



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL CASE NO 61 OF 1996**

**KIBUGU FARMERS**

**CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**PHILIP MUNGAI T/A MUNGAI**

**ELECTRICAL VENTURES.....DEFENDANT/RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 13<sup>th</sup> May 2019 in which the applicant seeks orders of stay of execution against the decree dated 4<sup>th</sup> December 2018 pending the hearing and disposal of his intended appeal.
2. It is the applicants case that the respondent has already taxed his costs and is thus positioning himself to execute the decree. The applicant states that he filed his notice of appeal timorously on the 12<sup>th</sup> December 2018 and is currently waiting for copies of the proceedings having requested the same vide a letter dated the 10<sup>th</sup> December 2018.
3. The applicant states that it and its members consisting 4,300 small scale farmers are likely to suffer irreparable loss if the decree is executed.
4. In rejoinder, the respondent asserts that the instant application lacks merit and has been brought five months after the judgement was entered without any explanation from the applicant on the inordinate delay.
5. The respondent further states that there is no reason why the decree he holds being a money decree should be stayed and that he is capable of repaying the decretal sum if the appeal succeeds by virtue of his profession as an electrical contractor and also by virtue of the engagement with the applicant.
6. The respondent further states that the applicant has not demonstrated what substantial loss will be suffered if stay is not granted. The respondent further states that if stay is to be granted, the applicant should be ordered to deposit the decretal sum plus interests as well as costs in a joint bank account in the name of the advocates for the parties herein.
7. The parties were to dispose of the application by way of written submissions however there are no submissions on record.

**B. Analysis & Determination**

8. In the cases of **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR** and **Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410**, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.
9. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. ***Substantial loss may result to the applicant unless the order was made;***
2. ***The application was made without unreasonable delay; and***

**3. 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.**

10. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

11. It is the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

12. The applicant states that it and its members consisting 4,300 small scale farmers are likely to suffer irreparable loss if the decree is executed. Conversely, the respondent herein states that he is capable of repaying the decretal sum if the appeal succeeds by virtue of his profession as an electrical contractor and also by virtue of the engagement with the applicant. The respondent further states that the applicant has not demonstrated what loss it is likely to suffer.

13. In that regard, it is my considered view that the Applicant has not satisfied the condition of demonstrating that he would suffer substantial loss if the order for stay of execution pending appeal was not granted.

14. Turning to the second issue, it is my considered view that a period of five (5) months for filing the present application was too long. As the Respondents correctly pointed out, the Applicant did not explain the delay and/or proffer a reason why he failed to file the said application timeously. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. The delay herein appeared to have been inordinate and also cause the Respondent to suffer prejudice or injustice.

15. I have come to the aforesaid conclusion because there is evidence that the Respondent had already initiated execution proceedings that would have been thwarted midstream by the filing of the present application. However, I do note that the applicant filed his notice of appeal timorously on the 12<sup>th</sup> December 2018 and is currently waiting for copies of the proceedings having requested the same vide a letter dated the 10<sup>th</sup> December 2018. The implication of this is that the Applicant would not have been able to have filed his Record of Appeal before this time. In the circumstances foregoing, I am persuaded to find and hold that the Applicant has satisfied the second ground for being granted a stay of execution pending appeal.

16. The Applicant has not demonstrated his willingness to furnish security and thus fails to satisfy this limb.

17. In the case of **Ujagar Singh v Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus: -

***“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”***

18. In the case of **Siegfried Busch vs MCSK [2013] eKLR** it was held:

***“A superior court to which an application has been made must recognise 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...”***

19. Accordingly, having considered the parties’ pleadings, affidavits and the existing case law, it is the considered view of this court that as the Applicant is entitled to exercise to his right of appeal, it is in the interests of justice that a stay of execution pending the hearing and determination of the Appeal be granted so as not to render his appeal nugatory.

20. Accordingly, the upshot of this court’s ruling is that the Applicant’s Notice of Motion application dated 13<sup>th</sup> May 2019 is merited and the same was hereby allowed in the following terms: -

**a) That there shall be a stay of execution of judgment that was delivered by this court on the 4<sup>th</sup> December 2018 pending the hearing and determination of the intended appeal on condition the Applicant shall deposit into an interest earning account in the joint names of his advocates and those of the respondents, the decretal sum within the thirty (30) days from the date hereof.**

**b) That in the event, the applicant shall default on the orders for deposit, the orders for stay of execution shall automatically lapse.**

**c) Costs of the application herein shall be in the cause.**

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF DECEMBER, 2019.

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Okwaro for Defendant/Respondent**