



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**CIVIL APPEAL NO. 82 OF 2015**

**WYCLIFF KIPKEMBOI KIBET.....APPELLANT**

**VERSUS**

**HORKYNGS KILIRU AGANDA ALUNDA.....RESPONDENT**

**RULING**

Being dissatisfied with the judgment of this Court from Civil Appeal No. 82 Of 2015, dated 27<sup>th</sup> November 2018, the applicant herein, Wycliff Kipkemboi Kibet intends to file an appeal against the said judgment before the court of appeal.

Vide a Notice of Motion application dated and filed on the 15<sup>th</sup> January 2019, under a certificate of urgency, the applicant herein seeks the following orders-

1. That the court be pleased to certify the application as urgent and do dispense with service in the first instance.
2. That pending the hearing and determination of this application interpartes, the court be pleased to order a stay of execution of the decree herein in Eldoret CMCC 812 of 2014.
3. That pending the hearing and disposal of the appeal to the Court of appeal of Kenya, there be an order staying the execution of the decree herein in Eldoret CMCC 812 of 2014.
4. That costs of the application be provided for.

The application is further supported by the affidavit of Eliakim Emunye, the Branch Manager of Geminia Insurance Company Limited, who are the applicant's insurers. In the supporting affidavit, the deponent claims that they, together with applicant, would suffer irreparable loss should a stay of execution against the judgment and decree not be granted since the respondent hasn't furnished the court with evidence of means to reimburse the decretal sum.

The applicant produced in evidence a copy of the Notice of Appeal for the intended appeal marked as EE1. The alleged Notice of Appeal is dated 7<sup>th</sup> December 2018 and was filed before the Court of Appeal Registry on the 11<sup>th</sup> December 2018.

The applicant has anchored his application on Order 42 of the Civil Procedure Rules, 2010.

The applicant canvassed this application by way of written submissions dated 21<sup>st</sup> March 2019 in which he claims that he has satisfied the conditions necessary for a grant of stay of execution.

The applicant claims that he would suffer substantial loss should the stay not be granted and the appeal succeeds because, he claims, the respondent hasn't proved his ability to refund the decretal sum in the event the intended appeal succeeds.

The applicant further claims that this application has been made expeditiously, without unreasonable delay. The applicant relied on Order 50 Rule 4 of the Civil Procedure Rules 2010 which provides that time does not run from 21<sup>st</sup> of December to 13<sup>th</sup> January the following year. He claims that the delay of 28 days is not unreasonable delay.

The applicant claims that he has deposited more than the half of the decretal sum to the respondent and the balance of Kshs. 1,428,000/= is what remains pending the proposed appeal. The applicant therefore prays that the application for stay be allowed.

The respondent filed his written submissions on 3<sup>rd</sup> April 2019 in reply to the applicant's Notice of Motion dated 15<sup>th</sup> January 2019.

The respondent claims that the applicant has not satisfied the conditions for staying execution of a judgment pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The respondent claims that the instant application was made after an unreasonable delay and that the applicant offered no explanation for the delay.

The respondent further claims that the applicant has not provided any documentary evidence as to ascertain that he has deposited funds in a joint interest earning account as security for costs of the intended appeal.

From the above submissions by both parties, this court has discerned a number of issues for determination.

Order 42 Rule 6 of the Civil Procedure Rules provide for the following conditions for a grant of stay of execution-

1. That the court be 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
2. That 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.

The applicant submitted that he would likely suffer substantial loss should a grant for stay not be granted and the appeal succeeds for the reason that the respondent has not proved his ability to pay the decretal sum. The respondent on the other hand claims that in the event that the applicant appeal succeeds, he would use the decretal sum that the appellant has paid to him.

The decretal sum that the appellant has allegedly deposited with the respondent is Kshs. 2,230,660/= against the total damages of Kshs.

3,478,176.20 awarded to the respondent.

As to whether the application was made after unreasonable delay, the applicant submitted that he made this application without unreasonable delay and relied on the case of **G.N Mwema P/A(sic) Mt. View Maternity and Nursing Home V. Miriam Maalim Bishar & Another [2018] Eklr** in which the court granted a conditional stay of execution despite a delay of over 9 months. The instant application was with a delay of around 26 days.

**Order 42 Rule 6, Sub-Rules 3-6** states as follows-

(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.

The applicable principles in deciding whether or not to grant a stay of execution pending an appeal were stated by the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where it held that:

- “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.”

Furthermore, the Court of Appeal decision in the case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** held as follows -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

In the case of **Siegfried Busch vs MCSK [2013] eKLR**, the court held that,

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

In the instant application, I find that the application wasn't made expeditiously and no concrete explanation was offered by the applicant for the delay. I also don't find merit in the respondent's assertion that the decretal sum deposited with him by the applicant is proof that he would be able to meet the costs of the appeal should it not be in his favour. The respondent could have already disposed the amount by then. However, it would be unfair to the applicant if he would not be able to recover the paid sum should he succeed on appeal, despite the fact that the application was made late and without explanation thereto.

In view of the above, this court finds merit in granting an order staying the execution of the decree in Eldoret CMCC 812 of 2014 pending the hearing and determination of the appeal. The application therefore succeeds.

Costs of this application be in the cause.

Dated Signed and delivered at Eldoret this 30<sup>th</sup> day of July, 2019

**S. M. GITHINJI**

**JUDGE**

In the absence of :-

**Mr. Manani for the Appellant and**

**Mr. Ombati for the Respondent**