



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 54 OF 2016

WILSON MUTEGI NYAGA.....APPELLANT

VERSUS

JOHANA MUTHENGI TOTO.....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated the 9th day of **December, 2016**, the Applicant/Appellant seeks stay of execution pending hearing and determination of Appeal.
2. The application is premised on grounds that the Appellant/Applicant has lodged an appeal against the Judgment of the Lower Court; he did not apply for stay of execution because he was not conversant with the procedures of Law; unless the stay of execution is granted the Appeal shall be rendered nugatory; the Appeal has high chances of success and it is in the interest of justice that the application be allowed.
3. The Applicant swore an affidavit in support of the application where he deposed that following the Judgment delivered by a Magistrate who was biased he has appealed. He failed to apply for stay of execution because he did not know the procedure laid down in Law and unless the stay is granted, the Appeal will be rendered nugatory.
4. In response thereto, the Respondent swore a Replying Affidavit where he deposed that the application is misplaced, misconceived and an abuse of the Court process. That the Bill of Costs was taxed and the decretal sum stand at **Kshs. 92,145/=** plus costs and interest. The Appellant has not demonstrated any indication of wishing to settle the matter therefore it was reasonable for him to pay the decretal sum.
5. Further, that the Applicant failed to demonstrate what irreparable damage he will suffer and his willingness to satisfy the order of the Court.
6. At the hearing **Mr. Mbaluka**, Counsel for the Applicant/Appellant submitted that the Applicant has lodged an Appeal and feels that it has a high chance of succeeding. It is fair for the Applicant to be given the opportunity to pursue the Appeal. In event the Court wishes it could grant a conditional stay.
7. In response thereto the Respondent opposed the application stating that the Applicant his uncle appreciates the fact that he owes him the sum. Therefore he should either pay the decretal sum or deposit the entire sum in Court.
8. The application has been brought pursuant to the provisions of **Order 42 Rule 6** which provides thus:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is 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

(b) 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.

(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.”

9. The Judgment herein was delivered on the 6th day of **December, 2016** and the Appeal was filed on the 9th day of **December, 2016**. There was absolutely no delay in filing of the Appeal as it was made timeously.

10. The issue to be addressed is whether the Applicant will suffer substantial loss if the order sought is not granted. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63** it was held as follows:

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to be satisfaction of the court, the court will not grant stay.”

In the case of **Sewakambo Diskson vs. Ziwa Abby HCT-00 CA MA 178 OF 2005** it was stated that”

“.....Substantial loss is a qualitative concept, it refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value that is merely nominal.....”

11. To move this Court to exercise its discretion in granting the order sought the Applicant had a duty of proving that he will suffer some great loss. The award was as a result of damage occasioned on the crop. It was a monetary award. It is not stated in the affidavit evidence what kind of loss the Applicant may suffer.

12. It is also averred that the Appeal may be rendered nugatory. As I have aforesaid this is a monetary decree. In the case of **Kenya Hotel Properties LTD vs. Willesden Properties LTD Civil Application No. NAI 322 of 2006 (UR)** it was stated that:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain rides to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicant if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”

13. The Respondent stated that he is able to pay the total sum should the Appeal not succeed. He stated that he is a teacher. A person may be a teacher but not able to pay the total sum. This therefore behoves me to exercise my judicial discretion by ordering the Applicant to deposit some security in Court.

14. In the result, I allow the application on condition that the Applicant deposits **Kshs. 92,145/=** in Court within **7 days**. In default the application shall stand dismissed. Costs of the application shall abide the outcome of the Appeal.

Dated, Signed and Delivered at Kitui this 19th day of January, 2017.

L. N. MUTENDE

JUDGE