



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 55 OF 2016**

**JOSEPHAT NIKASIO.....APPELLANT**

**VERSUS**

**DONALD MASIKA.....RESPONDENT**

**R U L I N G**

This is an application dated 15<sup>th</sup> January, 2020 by Josephat Nikasio the applicant against Donald Masika the Respondent seeking the following and remaining prayers: -

- a) That the court be pleased to order that the attachment of the applicant's movable properties held by Dominion Yard Auctioneers be lifted and all the applicant's properties be unconditionally released to the applicant forthwith.***
- b) That in the alternative the Respondent whether by himself or his agents Dominion Yard Auctioneers be retrained from selling, disposing off or in any manner wasting the applicant's movable properties that are held at Dominion Yard Auction Room.***
- c) That an order do issue that an inspection be carried out on the attached movable properties that were taken from the applicant's house at Bukembe upon their release and if the assessment report indicates damage costs of repair and or replacement to be borne by the respondent***
- d) That the court be pleased to grant a stay of execution on Bungoma CMCC No. 586 of 2008 pending hearing and determination of this appeal against the judgment made by the Hon. Mr. Yalwala on the 23<sup>rd</sup> day of September, 2016.***

The application is supported by the affidavit of the applicant sworn on 15<sup>th</sup> January, 2020 where he depones that the applicant was defendant in Bungoma CMCC No. 586 of 2008. The judgment was delivered against him and Respondent awarded Ksh.543,575 plus costs. He was dissatisfied with the judgment and decree and has filed a memorandum of appeal. He further depones that the matter involved Blue Shield Insurance and there is in existence a moratorium in respect of all the insured by Blue shield. That the Respondent has proceeded with execution against the applicant and attached his property in execution of the decree. He depones that the appeal has high chances of success and will be rendered nugatory unless order of stay is granted.

The Respondent Donald Masika opposed the application by filing a Replying Affidavit sworn on 30<sup>th</sup> January, 2020. He deponed that the judgment in Bungoma CMCC was delivered on 23<sup>rd</sup> September, 2016. Upon delivery of the said judgment the applicant filed this appeal on 10<sup>th</sup> October, 2016 and sought informal stay of execution which was granted for 30 days. On 27<sup>th</sup> October, 2016 applicant filed an application for stay. The court upon hearing the parties delivered a ruling on 19<sup>th</sup> January, 2017 where court granted stay of execution on condition that the applicant do deposit the decretal sum in a joint interest earning account of both counsels within 14 days; in default, the orders to lapse. That the applicant has not complied with the orders for 3 years and that the present application is, therefore, *res judicata* and an abuse of the process of the court.

By consent this application was canvassed by way of written submissions. Both parties filed their respective submissions. M/s Isiye for the applicant submitted that the Respondent was shocked when his property was attached by Dominion yard Auctioneers on 13<sup>th</sup> January, 2020 in respect of the decree in Bungoma CMCC No. 586 of 2008. He submitted that the motor vehicle involved in the accident KAN 685V Peugeot 505 was insured by United Insurance Company and that there is a moratorium in place against the insured. He submitted that there was no evidence that a ruling was made in a similar application, and for those reasons the application should be granted.

Mr. Murunga for the Respondent submitted that the application does not meet the threshold set out under Order 42 Rule 6 Civil Procedure Rules. He submits the applicant has not demonstrated that he will suffer substantive loss, that this application was brought 3 years 4 months after judgment, that the applicant has not offered security and finally that the application is *res judicata*. He submitted that by ruling delivered on 19<sup>th</sup> January, 2017. Applicant was granted stay by trial court on condition that they deposit decretal sum in joint interest earning account within 14 days which they did not.

