



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 56 OF 2012**

**ELIJAH LAGAT.....APPELLANT**

**VERSUS**

**WILSON KIPROTICH KING'ETICH.....RESPONDENT**

*(Being an application for stay of the order and decree of C. G. Mbogo, Chief Magistrate in Eldoret  
CMCC No. 684 of 2011 delivered on 21<sup>st</sup> May 2012)*

**RULING**

1. The appellant is aggrieved by the order of the lower court made on 21<sup>st</sup> May 2012. The dispute in the lower court related to a failed conveyance of a plot of land in Kapsabet Municipality. The agreement was not reduced into *writing*. The parties filed competing interlocutory applications. They were at cross-purposes. The appellant, who was the vendor, sought to have the suit struck out for want of a written sale agreement. The respondent on the other hand sought to strike out the defence.
2. The learned magistrate heard both applications. He dismissed the appellant's application; and, allowed the respondent's motion striking out the defence. The effect of the order was that the appellant was required to pay the respondent Kshs 2,370,000 together with interest. A further application for stay of execution of the decree was dismissed on 24<sup>th</sup> May 2013.
3. The appellant filed the memorandum of appeal on 7<sup>th</sup> June 2012. The appellant has now presented a notice of motion dated 30<sup>th</sup> May 2013 praying for stay of execution of the decree pending the hearing of the appeal. It is expressed to be brought under section 63 of the Civil Procedure Act; and, Order 42 of the Civil Procedure Rules 2010. The appellant avers that execution is imminent; that he stands to suffer substantial loss; that he has brought the motion without delay; that the respondent is still in possession of the suit property; and, that the appellant is willing to furnish security for due performance of the decree.
4. The motion is contested. The respondent filed a replying affidavit on 5<sup>th</sup> November 2015. He contends that the application is hopeless and an abuse of court process. He avers that the monies in the decree comprise a refund of the purchase price and improvements to the house. He was thus of the view that the application should only be allowed upon deposit of the decretal sum.
5. On 19<sup>th</sup> January 2016, learned counsels made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, and depositions.
6. Section 63 of the Civil Procedure Act gives the court wide discretion to grant interlocutory orders to prevent the ends of justice from being defeated. By dint of Order 42 of the Civil Procedure Rules 2010,

the court also has power to grant stay of execution pending appeal. Order 42 Rule 6 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 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.”*

7. In Butt v Rent Restriction Tribunal [1982] KLR 417, Madan JA (as he then was), cited with approval the views of Brett L.J. in Wilson v Church (No 2) 12 Ch D [1879] 454 at 459-

*“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”*

8. Justice Madan 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 another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”*

9. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General v Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in Madhupaper International Limited v Kerr [1985] KLR 840 at page 846.

10. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, Stephen Boro Gititha v Family Finance Bank & 3 others. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

11. The present motion was only presented to court on 31<sup>st</sup> May 2013. The impugned ruling was delivered on 21<sup>st</sup> May 2012. Although there was a delay of a year, I have considered that the appellant had made a similar application in the subordinate court on 18<sup>th</sup> June 2012. That application was dismissed on 24<sup>th</sup> May 2013. I thus find the present motion was brought without undue delay.

12. The key question is whether the appellant has demonstrated *substantial loss*. The decree is for payment of money. I am alive that as a general proposition the execution of money decree does not constitute substantial loss. See Kenya Shell v Benjamin Karuga [1982-88] 1 KLR 1018, Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR, Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.

13. I cannot comment on the merits of the appeal. That will be the true province of the appellate court. But it is not lost on me that the decree was for monies paid to the appellant for the abortive conveyance or improvements to the house standing on the plot. It is a *substantial* sum. Where the contested decree is substantial, it is a “*special circumstance*” that gives the applicant an undoubted right of appeal. See *Butt v Rent Restriction Tribunal* [1982] KLR 417 at 420. The appeal, on the face of it, seems arguable. There is thus a danger that the appeal will be rendered *nugatory*.

14. Justice is however a two way street. The point is that the respondent has a decree; but he cannot reap the fruits of its judgment. The prejudice is self-evident. When learned counsel for the appellant appeared before me, he said the appellant was willing to deposit a title in court. He did not give details. There is also an averment that the respondent is *residing* in the *house* that is the subject matter of the impugned oral agreement for sale. The respondent did *not* controvert that fact. The respondent is *not* averse to grant of stay provided that the decretal sum is deposited in court. The justice of this case then calls for a *conditional* stay.

15. I order that there shall be a *stay of execution* of the decree in *Eldoret CMCC No. 684 of 2011* pending the hearing and determination of this appeal but on *one condition*: That the appellant shall *either* deposit with the Deputy Registrar the *original unencumbered* title for Kapsabet Municipality Plot 186 within *twenty one* days of today’s date; *or*, in the alternative, deposit the decretal sum of Kshs 2,370,000 in a joint interest earning account of both advocates in a reputable bank within *sixty days* of today’s date. In default execution shall proceed. The costs of this motion shall be in the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 16<sup>th</sup> day of February 2016

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

No appearance for the appellant.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.