



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 137 OF 2015**

**MESHACK OWIRA OWINO.....1<sup>ST</sup> APPELLANT**

**STEREOMAX MEDIA GROUP LTD..... 2<sup>ND</sup> APPELLANT**

**- V E R S U S -**

**JACKSON OUMA OGEDA.....RESPONDENT**

**RULING**

1. Meshack Owira Owino, and Stereomax Group Ltd, being the 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein took out the motion dated 28.7.2015 whereof they applied for inter alia, an order for stay of execution pending the hearing and determination of this appeal. The motion is supported by the supporting and supplementary affidavits of Meshack Owira Owino. When served with the motion, Jackson Ouma Ogeda, the Respondent filed grounds of opposition to resist the motion. When the motion came up for inter partes hearing, learned counsels appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the material placed before this court. I have also noted that at the time of writing this ruling the Appellants were the only parties who filed their submissions.

3. From the material placed before this court, it is apparent that the Appellants herein were given some financial accommodation by the Respondent on 17<sup>th</sup> June 2011 in the sum of ksh.2,200,000/= The Appellants were required to repay the loan by monthly instalments together with the agreed interest of kshs.600,000/=. It would appear the Appellants fell into arrears and ended up in default. This prompted the Respondent to file an action before the Chief Magistrate's Court. In the end, judgement was entered in favour of the Respondent. The Appellants applied before the chief magistrate's court for inter alia an order for stay and for an order to liquidate the decretal sum by monthly instalments of ksh.10,000/= with periodic reviews after every 6 months. Hon. T. S. Nchoe, learned Senior Resident Magistrate heard the application and dismissed it on 4<sup>th</sup> March 2014. Being dissatisfied the Appellants filed this appeal to challenge the decision before this court. The Appellants are now before this court vide the motion dated 28.7.2015 seeking for stay of execution pending appeal, the subject matter of this ruling.

4. It is the submission of the Appellants that they have an appeal with arguable grounds and which has high chances of success.

5. The applicants are of the view that they will be able to show on appeal that the learned Senior Resident Magistrate failed to give due attention and regard to his submissions. It is argued that had he done so he would have come to conclusion that the Appellants deserved to be allowed to liquidate the decretal sum by instalments. The 1<sup>st</sup> Appellant beseeched this court to consider the fact that before this court gave an

order for stay of execution a warrant of arrest it had been issued against him to be apprehended and taken to custody to serve in civil jail. The 1<sup>st</sup> Appellant further argued that unless the order for stay is given this appeal will be rendered useless in that by the time the appeal comes up for hearing most probably he will have served his term in civil jail.

6. The Respondent strenuously opposed the motion on the basis that the Appellants have not offered any security as required under Order 42 Rule 6 of the Civil Procedure Rules. It was also argued that the appeal lacks merit in that it has no chance to succeed.

7. After a careful consideration of the material placed before this court in support and against the motion, I take the following view of the matter. In determining an application for stay of execution pending appeal, the principles are well settled.

First, an applicant must show that unless the order is granted he would suffer substantial loss. Secondly the application must be timeously filed and thirdly, that the court should consider the provision of security for the due performance of the decree.

8. The question is whether or not, the Appellants will suffer substantial loss if the order for stay is not given. I have carefully considered the rival arguments and I am convinced that the Appellants have persuaded me that they would suffer substantial loss if the order for stay is denied. It is clear to me that if the order is not granted, the 1<sup>st</sup> Appellant is likely to be taken to custody to serve in civil jail. It is difficult to know when this appeal will be ready for hearing. It is possible for the same to take long so that it may be heard after the 1<sup>st</sup> Appellant has served his term in civil jail. The Respondent has stated that the Appellants appeal is hopeless with no prospect of success. I have examined the grounds of appeal enumerated in the memorandum of appeal and I am satisfied that serious grounds of appeal have been put forward. The question as to whether or not the learned Senior Resident Magistrate considered the then financial status of the 1<sup>st</sup> Appellant before dismissing the application to liquidate the decretal sum by monthly instalments is a very serious point which is taken into account in such applications. I find the appeal to be arguable and not frivolous.

9. The second issue is whether or not the motion was timeously made. I note that the application was dismissed by the trial magistrate on 4<sup>th</sup> March 2015 while the appeal was filed on 2<sup>nd</sup> April 2015. The current motion was filed on 28/7/2015. In my humble view though there is no challenge to the question as to whether the motion was expeditiously filed, I am convinced that the motion was timeously filed.

10. The final principle to be applied is whether or not the Appellants should offer security for the due performance of the decree. The Appellants are saying that they will be happy if the Appellants are ordered to deposit in court the decretal sum pending appeal. This ground may not be applied to the current appeal because the Appellants are seeking to liquidate the decretal in monthly instalments. It will defeats logic to ask litigants to deposit the decretal sum for the due performance of the decree and yet they came to court to ask to settle with decretal sum by instalments.

11. In the end, I find the motion meritorious. It is allowed and in terms of prayers 2 and 3 of the motion.

**Dated, Signed and Delivered in open court this 19<sup>th</sup> day of August, 2016.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent