Applicant (Appellant) for a sum of **Kshs. 908,609/=**, interest and costs of the suit. It has further been demonstrated by the Respondent that the Respondent borrowed from her **Kshs. 698,930/=** and gave a plot at **Changamwe** as security.

19. The claim was therefore, for a debt where the trial Magistrate exercised his discretion by striking out the defence filed. It is however urged that the defence put up raised triable issues which calls upon this Court to hear the Appeal filed. It will therefore be in the interest of justice to have the Appeal determined prior to execution issuing.

20. On the issue of security for due performance, when the matter was placed before **Kariuki, J.** at the outset he granted interim stay of execution on condition that the Applicant deposited **Kshs. 300,000/=** in Court, an order that was complied with. In the circumstances, I grant stay of execution pending hearing and determination of the Appeal on condition that the sum of **Kshs. 300,000/=** deposited remains in custody of the Court.

21. Costs of the application shall abide the outcome of the Appeal.

22. It is so ordered.

Dated, Signed and Delivered electronically through **Skype** this **26th** day of **May, 2020**.

L. N. MUTENDE

JUDGE