



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 5 OF 2016**

**PATRICK MWENDA .....APPELLANT**

**-VERSUS -**

**EVANS OMARI MWITA.....RESPONDENT**

**RULING**

The appellant herein **Patrick Mwendwa** filed a Notice of Motion dated 22<sup>nd</sup> February 2016 pursuant to **Order 5 Rules 1,3, & 13** and **order 42 Rule 6 of the Civil procedure Rules** and sought the following orders:-

**1. Spent**

**2. Spent**

**3. That there be a stay of execution of the ruling decision dated 9<sup>th</sup> February 2016 herein and all consequential orders emanating therefrom pending the hearing and determination of Civil Appeal No. 5 of 2016.**

**4. Costs of the application be provided for.**

The above application was supported by a supporting affidavit from the appellant deponing that he had filed an application in the lower court at **Keroka PMCC NO. 19 of 2013** seeking to set aside an *ex parte* judgement but the court proceeded to dismiss the said application. To evidence this he attached a copy of the said application and ruling which were marked as **PM 1**. He further deponed that after the ruling was delivered on 9<sup>th</sup> February 2016 the stay subsisting then automatically lapsed. Thereafter, being aggrieved by the ruling herein, he instructed his advocates in record to file an appeal to the High Court.

He further deponed that he has already filed an appeal vide **Nyamira High Court Appeal No .5 of 2016** and that the appeal filed raises triable issues of law and fact and has overwhelming chances of success . To evidence this he attached a copy of the memorandum of appeal marked as **PM 2**.

He further deponed that there is no staying execution in place granted by court and if there had been any the same has long expired and hence there being no stay of execution orders in force, there is a real and imminent danger that the respondent shall proceed with the execution process.

He further deponed that the respondent is a person of no means and ability to reimburse any monies that might be secured by him in execution of the ruling herein; in the likely event that the trial court's ruling is upset once the appeal is heard. it is the Appellant's case therefore that the likely execution of the subject

ruling shall render the appeal nugatory and occasion substantial and irreparable loss to the appellants.

Lastly, the appellants has deponed that he is willing to unequivocally undertake to reimburse any monies that would be justified in appeal as deserving to the respondent.

The repondent in his part did not file any replying affidavit or grounds of opposition despite the fact that he was served with the above application.

After considering the above application by the appellant together with the supporting affidavit and annexures the issue presented before this court for determination is whether the appellant's application for stay of execution has any merit.

The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should not be deprived of the fruits of his judgment.

Stay of execution pending appeal is governed by **order 42 Rule 6 of the Civil Procedure Rules**. Facts to be considered before granting an application for stay of execution pending appeal are:-

- The applicant must demonstrate substantial loss,**
- The application must be made without unreasonable delay**
- The provision of such security as the court may impose.**

On whether the appellant will suffer substantial loss in **James Wangalwa & Another -v- Agnes Naliaka Cheselo Misc. Application No. 42 of 2011[2012] e KLR Gikonyo – Judge** held that:-

**No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silvester –vs- Chesoni [2002] 1 KLR 887, and also in the case of Mukuma –vs- Abwoga quoted above. The last case, referring to the exercise of discretion by the High Court and the court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule S (2)(b) of the court by Appeal Rules respectively emphasized the centrality of substantial loss thus:-**

**“...the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss of what has to be prevented by preserving the status quo because such loss would render the appeal nugatory?**

Applying the same principles in this case, the subject matter of this appeal in my understanding is the exparte judgement by the trial court. When the appellant applied to set aside the said exparte judgment citing mistake on the part of his previous advocate the trial court in 9<sup>th</sup> February 2016 dismissed the appellants application thus upholding the exparte judgement. The question that this court therefore has to answer is what substantial loss the appellant will suffer if stay of enforcement of the ruling of the subordinate court is not made in his favour.

In my humble view, the appellant will suffer substantial loss if the order of the trial court is enforced

since the appellant is to have his grounds proclaimed and yet he did not have his day in court to defend himself against the respondent's case. It cannot therefore be denied that whether or not the appellant owes the respondent money, proclaiming of his goods in his business premises will no doubt occasion substantial loss in terms of his business.

On the second condition of whether the application had been brought without unreasonable delay this court notes that the ruling of the trial court was read on the 9<sup>th</sup> February 2016 while the appellant's application to this court was made on 22<sup>nd</sup> February 2016. Thus 13 days in my view was not unreasonable delay taking into due regard that the above application by appellant is unopposed.

On the third condition of whether, sufficient security has been offered for the due performance of decree; in his supporting affidavit, the appellant states that he is ready and willing to abide by any terms and/or conditions that might be granted by this court in granting this application.

**Order 4 (2) Rule 6 (2) (6)** states in material particulars ".....such security as the court orders for the due performance....."

In my view this rule gives the court unfettered discretion to issue any orders pending the hearing of the appeal. I have no doubt therefore that I have power to order such security for the due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event where the court orders for security deposit and there is default then the orders for stay are rendered useless for a defaulting party.

It is in these grounds alone and in the interests of justice that I shall exercise my discretion in favour of the appellant and make the following orders:-

1. There be a conditional stay of execution of the orders of the lower court issued on 9th February 2016 pending hearing and determination of this appeal in the following terms:-
2. The appellant do deposit half the decretal sum into a joint interest earning account to be operated by both advocates for the respective parties within 45 days from the date of this ruling and the same to be held until further orders of this court.
3. The appellant to compile file and serve a record of appeal upon the respondent within 45 days from the date hereof.
4. The Deputy Registrar of this court is directed to immediately call for the lower court file to be submitted to this court to facilitate consideration of the appeal by a judge **under Sec 79B of the Civil procedure Act** and in any event not more than 21 days from the date of this ruling.
5. The costs of this application shall be borne in the cause
6. The matter to be mentioned on 6<sup>th</sup> September, 2016 to confirm compliance with the orders and directives herein.

**Dated and delivered at Nyamira High Court this 18<sup>th</sup> day of August 2016.**

**C.B.NAGILLA**

**JUDGE**

**In the presence of :-**

Lazurus Mose for Appellant

Nyangosi (absent) for the Respondent

Mercy -Court Clerk.