



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 627 OF 2016**

**DANIEL GITHAIGA.....APPELLANT/APPLICANT**

**VERSUS**

**THOMAS KABUI MUITUMA.....RESPONDENT/RESPONDENT**

**RULING**

1. The appellant has moved this court by a Notice of Motion dated 24<sup>th</sup> October, 2016 and filed on 26<sup>th</sup>/10/2016. He seeks an order of stay of execution against the order dated 21<sup>st</sup> October, 2016 and or further proceedings in Milimani CMCC No. 4376 of 2015 pending hearing and determination of the intended appeal.

2. The motion is brought under order 42 rule 6 (1), (2) and (6), and order 50 rule 6 of the Civil Procedure Rules and Section 1A, 1B 63 (e), 78 (1) (d) and 95 of the Civil Procedure Act. It is based on the grounds on the body of the motion and the supporting affidavit of the appellant. He stated that ex parte judgment was entered in Milimani CMCC No. 4376 of 2015 due to his insurer's failure to instruct an advocate to defend his case. He contended that he was not aware of the proceedings that led to the said judgment. That his advocates filed an application seeking to set aside the ex parte judgment, stay of execution and lifting of the warrant of attachment arising therefrom but that he was only given interim orders and the application was dismissed on 22<sup>nd</sup> September, 2016. He stated that he wishes to appeal against the said ruling and lamented that he stands to suffer substantial loss in the event stay orders are not granted, for the reason that he is a taxi operator in Lang'ata Shopping Centre with little income and he does not own any assets worth KShs. 675,104.64/= . That this appeal has high chances of success and the same will be rendered nugatory in the event the respondent proceeds to execute. That this motion has been brought in good faith and without delay. That no prejudice will be occasioned to the respondent if the orders sought are granted.

3. The respondent filed grounds of opposition dated 15<sup>th</sup> November, 2016 wherein he contended as follows:

- 1) That the appellant has not demonstrated that the respondent is incapable of refunding the decretal sum if the same is paid to the respondent.
- 2) That the appellant has not offered security whatsoever.
- 3) That the application is meant to delay or frustrate the respondent in realization of the fruits of his judgment. The respondent will therefore be prejudiced by the application and the appeal.
- 4) That the allegation by the appellant that he does not own any assets worth KShs. 675,104.64/= is

baseless and irrelevant.

4. In his submissions, the appellant stated that the purpose of stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. It was submitted that the appellant having stated; that he was not aware of the proceedings that resulted to the judgment; that his insurer having failed to appoint an advocate to defend his case and that he did not have assets of the same value as the decretal sum, it was clear that he stands to suffer substantial loss if the orders sought are not granted. The appellant relied on Judge Gikonyo's holding in **James Wangalwa & another v. Agnes Naliaka Cheseto [2012] e KLR** where he stated:

***“...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...”***

5. On the issue of time, the appellant submitted that this motion was brought without unreasonable delay as the ruling of the lower court appealed against was delivered on 22<sup>nd</sup> September, 2016 and this application was filed less than a month later on 24<sup>th</sup> October, 2016.

6. On the issue of security of costs, the appellant stated that although the respondent claims that he has not offered any security, Order 42 rule 6 (2)(b) of the Civil Procedure Rules provides that it is for the court to order the kind of security the applicant should give. On this issue the appellant cited **James Wangalwa** (supra) where the Judge held:

***“I agree with the respondent that the applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6 (2) (b) of the CPR reveals that, it is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered.”***

7. It was further submitted that the respondent has not demonstrated the prejudice he stands to suffer if the orders sought are granted. The appellant quoted an excerpt of Judge MboghliMsagha's decision in **Tobias Ong'anyAuma v. Kenya Airways Corporation Limited [2001] eKLR** where he stated:

***“An order for stay of execution does not deprive a decree holder of the fruits of the said decree. It merely delays such an execution in the event the appeal does not succeed, and, in a decree such as the one in issue, the delay can always be compensated by an award of interest.”***

8. The respondent on the other hand submitted that for an application for stay of execution to be granted, the applicant must satisfy the conditions set out under order 42 rule 6 (2) of the Civil Procedure Rules. It was submitted that the appellant has not demonstrated that he will suffer substantial loss unless the stay is granted. That all the appellant has done is to state that he is a taxi operator and cannot afford to raise the decretal sum. That in effect the appellant is asking this court to ignore the condition on security. It was submitted that the appellant has not offered any form of security whatsoever for example by offering to deposit the decretal sum in court or in a joint interest earning account and has not proved or alleged that the respondent is incapable of refunding the decretal sum if the appeal succeeds.

9. This application is based on Order 42 Rule 6 (1) and (2). That Rule provides:

***“6.(1) No appeal or second appeal shall operate as a stay of 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 sub-rule(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.”*

10. The above Rule was discussed in the case Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006] eKLR as follows:-

*“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”*

11. In the instant case, there was no delay in the filing of this motion.

12. As for substantial loss the Appellant stated that he is unable to raise the decretal sum and that he relied on his insurer to procure an advocate but the insurer failed to do so and it is due to the said failure that judgment was entered against him. Judge Ogola in **Antoine Ndiaye v. African Virtual University Nairobi HCCC No. 422 of 2006** defined substantial loss perfectly well which definition I wish to adopt thus:

*“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”*

In **Kenya Shell Limited v. Benjamin Karuga Kibigu & Ruth Wairimu Karuga (1982-1988) 1KAR 1018** it was held thus:

*“It is usually a good rule to see if order 41 rule 4 of the civil procedure rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.”*

13. This court appreciates that an order staying execution is a discretionary remedy though the same should be exercised judiciously and the court should try and balance the interest of both parties to the Appeal. The Appellant has his undoubted right of appeal whereas the Respondent has a judgment which he is at liberty to execute. The court should not be obsessed with the Appellant’s right to appeal at the expense of the Respondent who has a lawfully obtained judgment.

14. In the end, the court finds that the application dated 24<sup>th</sup> October, 2016 has merits and its granted on condition that the appellant deposits half of the decretal sum in court. The money to be deposited within 30 days from today failing which the stay order shall lapse. Costs of the application to abide the outcome of the appeal.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of March, 2017.**

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**L NJUGUNA**

**JUDGE**

*In the presence of*

.....*For the Appellant/Applicant*

.....*For the Respondent/Respondent*