



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. 65 OF 2016**

*(Being an appeal from a Judgment of the Chief Magistrate's Court at Naivasha Civil Case No.598 of 2015, P. Gesora - CM)*

**DANIEL MUKABWA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**GEORGE MBURU.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**MAGGIE KITUI MUYALA.....RESPONDENT**

**RULING**

1. The Respondent's application filed on 14/12/2016 was in response to this court's conditional but temporary order, issued on 4/11/2016 in favour of the Applicants, granting prayer 2 of the Notice of Motion of even date which was couched in the following terms:

**“THAT there be an interim stay of execution of the decree of the lower court in NAIVASHA PMCC NO. 598 of 2014 pending the hearing and determination of this application.”**

2. Unfortunately the court in issuing the order erroneously failed to assign a date for an *interpartes* hearing, but upon notice thereof through the Respondent's application of 14/12/2016 the court set in motion steps for the hearing of the two applications on 19/12/2016. Parties agreed to dispose of the applications by way of written submissions.

3. The Appellants' application was brought under Order 42 Rule 6 of the Civil Procedure Rules, principally, and seeks stay of execution pending appeal. By their affidavits and submissions, the Appellants assert that they have approached the court timeously, and are willing to offer security for the performance of the decree in the lower court. Pointing to the decree which exceeds the sum of Shs 3.8 million, the Appellants express fear that if execution proceeds, the Respondent will have no means to refund the decretal sum, should the appeal succeed.

4. In her Replying affidavit in opposition to the Appellants' application and supporting affidavit to her own application the Respondent complains that this court made orders without giving her audience. That she had not commenced execution as she had no notice of the lower court's judgment. That this court's order of 4/11/2016, ought to be varied, to allow the release of half the decretal sum to her to cater for her medical expenses. I note here while her Notice of Motion of 14/12/2106 does contain a prayer for the setting aside or variation of the order of 4/11/2016 there is no mention therein of the request for the release of part of the decretal sum to the Respondent.

5. Order 42 Rule 6 (2) of the Civil Procedure Rules is in the following terms:

**“(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.”**

6. The decretal sum in this case is substantial. The Appellants’ apprehension in respect of the Respondent’s means to refund the sum if the appeal succeeds has not been controverted by the Respondent.

7. **Kasango J** stated in **Kenya Orient Co. Ltd –Vs- Paul Mathenge Gichuki & Others [2014] eKLR** that once such an allegation against a Respondent is made in an application, the burden shifts on the Respondent to prove the contrary. The Learned Judge stated:

**“.....the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent’s resources.”**

8. The Respondent has indicated that she needs a part of the decretal sum released to her to meet her medical needs, but she is reticent on her means to repay. Thus the Appellants’ apprehension may not be misplaced, in the circumstances of this case.

9. The Appellants have offered to deposit security for their eventual performance of the decree. They approached the court timeously. Complaints in relation to the latter by the Respondent to the effect that she was unaware of the judgment date in the lower court, do not further her case herein. Ditto the fact that she has not extracted a decree. An Appellant exercising his due right of appeal cannot be denied a deserved stay on such grounds, unless there is evidence of foul play or mischief by the Appellant. In this case no such foul play has been demonstrated.

10. In the case of **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** the court stated:-

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”**

**Madan JA (as he then was)**, delivered himself thus in the **Butt case** (Supra) at page 419,

**“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that an order, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”**

11. Thus despite empathising with the Respondent’s alleged medical and financial difficulties, this court cannot deny a stay to the Appellants who have made a deserving case, much less order them to release a large sum of money to the Respondent as condition for the stay, in the circumstances of this case. However, the Appellants will be under a duty to prosecute the appeal with the same zeal and speed as their application for stay.

12. Reviewing all the foregoing, I find that the Appellants’ application has merit and I allow prayer 3 therein. On condition that the Appellants do deposit a sum of Shs 1.5 million, inclusive of the deposit of Shs 700,000/= already made into court, pursuant to the court’s order of 4/11/2016 within 10 days of today’s date. The entire sum of Shs 1.5 million is to be deposited into an interest earning account in the

joint names of the parties' advocates.

13. In my view, if the Respondent is successful on appeal, she will be compensated adequately through interest and costs and therefore not prejudiced. Her Notice of Motion is dismissed. The costs in respect of the Appellants' application will abide the outcome of the appeal.

Delivered and signed at Naivasha on this **28<sup>th</sup>** day of **March, 2017**.

In the presence of:-

Mr. Mburu holding brief for Muchemi for the Appellants/Applicants

Miss Rashid holding brief for Ms Rashid for the Respondent

C/C - Barasa

**C. MEOLI**

**JUDGE**