



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 181 OF 2017**

**FRANCIS NJOROGE.....APPELLANT**

**VERSUS**

**STEPHEN MAINA KAMORE .....RESPONDENT**

**RULING**

The Appellant filed a Notice of Motion dated 6/6/2017 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules seeking orders for stay of execution of the judgment delivered on 31<sup>st</sup> March, 2017 in CMCC No. 12274(A) of 2006 awarding the Respondent the sum of Kshs. 1,650,215/=, pending the hearing and determination of the Appeal. This application is supported by the Affidavit of the Appellant. The grounds of the Application are that; execution is likely to be effected, the Appellant's appeal has chances of success and the same will be rendered nugatory, that the Applicant will suffer substantial loss if execution is not stayed and that the application has been brought without unreasonable delay.

The application is opposed by the Respondent who swore a Replying Affidavit dated 21<sup>st</sup> July, 2017. He depones that the Appellant has not illustrated how he will suffer substantial loss and that the onus of proving that the Respondent is not capable of reimbursing the decretal amount is on the Appellant. The Respondent further depones that the Appellant has not provided any security and that the application was filed after unreasonable delay.

This Application was canvassed by way of oral submissions. The Appellant submits that the judgment being appealed from is littered with a lot of irregularities and that in the event the court makes an order for security, the same be reasonable due to the economic hardship. He pleads that the motor vehicle which was involved in the accident is his only source of income. The Respondent submits that the Appellant has not met the requirement of Order 42 Rule 6 of the Civil Procedure Rules and as such the application should not be granted.

I have read and considered the oral submissions and the Affidavits on record.

The principles for granting an order for stay of execution are provided for under Order 42 Rule 6 of the Civil Procedure Rules which are;

- (a) That the application has been made without unreasonable delay;
- (b) That security for costs has been given; and
- (c) That substantial loss may result to the Applicant unless the order for stay is made.

The corner stone of the jurisdiction of the court under Order 42 Rule 6 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto HC Misc No. 42 of 2012 OR {2012} eKLR** where it was held *inter alia* that:-

***“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 vs. Chesoni, {2002} 1 KLR 867 .....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 line with the above authority, the argument by the Appellant that the Respondent is likely to execute the decree is not a consideration to illustrate substantial loss. Execution is a legal process. Substantial loss is what the Appellant would suffer if the application is not granted, and Appeal succeeds. The only argument which the court can consider to support substantial loss is the averment by the Appellant that he might not be able to recover the decretal sum from the Respondent in the likely event that the Appeal succeeds.

When such an allegation is made, the evidential burden shifts to the Respondent to prove that he is capable of reimbursing the decretal sum should the Appeal succeed. The Respondent has not discharged this burden. In his Affidavit, the Respondent depones that the burden rests on the Appellant to prove the Respondent’s financial limitation to refund the decretal amount. This is not the case since the Appellant is not privy to the Respondents financial status, it was incumbent upon the Respondent to table such evidence to prove that he will be able to reimburse the decretal sum in case of a successful Appeal.

On whether or not the application was brought without undue delay, I would say that even though the application was not brought timeously, the delay was not unreasonable. The application was filed on 6<sup>th</sup> June, 2017 whereas the judgment had been delivered on 31<sup>st</sup> March, 2017.

On security for the due performance of the decree in case the appeal fails, the Appellant has not offered any security that this court can consider. He however pleads with the court to be lenient in case it makes orders as to security, due to economic hardships.

For an order of stay of execution to be granted, the court has to be satisfied that the applicant has met the provisions of Order 42 rule 6. This was well emphasized in the case **Antonie Ndiaye V. African Virtual University (2015) Civil Suit No. 422 of 2006** where the Court held that,

***“the relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judiciously, that is to say, judiciously upon defined principles of law, not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown, the Court should be guided by three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules...”***

In considering whether to grant a stay of execution, the Court has to weigh the competing interest of both parties in exercising its discretion. The Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** held that,

***“ In seeking to balance the interests of the respective parties, the approach we have always taken***

***in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruits of judgment in their favour and their rights are safeguarded.”***

The circumstances of this case call for the exercise of my discretion in favour of allowing the application. At the same time, the Respondent has a decree which has to be secured for ease of execution in case the Appeal is not successful. The Appellant seeks the Courts indulgence to exercise lenience on security as his motor vehicle which was involved in the accident was the sole source of income. In allowing the application, I will direct the Appellant to deposit one half of the decretal amount in a joint interest earning account to be opened by both counsels pending the hearing and determination of the Appeal. Such decretal sum to be deposited within 60 days from the date of this ruling failure to which the stay orders shall lapse.

The costs of the application shall abide the outcome of the Appeal.

Dated, signed and delivered at Nairobi this **15<sup>th</sup>** day of **November, 2017**.

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**L. NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellant.***

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