



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CIVIL APPEAL NO. 6 OF 2017**

**P.J. DAVE FLOWERS LTD.....APPLICANT**

**Versus**

**DAVID SIMIYU WAMALWA.....RESPONDENT**

**(Being an appeal from the judgement and decree of the Senior Resident Magistrate Hon. Mbicha delivered on 11/4/2017 in Kajiado CMCC No. 117 of 2016)**

**RULING**

Before me is an application by the applicant which is made under Order 22 rule 22, Order 42 rule 6, Order 50 rule 6, Order 52 rules 1, 3 and 4 of the Civil Procedure Code, Section 1A, 1B and 3A of the Civil Procedure Act. The applicant is seeking a stay of execution of the judgement of the lower court delivered on 11/4/2017 pending the determination of an appeal. The application is supported by the annexed affidavit of Judy Jerotich, the Human Resource Manager of the defendant/appellant company.

The main grounds as deduced from the application and the affidavit being dissatisfied with the judgement of the lower court delivered on 11/4/2017, a notice of appeal has been filed challenging the entire judgement and consequential orders. The learned counsel Mr. Kenya for the applicant submitted that the appeal against the judgement of the trial court stands overwhelming chances of success at appeal.

The issues intended to be canvassed on appeal have been deduced as per the memorandum of appeal filed in court on 1/5/2017. The learned counsel argued that the applicant reasons that the trial court failed to appreciate facts and supportive evidence on both liability and quantum. This failure by the trial learned magistrate learned counsel contends are valid grounds to persuade the appellate court to review and reverse the judgement in question.

Learned counsel further submitted that the applicant has met the test provided for under Order 42 rule 6 of the Civil Procedure Rules for this court to grant stay of execution in this matter. According to learned counsel if the stay of execution is not granted tan dint eh event the respondent proceeds with execution, the applicant will suffer irreparable loss. In this regard learned counsel placed reliance on the following cited authorities; Elena *Doudoladova Korir v Kenyatta University – Industrial Court of Kenya at Nairobi Cause No. 1715 of 2011*, Joseph Simiyu Mukenya *v Agnes Naliaka Cheseto Misc. Application NO. 42 of 2011 eKLR*, *Equity Bank Limited v Taiga Adams Company Limited, Civil Appeal No. 772 of 2005 eKLR*.

The application is opposed by the defendant. In a replying affidavit sworn by counsel Mr. Waiganjo the respondent basically avers that the applicant has not met the principles for grant of stay of execution. Learned counsel further submitted that the grant of stay will deprive the respondent's of the fruits of judgement duly awarded by the competent court.

In a nutshell learned counsel submitted that there are no sufficient grounds for this court to exercise discretion in favour of the applicant. Learned counsel relied on the following cited authorities; *Equity ban Limited Case (Supra)*, *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others Civil Appeal No. 991 of 1997*, *Hassan Guyo Wakalo v Straman East African Ltd Civil Application No. 160 of 2013 eKLR*, *David Morton Silverstein v Atsango Chesoni Civil Application No. 189 of 2001*.

I have read the notice of motion and considered the submissions of counsel on both sides together with the principles in the case law cited. In cases of this nature the general principle of law is that the court will not without good cause deny a successful party in obtaining the fruits of his judgement. This is more so in a judgement obtained on merits. However, the same law has clothed the court with discretionary power to be exercised in each case where justice requires that such judgement be stayed pending the determination of an appeal. The inference of such power which the court may draw from is provided for under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules. In these provisions it is not necessary for an applicant to demonstrate that an intended appeal has good chances of success before a stay of execution of a decree is to be granted. All what the applicant is required to show to be considered for an order of stay of execution of judgement pending appeal are the following grounds:

- (1) That there is sufficient cause for the stay to be granted.**
- (2) That the application has been made without unreasonable delay.**
- (3) That the applicant would suffer substantial loss unless the order is made.**
- (4) That it is necessary that such security as the court may order for the due performance of the decree be furnished.**

The principles of various case law in our jurisprudence are indicative that the existence of one or more of these grounds would entitle an applicant a stay of execution pending appeal. This is evident from the dicta in the case of *Winfred Nyawira Maina v Peterson Oyiengo Gichana [2015] eKLR* where the court held:

**“The foundation of the stay pending appeal is that the party intending to file or has filed an appeal in the exercise of his constitutional right of appeal he must, however, show sufficient cause and preponderantly that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him.”**

What constitutes substantial loss was well illustrated in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto Misc. Application No. 42 of 2011* where the court held inter alia:

**“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 N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma v 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) 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.”**

In considering this application I will adopt these principles in balancing the interest of the parties in exercising discretion in one way or another. Coming to the facts of the case before me it is not disputed the impugned judgement was delivered on 11/4/2017 and the resultant decree is yet to be drawn and served upon the applicant/defendant. The application for stay together with the memorandum of appeal was filed timeously on 11/5/2017. The applicant followed it up with an application to be supplied with certified copies of proceedings and judgement. As at the time of canvassing this application the applicant had not been supplied with the trial court certified record. Legally speaking the applicant has filed an appeal against the lower court judgement. In filing the appeal the applicant has acted in a timely manner. That therefore satisfies the ground on the requirement as to time to lodge application of this nature.

Secondly, from the submissions by the applicant’s counsel the claim before the lower court involved a plaintiff who had been injured in the course of employment with the applicant company. As a result of the accident the plaintiff/respondent filed a claim based on negligence and breach of statutory duty on the part of the applicant/defendant. The trial court in a full trial awarded liability at a ratio of 80:20% and a global sum for general damages of Ksh.150,000 plus interest and costs of the suit.

The applicant in the affidavit and submissions by counsel contends that in the event of execution the intended appeal challenging the judgement would be rendered nugatory. The applicant further depones that if the amount of Ksh.123,000 together with costs and interest is paid out the respondent will not be in a position to refund in the event the appeal succeeds. The respondent counsel in the replying affidavit has not advanced evidence that if the execution is allowed to proceed and in later stage the appeal succeeds the money paid out will be refunded. Therefore without the evidence it would be difficult to make an assumption that the applicant would not suffer substantial loss in the event the appeal succeeds.

My view on evaluation of the facts and circumstances of this case, there is sufficient material to show that the applicant will suffer substantial loss if this court does not exercise discretion to grant an order for stay of execution. As rightly observed in the case of *James Wangalwa and Silverstein v Chesoni (Supra)*. The applicant has brought himself within the jurisprudential dicta of these authorities.

The upshot of all this I find that the applicant has satisfied that without stay of execution he will suffer substantial loss which would not be compensated in damages. There is therefore substance to this application which I do hereby allow on the following conditions:

- (1) That the applicant do deposit the decretal amount of Ksh.123,000 in a joint earning interest account of both advocates in a reputable bank agreed between themselves. The deposit be done within 30 days from today’s date and the deposit slip be filed in court.**
- (2) That the applicant do file, serve the record of appeal within 30 days from today’s date.**
- (3) That the deputy registrar cause the lower court record to be prepared and issued to the applicant within 14 days from today’s date.**
- (4) That the costs of this application do abide the appeal.**
- (5) That this matter be mentioned on 1/11/2017 at Ngong to monitor compliance.**

**Dated, delivered and signed in open court at Kajiado this 26<sup>th</sup> day of September, 2017**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Nyangaya holding brief for Keya for the respondent

Mr. Itaya for Waiganjo for the applicant

Mr. Mateli Court Assitant