



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 22 OF 2020**

**CANNON ASSURANCE COMPANY LIMITED.....APPELLANT/APPLICANT**

**-VERSUS-**

**ERIC MAINA.....RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 24<sup>th</sup> February, 2020 taken out by the appellant/applicant herein in which it sought for the substantive order for stay of execution of the judgment and decree issued in Milimani CMCC No. 2387 of 2019 pending the hearing and determination of the appeal against the ruling consequently delivered by the trial court on 10<sup>th</sup> January, 2020 and in the alternative, an order for a temporary injunction barring execution against the applicant, together with an order for provision of costs of the Motion.
2. The Motion is supported by the grounds set out on its body and the facts deponed in the affidavit of its Legal Officer, **Lucy Kimunya**.
3. To oppose the Motion, the respondent put in a replying affidavit.
4. When the Motion came up for hearing, this court gave directions for the parties to dispose of it by filing written submissions.
5. The applicant submits that its appeal raises arguable issues and has high chances of success. The applicant further submits that unless an order for stay of execution is granted, it stands to suffer prejudice and substantial loss in the manner described in the supporting affidavit, thereby rendering the appeal nugatory should it succeed.
6. It is the contention of the applicant that it is ready and willing to abide by the orders that will be made by this court in respect to the provision of security for the due performance of the decree.
7. The applicant urged this court to take into account the decision arrived at in the case of **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR** when it expressed itself thus:  
  
*“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”*
8. In reply, the respondent has argued that there has been an inordinate and inexplicable delay in bringing the Motion.
9. On the subject of substantial loss, it is the argument of the respondent that the applicant has not demonstrated the substantial loss it is likely to suffer should this court decline to grant an order for a stay of execution. The respondent made reference *inter alia*, to the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** where the court held that:

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail,*

*a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:*

*“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*”

10. The respondent also submits that whereas the applicant has indicated its willingness to provide security as required by law, the respondent is equally entitled to fair treatment and hence his interests also ought to be taken into consideration.

11. The respondent reminded this court that whether to grant an order for stay of execution is purely discretionary and that such discretion must be exercised judiciously and where sufficient cause has been shown, as was reaffirmed in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**.

12. I have considered the grounds set out in the body of the Motion, the facts deponed in the affidavits supporting and opposing it, and the contending submissions.

13. Before I delve into the merits of the Motion; however; I consider it necessary to address the issue raised by the respondent that the Motion is an abuse of the court process.

14. In his affidavit, the respondent stated that the applicant previously filed four (4) applications seeking similar orders and with the intention of denying the respondent the enjoyment of the fruits of his judgment. The respondent added that in this regard, the applicant has not approached this court with clean hands and is therefore not entitled to the order for a stay of execution sought.

15. Upon perusal of the record, I note that save for the Motion now before me, the applicant had filed a similar application dated 16<sup>th</sup> January, 2020 before the lower court. Going by the averments made in the supporting affidavit of Lucy Kimunya, the lower court did not grant an order for a stay of execution.

16. The record shows that following the filing of the present Motion, the High Court granted extensions on the interim order for stay of execution on about three (3) occasions.

17. From the foregoing, there is nothing to indicate that the applicant filed several applications seeking similar orders and in any event, the law does not preclude a party from filing an application for a stay of execution with the High Court after a similar application was filed, heard and determined by the lower court. I am therefore not convinced that the present Motion is an abuse of the court process.

18. On a different note and in respect to the issue on whether the applicant has an arguable appeal, I am of the view that the subject on whether or not an appeal has high chances of success is not a requirement for consideration in appeals to the High Court when it comes to applications seeking an order for a stay of execution.

19. On the merits of the Motion, the guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions in determining an application for stay.

20. The first condition is that the application must have been made without unreasonable delay. It is apparent that the Motion was filed within a period of slightly one (1) month from the date of delivery of the decision on 10<sup>th</sup> January, 2020. As earlier mentioned, the applicant explained that part of the time was taken in filing and pursuing an application seeking similar orders before the lower court. In my view, the delay is not inordinate/unreasonable or inexcusable.

21. Under the second condition, the applicant is required to show to this court's satisfaction the substantial loss it would suffer if the order for stay is denied.

22. In her affidavit, Lucy Kimunya stated that the applicant's property has already been proclaimed and that if the respondent is allowed to proceed with execution, the applicant stands to suffer substantial loss and its appeal will be rendered nugatory.

23. The deponent also stated that the applicant is apprehensive that should the decretal sum be paid to the respondent, he will not be able to refund it should the appeal succeed; while stating on the other hand that the respondent does not stand to suffer any prejudice should an order for a stay of execution be granted.

24. In reply, the respondent asserted that he has a lawful judgment in place and should therefore be allowed to enjoy its fruits.

25. It is a legal principle that execution is a lawful process since a party is entitled to the fruits of its judgment. Nonetheless, it is also a principle of law that where a party's ability to refund the decretal sum has been questioned, such a party is required to bring evidence to persuade the court otherwise.

26. In the present instance, the respondent made no mention as to his ability to refund the decretal amount once it is paid to him and the appeal succeeds and yet this was an issue which was raised by the applicant.

27. I am therefore satisfied that the applicant has demonstrated that it stands to suffer substantial loss in the circumstances.

28. The final condition is on the provision of security for the due performance of the decree or order. The applicant indicated its willingness to abide by the terms to be issued by this court on the provision of security, while the respondent urged this court to order the applicant do deposit the entire decretal sum or to have it paid to him.

29. In the end, the Motion dated 24<sup>th</sup> February, 2020 is found to be meritorious. Consequently, an order for stay of execution pending appeal is granted on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this appeal within 30 days of this day, failing which the application shall be treated as having been dismissed. Costs of the application to abide the outcome of the appeal.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24<sup>th</sup> day of September, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent