

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT APPEAL NO. 514 OF 2015

NDUNGU HAULIERS LIMITED.....APPELLANT

VERSUS

PATRICK MWANGE KILUVA.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 20th November, 2015 seeking an order for a stay of execution of a judgment of lower court dated 22nd October, 2015 pending the hearing and determination of the appeal filed by the appellant. It is supported by an affidavit sworn by the advocate for the appellant to which a replying affidavit has been filed by the advocate for the respondent.

The respondent has judgment in his favour for the sum of Kshs. 600,000/= plus costs and interest at courts rates. After the said judgment the appellant sought a stay of execution which was granted for 30 days. That however expired but the appeal is yet to be heard. The Memorandum of Appeal has already been filed but the record cannot be filed in the absence of the lower court proceedings.

Where such is the position the court has taken upon itself to shoulder the blame for the delay which cannot be attributed to the parties. Indeed, the learned counsel for the appellant has stated at paragraph 4 of the supporting affidavit that she has applied for certified copies of proceedings and judgment and a copy of the application has been annexed.

In the replying affidavit the respondent states that there is a delaying tactic on the part of the appellant aimed at shielding the appellant from enjoying the fruits of his judgment. Further, the applicant has not demonstrated that he has an arguable appeal with a probability of success.

I have considered the material before me including the submissions filed by both counsel. At this point I am only supposed to consider if the circumstances attendant herein justify the order sought. The applicant has the right of appeal which has been expressed by the filing of the Memorandum of Appeal herein. That right would be defeated if execution is allowed to proceed.

There is always of course the doubt to be entertained of whether or not the responded would be in a position to refund the sum paid in the event the appeal succeeds. The applicant has offered security which however is not defined. I am inclined to allow the application and order a stay of execution pending the determination of the intended appeal.

This however is conditional on the deposit of the decretal sum in an interest earning account, with a financial institution in the names of both counsel for the parties or a filing of a bank guarantee equivalent to the said sum. Compliance shall be within 30 days from the date hereof. The costs of this application shall be in the appeal.

Dated, signed and delivered at Nairobi this 30th day of March, 2016.

A. MBOGHOLI MSAGHA

JUDGE