



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL CASE NO.23 OF 2015**

**MICHAEL GITHINJI.....APPELLANT/APPLICANT**

**VERSUS**

**CHRIS MURIMI WANJOHI.....RESPONDENT**

**RULING**

1. **Michael Githinji** the appellant/applicant herein, has moved this Court vide a Notice of Motion dated 19<sup>th</sup> October, 2015 for the following orders namely:

- i. *That this application be certified urgent and be heard exparte in the first instance.*
- ii. *That there be a stay of execution in Baricho P.M.C.C. No. 36 of 2014 pending the hearing and determination of this application.*
- iii. *That there be a stay of execution in Baricho P.M.C.C. No. 36 of 2014 pending the hearing and final determination of the appeal filed herein.*
- iv. *That costs to abide by the outcome of the appeal.*

2. The application before court was based on the following grounds:-

- a. *That the applicant has contested the decision of the trial court and conditions given for stay of execution.*
- b. *That the applicant is apprehensive that the appeal will be rendered nugatory if execution is levied against him.*
- c. *That the appeal is meritorious and has overwhelming chances of success.*
- d. *That the applicant has moved this court without any delay.*
- e. *That the applicant is ready and willing to provide security to be deposited in court.*
- f. *That the respondent will not suffer any prejudice if the orders sought are granted.*

3. Prayer (i) and (ii) had been spent by the time this application was heard so this ruling is in respect to prayer (iii) and (iv). In his supporting affidavit sworn on 19<sup>th</sup> October, 2015 the applicant has *inter alia* deposed that the subordinate court in Baricho P.M.C.C. No. 38 of 2014 awarded the respondent Kshs.2,205,337/= which amount in his contention is enormous. He has added that his application for stay of execution pending appeal was allowed by the trial court with conditions that 50% of the decretal amount be paid to the respondent while the other 50% be deposited in an interest earning account. It was submitted that the condition given was not favourable as the

- respondent did not provide proof of his income to show that he was in a position to refund the amount paid to him if the appeal is successful.
4. The applicant has also submitted that he has filed an arguable appeal which in his view stands high chances of success and that the same may be rendered useless unless stay is granted. The applicant has cited the case of **BETHEUL MUIRURI BENJAMIN -VS- DEVELOPMENT BANK OF KENYA [2006] eKLR** as an authority to persuade me to exercise my discretion and order a stay of execution so that the appeal if successful is not rendered nugatory. He submitted that he would suffer substantial loss unless stay is granted.
  5. The applicant has submitted that he is ready and willing to furnish security but the same should be deposited in court so that the appeal pending is not rendered an academic exercise.
  6. **Charles Murimi Wanjohi** has opposed the application through a replying affidavit which was sworn on 24<sup>th</sup> October, 2015. He has contended that the application is geared to delay the enjoyment of fruits of his successful litigation and is not made in good faith as no reason has been advanced by the applicant why the condition given for stay of execution was not complied with. It is also submitted that the applicant has not demonstrated what substantial loss he would suffer if he complied with the conditions imposed by the subordinate court. On this score the respondent has cited the case of **Socfinac Company Limited -VS- Nelphat Kamotho Muturi [2013]eKLR**
  7. The respondent has responded to the applicant's contention that his financial means is uncertain, by submitting that he is a teacher employed by Teachers Service Commission and in his view he has what it takes to refund the amount paid to him if he was to be ordered to do so on appeal. It was further submitted that the respondent will suffer prejudice if stay of execution was to be granted as it would delay the respondent from enjoying his fruits of judgment and also prejudice his further treatment of the injuries he sustained.
  8. I have considered the application, the response made and both submissions made by both counsels and authorities cited. The provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010** provide as follows:

***“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.***
- b. ***Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

The proviso to *sub rule I* provide that an appeal shall not operate as a stay unless sufficient cause has been shown for such stay.

9. The applicant moved this Court on 21<sup>st</sup> October, 2015 under certificate of urgency after the subordinate court granted him a conditional stay of execution on 14<sup>th</sup> October, 2015. The filing of this application in my view was timely and certainly he cannot be faulted for any delay given that the learned counsel for the applicant needed time to communicate the decision of the lower court and take instructions.
10. I have looked at the Memorandum of Appeal and I must say that as it stands, it has no chance of success owing to misdescription of the respondent who is misdescribed as CHRIS MURIMI WANJOHI instead of his correct name of CHARLES MURIMI WANJOHI. The same of course is not fatal as it could be typographical error which can be rectified with an amendment but the position as of now is that the Memorandum of Appeal is defective and I am unable to find that the same at this stage has overwhelming chances of success as it stands.
11. Secondly the appellant did not annex the copy of the pleadings of proceedings in the subordinate court to help this Court determine the chances of the appeal or whether the appeal is arguable in regard to the amount awarded. This Court is unable to tell the nature of injuries suffered by the respondent and the basis for the award of damages because of the applicant's failure to place sufficient material before this Court. The applicant had the burden to show or demonstrate that there exists a good cause why I should order a stay of execution. I also agree with the respondent that he also had the burden to demonstrate that he would suffer “substantial loss” and not just

financial loss unless stay is granted.

12. My third and final finding is that the applicant has clearly failed to demonstrate how the conditions for stay given at the subordinate court would render his appeal nugatory or an academic exercise as he puts it. It is not enough to state an eventuality is likely to occur. An applicant must show sufficient cause to deny a successful litigant his fruits of judgment. It is important to note that the provisions of **Sections 1A and 1B** of the **Civil Procedure Act** clearly provides that the overriding objective of the said statute is to deliver timely justice to litigants. A party should not be made to feel that he is being unfairly delayed in his quest for justice. I find that the respondent's contention that the application will have the effect of delaying fruits of his litigation well founded. The ruling of the trial court on the applicant's application for stay at that level has not been seriously faulted by the applicant in his application before this Court. This Court finds that the subordinate court's ruling addressed the interests of both parties and balanced the scales of justice well to address the concerns of both parties. That is the position this Court will take and is informed by the decision of the Court of Appeal in the case of **Shell Limited -VS- Kibiru & Anor (1986) KLR** where the court made the following observations:

***“In an application for stay the court should balance the parallel prepositions first that a litigant if successful should not be deprived of the fruits of a judgment in his favour without a just cause and secondly that execution would render the proposed appeal nugatory.”***

13. The applicant in this application has failed to show that his appeal will be rendered nugatory by complying with the conditions set by the subordinate court in granting a stay of execution.

In the premises this Court finds no merit in the application dated 19<sup>th</sup> October, 2015. The same is dismissed. The conditions set by the subordinate court for granting a stay of execution are fair in the circumstances. The same are upheld. The applicant is granted a further 21 days from the date of this ruling to comply in the interest of justice. The appellant is directed to expedite the preparation of the record of appeal and move with speed to cure the cited defect in the Memorandum of Appeal. It is so directed.

***Dated and delivered at Kerugoya this 15<sup>th</sup> day of June, 2016.***

**R. K. LIMO**

**JUDGE**

15.6.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Anne thungu holding brief for S. N. Ngari for Respondent

Appellant absent.

COURT: The Ruling is dated, signed and delivered in the open court in the presence of Anne Thungu Advocate holding brief for S. N. Ngari advocate for the Respondent.

**R. K. LIMO**

**JUDGE**

15.6.2016