



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 597 OF 2012**

**JOHN N MUGAMBI.....1<sup>ST</sup> APPELLANT**

**MUGAMBI & COMPANY ADVOCATES.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DR. KIAMA WANGAI.....RESPONDENT**

**R U L I N G**

1. The appellants herein took out the motion dated 28<sup>th</sup> June, 2019 in which they sought for inter alia an order for stay of execution for recovery of costs and other consequential orders pending appeal.
2. The motion is supported by the affidavit of John N Mugambi.
3. The Respondent was served with the aforesaid motion but he did not deem it fit to file a response, therefore, the Applicants were granted Leave to prosecute the application ex parte.
4. The Applicants stated that they are aggrieved by this court's ruling delivered on 17<sup>th</sup> February, 2018 and have preferred an appeal before the Court of Appeal.
5. It is their submission that whilst the appeal is pending they are left exposed with the threat of execution for costs.
6. They aver that unless the order for stay is granted, the appeal will be rendered nugatory. The deponent of the supporting affidavit stated that he was ready to make an undertaking as to damages as security for the grant of the orders.
7. The background of this motion is short and straightforward. The Respondent filed an action before the Chief Magistrate's court against the Appellants in which he sought for payment of Ksh.56,670/- being unpaid rent in respect of rooms 715 and 716 at 7<sup>th</sup> floor Maendeleo House.
8. The suit was heard and determined by Hon. Obulutsa in favour of the Respondent.
9. The appellants were ordered to pay the Respondent Ksh.55,000/- plus costs and interest vide the judgment delivered on 9<sup>th</sup> October, 2012.
10. The appellants being aggrieved, filed this appeal in which they put forward the followings of appeal: -
  - i) That the learned magistrate erred in law and in fact entirely dismissing the appellants defence when it was obvious that the plaintiff had not strictly proved his case as required by law.***
  - ii) That the learned magistrate erred in law and in fact by misdirecting himself and failing to consider, appreciate and uphold the Appellants defence, evidence and submissions and subsequently entering judgment of the plaintiff.***
  - iii) That the learned magistrate erred in law and in fact in failing to direct his mind to serious matters that were raised by the defence regarding the locus standi of the plaintiff to file, maintain and prosecute the suit.***
11. This court issued a notice to show cause why the appeal should not be dismissed for want of prosecution and had it served upon the appellants.

12. When the notice to show cause came up for hearing on 6<sup>th</sup> October, 2017, the Appellants and their advocate failed to turn up to answer the notice thus prompting this court to issue an order dismissing the appeal for want of prosecution .

13. Being aggrieved by the dismissal order, the Appellants filed the motion dated 11<sup>th</sup> October, 2017 in which they sought to have the aforesaid order set aside. This court heard the aforesaid application and found the same to be without merit vide its ruling delivered on 16<sup>th</sup> February, 2018.

14. The Appellants being dissatisfied filed a notice of appeal with the intention of challenging this court's decision before the Court of Appeal.

15. The Appellants are now before this court seeking for an order for stay of execution pending appeal.

16. The principles to be considered in determining an application for stay pending appeal are well settled. First, an applicant must show that if he is denied the order he would suffer substantial loss. Secondly, the application for stay should be filed without unreasonable delay. Thirdly, the provision for security for the due performance of the decree should be factored.

17. The application for stay dated 25<sup>th</sup> June, 2019 was filed on 1<sup>st</sup> July, 2019 while orders sought to be stayed were issued on 16<sup>th</sup> February, 2018.

18. The Notice of appeal was filed on 22<sup>nd</sup> February, 2018. The record shows that the Bill of Costs was taxed on 31<sup>st</sup> May, 2018 and a certificate of taxation was issued on 7<sup>th</sup> June, 2018. The application for stay was filed more than a year from the date the certificate of taxation was issued.

19. I find the delay for more than a year in filing the application for stay to be unreasonable, therefore, the same should not be entertained.

20. The second principle to be considered is whether the applicants have shown the substantial loss they would suffer if the order for stay is denied. In this matter, the appellants/applicants have merely stated that their appeal would be rendered nugatory. The Applicants have not shown how the appeal would be rendered nugatory and what the substantial loss is. The application therefore fails to meet the second requirement.

21. The third principle is the requirement for the provision of security for the due performance of the decree. This principle is dependent on the first two principles which the applicants have failed to satisfy.

22. In the end, the motion dated 28<sup>th</sup> June, 2019 is found to be without merit. The same is dismissed with costs to respondent.

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of October, 2019

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent