



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 191 OF 2015**

**PATEL DEVIKA.....APPELLANT**

**VERSUS**

**N M B (A minor suing**

**Through her mother and next friend**

**F M K).....RESPONDENT**

**RULING**

**The Application**

The application before the court for determination is a Notice of Motion dated 11<sup>th</sup> December 2015 filed by the Appellant under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The Appellant is seeking orders that there be a stay of execution of the judgment and/or decree in Machakos CMCC No. 818 of 2011 pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 11<sup>th</sup> December 2015 by Paul Kabira, a legal officer of APA Insurance Limited, the Appellant's insurers. The main ground is that the Appellant is dissatisfied with the lower court's judgment delivered on 30<sup>th</sup> October 2015 on the issues of liability and quantum of damages awarded of Kshs 250,000/=, and has lodged a Memorandum of Appeal herein challenging the said judgment. Further, that Respondent's financial position and economic status is unknown to the Appellant, and there is no guarantee that she can refund the decretal sum should the Appellant's Appeal succeed. In that event, that the Appeal would be rendered nugatory.

Lastly, it is averred that the Appellant through the insurers of the subject motor vehicle is ready and willing to furnish security by depositing the judgment sum in an interest earning account to be opened in the joint names of the Appellant's and the Respondent's Advocates or by securing the same in any other manner as directed by the court.

The foregoing arguments were reiterated in written submissions dated 13<sup>th</sup> January 2016 filed by Muchui & Company Advocates, the Appellant's learned counsel to demonstrate that the Appellant had met the requirements of Order 42 Rule 6 of the Civil Procedure Rules. Reliance was placed on various judicial authorities **Johnson Mwiruti Mburu vs Samuel Macharia, HCCA 716 of 2003.**

**The Response**

The Respondent opposed the Appellant's application in a Replying Affidavit she swore on dated 18<sup>th</sup> December 2015, wherein it was urged that the Appellant's application is made in bad faith and is intended to delay and or deny her daughter the fruits of the judgment of the Magistrate's Court in Machakos CMCC No. 818 of 2011. Further, that the fact that the Appellant is aggrieved by the decision of the Trial Court and has filed an appeal therefrom does not permit them to decline or neglect to obey the orders of the lower court, after the lapse of the said 30 days of stay granted by the said Court.

The Respondent averred that being a hair dresser, she is of means and thus capable of refunding the amount of the judgment debt or portion thereof paid should the Appellant's appeal succeed. It was also alleged by the Respondent that the Appellant will not suffer any irreparable loss or harm if the stay of execution of the judgment is declined. Lastly, that the Appellant has not met any of the conditions necessary for the grant of orders of stay pending the determination of his appeal.

N.M Mutinda Advocate the learned counsel for the Respondent filed written submissions dated 14<sup>th</sup> January 2016, wherein it was contended that the Appellant had not clearly stated the loss they stand to suffer other than state that the decretal sum was a lot of money. Reliance was placed in the decision in **Meteine ole Kilelu & 19 Others vs Moses K. Nailole, Nairobi C.A Civil Appeal No. 340 of 2008**. It was also submitted that the Appellant had not offered any security for the due performance of the decree, and that there was delay on his part before filing the application.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which 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.”**

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to

avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, the decision in the lower Court was delivered on 30<sup>th</sup> October 2015 while the current application was filed on 14<sup>th</sup> December 2015. The delay in filing the application was therefore slightly over one month, and in the circumstances was not inordinate.

On the fulfillment of the second condition, I also agree with the Respondent that the Appellant has not demonstrated what substantial loss it will suffer save for stating that its appeal will be rendered nugatory and that the Respondent will not be able to refund the decretal sum. The Appellant in this regard needed to show what specific loss or prejudice it would suffer if it pays the decretal sum, over and above mere monetary loss.

Lastly, on the third condition, the Appellant did affirm that that he is willing to furnish security by depositing the judgment sum in a joint interest earning account in the names of the Appellant's and the Respondent's Advocates or on such other terms set by the Court.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 11<sup>th</sup> December 2015 is allowed on the terms that there shall be a stay of execution of the judgment and/or decree in Machakos CMCC No. 818 of 2011 pending the hearing and determination of this appeal, only on condition that the Appellant shall pay to the Respondent one half of the decretal sum and deposit the remaining half of the decretal sum in a joint interest earning account in the joint names of the Appellant and Respondent's Advocate within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.

The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15<sup>th</sup> day of June, 2016.

**P. NYAMWEYA**

**JUDGE**