



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 2 OF 2018**

**NICHOLAS MWAKA.....APPELLANT/APPLICANT**

**VERSUS**

**E W (Suing through WINFRED NDANU as next friend).....RESPONDENT**

**RULING**

1. Before this court is the appellant's notice of motion dated 3<sup>rd</sup> December, 2018 seeking the following orders:

***a) Spent.***

***b) Spent.***

***c) That pending the hearing and determination of the appeal herein an order of stay of execution of the decree in CMCC 132 of 2010 arising from the judgment delivered on 22<sup>nd</sup> December 2017 do issue.***

***d) That costs be provided for.***

2. The motion is supported by the grounds on the body of the motion and the appellant's supporting affidavit sworn on 3<sup>rd</sup> December, 2018. It is the appellant's case that he received a copy of certified proceedings and judgment on 28<sup>th</sup> November 2018. That the lower court registry never informed him that the proceedings were ready despite checking the same on several occasions. That on 17<sup>th</sup> August, 2018 he filed an application for stay of execution under certificate of urgency. That the lower court however declined to certify the same as urgent since no decree had at the time been issued and no steps had been taken to execute the judgement. That on 21<sup>st</sup> September, 2018 the decree was signed and a warrant of attachment thereafter issued on 20<sup>th</sup> November, 2018 and a proclamation was made of all the stock in trade in his shop on 22<sup>nd</sup> November, 2018. That on 28<sup>th</sup> November, 2018, he filed another certificate of urgency since the circumstances had changed and the process of execution was in motion and the court ruled that the application was not urgent.

3. It is the Appellant's case that his application was not considered on merit since none of the facts which he brought before the court in support of his application was considered. He stated that judgement was entered against him for KShs. 480,000.00 and the amount sought in the proclamation is KShs. 640,861.00. That the execution of the decree will render him penniless and that the value of stock in trade at his shop in Mlolongo and household effects together cannot raise the amount sought when sold at public auction and this will also ruin his livelihood. That even though he is liable to pay the judgment debt, he is liable only as the owner of the vehicle as it was driven by an employee. That he is financially on very shaky ground and if the decree is executed, he will suffer irreparable damage and hardships to the extent that if he is successful on appeal, its results would be rendered nugatory.

4. He stated that the execution of the decree will leave him with no means to support himself or even continue to pay school fees for his children and no monetary compensation can compensate him for the lost time and opportunity as regards his children's education. He stated that he filed **Judicial Review No. 37 of 2017** which emanated from **CMCC 131 of 2010** which is a claim involving the same accident filed by the plaintiff's fellow passenger. That he filed **Civil Appeal No. 29 of 2014** from the judgment in **CMCC No. 131 of 2010** and that stay of execution of the said judgment was granted in the Judicial Review case. That the High Court having acknowledged that a stay of execution of the decree should issue, he requests that this court takes cognizance of its decision and not place him in a position where the relief given by the superior court is negated. That he makes this application for stay upon proclamation of the goods in his shop on 22<sup>nd</sup> November, 2018. He stated that despite the fact that he is unable to raise the decretal sum, he is ready and willing to deposit in court title to his land L.R. Matungulu/Katine/3058 valued at KShs. 600,000.00.

5. In response thereto, the respondent filed a replying affidavit on 22<sup>nd</sup> January, 2019. She contended that the application is misconceived and lacks merit since the appellant does not have an arguable appeal. That the application has been made to deny her the fruits of her judgment. She stated that the appellant is a man of means and is able to satisfy the decree contrary to his allegations. That the Judicial Review application which emanated from **CMCC 131 of 2010** does not apply to this case as these are distinct and separate cases. That in the

event this court is inclined to grant stay orders, the appellant be ordered to pay her half the decretal amount within 14 days and the other half be deposited in a joint interest earning account in the names of both advocates on record.

6. The rival submissions were essentially a reiteration of their averments in the affidavit. The appellant relied on **Daniel v. Ferguson (1891) 2 Ch. 27, CA** and sections 1A and 3A of the Civil Procedure Act while the respondent cited **Amal Hauliers Limited v. Abdulnasir Abukar Hassan (2017) eKLR**.

7. I have given due consideration to the averments and the rival submissions together with the authorities cited therein. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. In determining an application for stay of execution, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

*a) The application is brought without undue delay;*

*b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and*

*c) 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.*

8. There is no contention on the issue of time and I shall therefore not delve into it. On the issue of loss, the appellant annexed a copy of the proclamation by Cash Gate Auctioneers. The same reveals that the items proclaimed are; 50 pcs engine belts, 50 pcs shock absorbers, 70 pcs car batteries, 100 pcs leaf springs, 100 pcs engine oils, 50 pcs coolants, 50 pcs pistons, 200 pcs bushes and 1 pc skytop T.v. which items are tools of trade. Such items are exempt from attachment under Section 44 (1) of the Civil Procedure Act. In the circumstances, I find that the Appellant has established that he stands to suffer loss if the orders sought are not granted. Finally, the appellant indicated that he is unable to raise the decretal sum but expressed his willingness to deposit his title deed to **L.R. Matungulu/Katine/3058**. In view of the same, I find that the appellant has satisfied the prerequisites of order 42 rule 6 of the Civil Procedure Rules to warrant grant of order of stay of execution. Even though the Respondent has sought to be paid half the decretal sums while the rest to be deposited into an interest earning account in the names of both Advocates, I find that the Appellant's situation appears dire. The Auctioneer has already confirmed receiving Kshs.150,000/= from the Appellant which should be enough to cushion the Respondent pending the determination of the appeal. It would be unfair to deny the Appellant a right to ventilate his appeal. The security offered is sufficient and can be easily realized upon conclusion of the appeal.

9. In the result, it is my finding that the Appellant's Application dated 3/12/2018 has merit. The same is allowed in the following terms.

*a) That pending the hearing and determination of this appeal, an order of stay of execution of the decree in CMCC 132 of 2010 arising from the judgement delivered on 22<sup>nd</sup> December 2017 is hereby granted.*

*b) The Appellant/Applicant do surrender title L.R. Matungulu/Katine/3058 together with its valuation report for authentication to the Deputy Registrar within 30 days from this date and upon authentication be deposited in court as security with a corresponding entry being made on the Register at the Lands Offices.*

*c) In the event the title is found not to be authentic, the orders of stay shall automatically lapse.*

*d) The costs of the application shall abide in the appeal.*

It is so ordered.

Dated and delivered at Machakos this 1<sup>st</sup> day of August, 2019.

D. K. Kemei

Judge