



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 124 OF 2016

DAVID M. MULANI.....APPELLANT

VERSUS

STEPHEN MUSYIMI KILONZO.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated and filed on 22nd November 2016, which is filed by the Appellant, seeking orders that there be a stay of judgment delivered on 5th October 2016 in **Machakos CMCC No. 1195 of 2008** and of the subsequent decree pending the hearing and determination of the appeal filed herein. The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on the same date by the Appellant, and submissions dated 24th January 2017 filed by his advocates, P.M. Mutuku & Company Advocates.

The grounds in summary are that the Appellant, being aggrieved by the judgment of the trial court, has filed an arguable appeal with high chances of success, and which will be rendered irrelevant and nugatory if stay is not granted. It is the Appellant's submissions that all the pre-requisites have been met regarding the grant of orders of stay pending an appeal.

Reliance was placed on the judicial decisions in **Channen Agricultrual Contractors Ltd vs. Nicodemus Mugara, (2006) eKLR** for the position that the Appellant has met the conditions to be satisfied before such an order can be issued, which are that he has filed an appeal which has high chances of success and will suffer substantial loss if stay pending determination of the appeal is not granted. In addition, that in the event the appeal succeeds the Appellant may not be able to recover the entire decretal amount from the Respondent. Reliance was further paced on the decision in **Swanya Limited vs. Daima Bank Limited, (2001) eKLR** for the position that his appeal should not be rendered nugatory.

The Response

The Respondent opposed the Appellant's application in a Replying Affidavit he swore on 9th December 2016, and submissions dated 9th January 2017 filed by his Advocate, Annie W. Thoronjo Advocates. He averred that the said application has not met the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules and is therefore not merited. Further, that he is a businessman and able to repay the decretal sum in the event the appeal succeeds. He averred that the Appellant has not demonstrated the loss or prejudice he has suffered, and yet the Respondent will suffer greatly as he will be denied the enjoyment

of his lawfully obtained judgment which he has already been denied for 8 years.

The Respondent stated that litigation has to come to an end one way or another, and this application is a gross abuse of the court's process and it is against all the rules of natural justice and should be dismissed with costs. However, that should the Court be inclined to grant conditional stay, the Appellant should release to the Respondent half the decretal sum of Kshs 70,000/=.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the judgment delivered in **Machakos CMCC No. 1195 of 2008** and subsequent decree should be stayed pending the hearing of the appeal. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which provides as follows:

“6.(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 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.”

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court notes that judgment was delivered in the lower court on 5th October 2016; and the Memorandum of Appeal was filed herein on 24th March 2016; while this application was filed on 22nd November 2016. There was therefore no inordinate delay in filing the application.

On the fulfillment of the second condition, an applicant needs to show what specific loss or prejudice he will suffer if he pays the decretal sum. The Appellant has in this respect stated that the Respondent may not be able to refund the decretal sum in the event that its appeal succeeds. The Respondent on the other hand has averred that he is a man of means. Lastly, on the third condition, the Appellant did not indicate that he is willing to furnish security. I note that the judgment in the lower court was delivered in favour of

the Respondent, and as no security is being offered by the Appellant to secure the said judgment, the Respondent is justified to believe that he will be unduly prejudiced.

Accordingly, the orders that commend themselves to me arising from the foregoing are that the Appellant's Notice of Motion dated 22nd November 2016 is allowed only on the following terms:

1. There shall be a stay of execution of the judgment delivered on 5th October 2016 in **Machakos CMCC No. 1195 of 2008** and of the subsequent decree pending the hearing and determination of the appeal filed herein, only on condition that the Appellant deposits the entire decretal sum in an interest earning account in the joint names of the Appellant's and Respondent's Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Notice of Motion shall follow the Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 4th day of August, 2017.

P. NYAMWEYA

JUDGE