



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI CIVIL DIVISION**  
**CIVIL APPEAL NO. 587 OF 2017**

**EMMY KEINO (SUING THROUGH HER ATTORNEY**

**STEPHEN MBOGO NYAGA) .....APPLICANT**

**VERSUS**

**BOARD OF TRUSTEES**

**TELEPOSTA PENSION SCHEME.....RESPONDENT**

**RULING**

The Appellant filed a Notice of Motion Application dated 20<sup>th</sup> November, 2017 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules seeking orders that, there be stay of execution of the judgement delivered on 19<sup>th</sup> October, 2017 in Milimani Commercial Courts Civil Suit No. 6745 of 2014 together with proceedings in the said suit pending the hearing and determination of the Appeal. The Applicant, also sought that the costs of the application do abide the outcome of the Appeal.

This Application is premised on the grounds on the body of the application and on the Supporting Affidavit of **STEPHEN MBOGO NYAGA**, the Appellant's Attorney. The grounds advanced in support of the application are that the appeal has good chances of success and substantial loss will be occasioned to the Applicant unless execution of the judgment is stayed and that the Appeal shall be rendered nugatory unless the orders are granted. The Applicant believes that the respondent will not suffer any prejudice if the judgment is stayed.

The Respondent filed a Replying Affidavit dated 5<sup>th</sup> December, 2017 sworn by **PETER K. ROTICH**, the Administrator/Trust Secretary, of the Respondent who avers that the Application is misconceived and frivolous. He also depones that the Applicant will not suffer any irreparable loss and has not provided security for the due performance of the decree. The Respondent further stated that it will continue to suffer loss of income from their property while the Applicant continues to enjoy possession without paying any consideration as they are the registered owners of the property. The Respondent avers that the Applicant concealed the fact that he had obtained stay orders in the lower court which had already lapsed and also the fact that judgement had been entered in favour the Respondent for unpaid rent and mesne profits.

The Application was canvassed by way of oral submissions on 20<sup>th</sup> December, 2017 which I have applied my mind to. Although no authorities were cited, I have gone further to consider a number of them which are applicable in this case. Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for

granting an order of stay of execution which are;

- (a) That the application has been made without unreasonable delay;
- (b) That security for costs has been given; and
- (c) That substantial loss may result to the Applicant unless the order for stay is made.

The said guidelines were outlined by the Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** where the Court held that,

***“We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court’s decision in CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4 as follows:***

***“. . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”***

What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 20<sup>th</sup> November, 2017 whereas the Judgment sought to be stayed was delivered on 19<sup>th</sup> October, 2017. Considering the fact that there were earlier stay orders that had been issued by the lower court which lapsed in order for the instant application to be filed, I do not find the delay in filing the application unreasonable.

On substantial loss, the Applicant avers that she will suffer irreparable loss, without giving particulars of the nature of loss to be suffered. The Applicant was expected to show how the Respondent would not be in a position to compensate him in the event that the Appeal succeeds and execution has already taken place. I find that the Applicant did not discharge this burden. What constitutes substantial loss was further discussed in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA MISC APPLICATION No 42 of 2011 [2012] eKLR (Gikonyo J** stated that:

***No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.***

***The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867, and also in the case of MukumaVs.Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:***

***“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

The third tenet for granting an order of stay of execution is that the Applicant must provide security for

the due performance of the decree, which the Applicant has not offered. It was during the submission that the Appellant generally stated that he is willing to offer security without elaborating the nature of security he is willing to offer. The Applicant has not offered any security terms he is ready to commit for due performance of the decree yet there is already a judgment in favour of the Respondent. For the above reasons, the Applicant has not established sufficient cause why the orders sought should be granted.

The upshot of the above is that the application dated 20<sup>th</sup> December, 2017 is hereby dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **18<sup>th</sup>** Day of **January, 2018**.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicant

..... For the Respondent