



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 35 OF 2016**

**ALLAN NGALA MWENDWA.....APPLICANT**

**VERSUS**

**MARGARET WILSON WAMBUA.....1<sup>ST</sup> RESPONDENT**

**SEBASTIAN MUEMA WILSON.....2<sup>ND</sup> RESPONDENT**

*(Suing as representatives of Estate of Athanas Wilson Wambua (Deceased))*

**R U L I N G**

1. By way of Notice of Motion, the Applicant seeks Stay of Execution of the Ruling delivered on the **14<sup>th</sup> September, 2016**, the Judgment and Decree in **Kitui Chief Magistrate's Court Civil Case No. 425 of 2015**, and all consequential orders emanating therefrom pending hearing and determination of the Appeal and any other or further orders that the Court would deem fit to grant.
2. The application is premised on grounds that: An Exparte Interlocutory Judgment was entered in the matter against the Applicant for **Kshs. 5,459,670/=** plus costs and interest; the Appellant was not given an opportunity to participate in the proceedings and his application seeking to set aside the exparte judgment and leave to defend the suit was dismissed; The Applicant has a good defence; the Traffic Case between the parties in respect of the accident, **Kitui Chief Magistrate's Court Traffic Case No. 45 of 2014** is ongoing, the true cause of death is in dispute and the outcome will have direct bearing on the issue of liability which is highly contested; there being no Stay of Execution Applicants herein and their insurers are exposed to execution despite the pending Appeal and they will suffer irreparable loss as Respondents are not persons of means and would not refund the decretal amount; The application has a high chance of succeeding and they are willing to furnish security for due performance of the decree.
3. Mrs. Janerose Gitonga, the Legal Manager in charge of claims of First Assurance Company Limited swore an affidavit in support of the application where she deponed *inter alia* that the Insurance Company learnt of the matter having been heard and a final judgment entered on **23<sup>rd</sup> April, 2016** on being served with a notice of entry of judgment by **Kan Insurance Brokers LTD** who had received a copy from their insured. The insured has a good reason for failure to appear and file a defence within the prescribed time and he has a good defence as detailed in the draft defence.
4. In response thereto, the Respondents' Advocate **Muendo M. Uvyu** filed a replying affidavit where he stated that the application filed before the Lower Court seeking stay of execution and setting aside the interlocutory judgment and all consequential orders in the suit was dismissed on merit.
5. That notice of entry of judgment against the Applicant was not made to the Applicant on **23<sup>rd</sup> April,**

2016 but on the **8<sup>th</sup> January, 2016** when the firm (First Assurance Co. LTD) informing them that an interlocutory judgment was entered pending formal proof on **17<sup>th</sup> February, 2016**.

6. The Insurance Company did not bother to apply to set aside the interlocutory judgment. They waited until the full hearing was conducted.

7. Further, he stated that the appeal has no chance of succeeding because the facts are in favour of the Respondents; The 2<sup>nd</sup> Respondent is a Clinical Officer working for Fairmont Hotels Resort therefore a man of means capable of refunding the decretal amount should the appeal succeed.

8. The appeal was canvassed by way of written submissions which I have duly considered.

9. The application has been brought pursuant to the provisions of **Order 42 Rule 6 and 9** of the **Criminal Procedure Rules** that provide thus:

*“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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) .....*

*(5) .....*

*(6) .....*”

10. An application for stay of execution in this matter was made and denied by the Lower Court. However the law mandates this Court to determine this application. Judgment in this matter was made on the **14<sup>th</sup> day of September, 2016**. The application to set aside the Ruling was made on the **21<sup>st</sup> day of September, 2016** some seven (7) days later. The application was therefore filed without unreasonable delay in compliance with the requirements of **Order 42 Rule 6(2)(a)** of the **Criminal Procedure Rules 2010**.

11. In the case of **Standard Assurance Co. LTD vs. Alfred Mumea Komu Civil Appeal No. 186 of 2007** the Court stated thus:

*“Substantial loss, in its various forms is the corner stone of best jurisdiction for granting a stay. That is what has to be presented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”*

12. In the case of **Equity Bank LTD vs. Taiga Adams Company LTD 2012 eKLR** the Court stated thus:

***“..... The only way of showing or establishing substantial loss is by showing that if the decretal sum is to be paid to the respondent – that is execution carried out – in the event the appeal succeeds the respondent would not be in a position to pay – reimburse as she/he is a person of no means.”***

It is argued that if stay of execution is not granted the Applicant will suffer loss as the Respondents are not persons of means therefore will not be capable of refunding the decretal sum.

13. In the case of **ABN AMRO BANK, N.V. vs. LE MONDE FOODS LIMITED – Civil Application No. NAI 15 of 2002**, the Court stated:

***“.....all an applicant in the position of the bank can reasonably be expected to do is to swear, upon reasonable grounds, that, the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed..... the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has such as land, cash in the bank so on.”***

In Paragraph 16 of the replying affidavit it is stated that the 2<sup>nd</sup> Respondent works as a Clinical Officer therefore a man of means capable of refunding the money. The sum awarded is substantial. No information was divulged of what the alleged Clinical Officer earns or if he has some other source of income that would enable him refund the sum in event of the appeal succeeding. Therefore I am satisfied that the Applicant may suffer substantial loss.

14. It is argued that the appeal may be rendered nugatory if it succeeds after execution proceeds. Indeed, as correctly submitted this is a money 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.”***

15. I have aforesaid that the means of the Applicant are questionable therefore refunding the money may not be easy. In the premises it will be in the interest of justice for this Court to grant a conditional stay.

16. I therefore allow the application for stay of execution on condition that the Applicant deposits the entire decretal sum in Court within fourteen (14) days. In default, the application shall stand dismissed. Costs of the application shall abide the outcome of the appeal.

17. It is so ordered.

**Dated, Signed and Delivered at Kitui this 23<sup>rd</sup> day of February, 2017.**

**L. N. MUTENDE**

**JUDGE**