This application is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Order 42 provides: -

***(1) 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.***

***(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.***

***(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

***(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.***

In an application for stay under Order 42, the applicant must satisfy the court that: -

***a) Substantial loss may result to the applicant unless the order is made.***

***b) The application has been made without undue delay.***

***c) Such security has been offered or given by the applicant where as in this case the applicant is seeking stay of execution pending the hearing and determination of an appeal the court has to consider whether refuse of grant of order will render the appeal nugatory.***

**In Butt vs Rent Restriction Tribunal Nai CA 6 /1979** the Court of Appeal stated: -

***“1. 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.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.***

***3. 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.***

***4. 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 of rent in dispute and the appellant had an undoubted right of appeal.***

***5. The court in exercising its powers under Order 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 lapse.”***

The court where an application for stay of execution is made exercises the judicial discretion in the interest of justice. Such discretion is exercised within the parameters of law provided for under order 42 Rule 6. The applicant must satisfy all the conditions stipulated. In this case, the applicant filed this application over 3 years after judgment. In fact while the applicant filed Memorandum of Appeal on 10<sup>th</sup> October, 2016, he did not file this application until 15<sup>th</sup> January, 2020. No reason has been advanced for the undue delay. It would appear that the applicant was prompted to file this application by the attachment of his property.

The applicant has to demonstrate that he will suffer substantial loss if execution proceeds. The applicant where it is a money decree, must show that the decree-holder is such a man who if he is paid will be unable to refund if the appeal succeeds. He must demonstrate that execution will irreparable affect or will render the appeal if successful nugatory. There is no evidence adduced that the decree-holder is a

man of straw who cannot be made to refund if the appeal succeeds not supposed to pay as that is the responsibility of Blue Shield Insurance the insurers of the motor vehicle. Under Order 42 Rule 6 (2) under which the application is brought is very specific it states: -

**2) No order of stay shall be made under Sub Rule 1 UNLESS then proceeds to set out the conditions which are that: -**

**a) Substantial loss may result.**

**b) Application made without unreasonable delay.**

**c) Such security for due performance has been offered. An applicant must satisfy all the three conditions for grant of stay.**

The applicant in such application must demonstrate readiness or ability to offer such security as the court may order for the due performance of such decree or order as may ultimately be made. The applicant has neither in the supporting affidavit or in submissions showed willingness to offer such security. In fact the tone of the applicant's submission is that he is not supposed to pay as it is the responsibility of Blue Shield Insurance the Insurance of the Motor vehicle. No such evidence was however tendered by the applicant on this.

The last issue is whether a similar application was made in the trial court and orders made which were not complied with by the applicant. The Respondents submits that a ruling delivered on 19<sup>th</sup> January, 2017 granted stay of execution upon fulfilment of condition by applicant. The applicant feigned ignorance of the said ruling in their submissions stating that no such ruling existed as a copy thereof has not been annexed to the Respondent's response. The position is that the applicant did file application dated 26<sup>th</sup> October, 2016 in the trial court seeking stay of execution. The trial court by ruling dated 19<sup>th</sup> January, 2017 stated: -

***"I hereby grant the application dated 26<sup>th</sup> October, 2016 in terms of prayer (c) thereof on the following conditions.***

***1) That the defendant/applicant shall avail the entire decretal sum herein in the sum of Ksh.543,575 for deposit in a bank interest earning account in the joint names of counsels for both parties on record herein within fourteen 914) days form the date hereof.***

***2) That the defendant shall ensure that the record of appeal is lodged/filed in the Bungoma High Court Civil Appeal No. 55 of 2016 within sixty (60) from the date hereof.***

***3) That failure to comply with any of the conditions in 1 & 2 above the stay order shall automatically lapse (subject only to are further order of the court) and execution shall proceed or the deposit sum released to the plaintiff/respondent as the case may be."***

From the above it is clear that the applicant has been granted stay of execution by the trial court. I note that other than the memorandum of appeal filed on 10<sup>th</sup> October, 2016, the applicant has not prepared a Record of Appeal or taken any steps in the prosecution of this appeal.

After considering the application and submissions, I am not satisfied that the applicant has satisfied the criteria set out in Order 42 Rule 6(2) of the Civil procedure Act for granting of the orders sought. I, therefore dismiss the application with costs.

**Dated, signed and delivered at Bungoma this 18<sup>th</sup> day of June, 2020.**

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**S N RIECHI**

**JUDGE**