



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**HIGH COURT CIVIL APPEAL NO. 116 OF 2015**  
**(From the original Civil Suit Keroka PMCC NO. 152 of 2011)**

**JEREMIAH MISIANI MAAKE.....APPELLANT**

**VERSUS**

**NYANGORA WHOLESALERS.....RESPONDENT**

**RULING**

The appellant herein **Jeremiah Misiani Maake** by a Notice dated 29<sup>th</sup> November 2015 under **order 42 rule 6 and order 22 rule 22** sought to the following orders from this court:-

- 1. Spent**
- 2. Spent**
- 3. That there be an order of stay of execution of the decree judgment delivered in the 10<sup>th</sup> day of November 2015 pending the hearing and determination of Nyamira High Court Civil Appeal No.116 of 2015.**
- 4. That costs of the application be in the cause.**

The above application was supported by the supporting affidavit of the appellant deponing that judgment was entered against him for a sum of Kshs.186, 000 with costs and interest and that since he was aggrieved by the said judgement he has now instructed his advocate on record to prefer an appeal.

He has further deponed that the respondent herein Nyangora Wholesalers (decree holder) have instructed the Hegons Auctioneers to attach his property. To evidence this he has attached copies of the warrants of attachment and sale which were marked as **MM 1**.

He has further deponed that his appeal is arguable and has a very high chance of success; that should the respondent execute the decree his appeal shall be rendered nugatory and that the application has been brought without undue delay hence it is only fair and just that he be granted a stay of execution.

The above application was opposed by the respondents in their replying affidavit dated 23<sup>rd</sup> February 2015. In the said replying affidavit sworn by Mellen Nyarango a director of the respondent, she has deponed that the applicant has not placed before the court any material to warrant the court to issue the orders for stay sought by the appellant as the appellants application has not been brought within the required legal standard for the court to issue the orders sought.

She further deponed that the onus is on the appellant to show that he shall suffer loss in the event that the orders sought are granted. Hence, she attended that nowhere in the whole application has the applicant shown what loss if any he shall suffer in the event the stay is not granted.

She further deponed that the appellant has neither shown that in the event the amount claimed in the judgement is paid the respondent shall not be able to pay it back in the event the appeal succeeds. She further deponed that the applicant has not offered to furnish security for the performance of the decree if the application is not allowed. The respondent contends that being a reputable company running wholesale business in Keroka Township and its environs and hence the respondent shall not be in problems to refund the money if appeal eventually succeeds. It is therefore the respondent's case that there is a valid judgment that ought to be satisfied by the appellant and the mere fact that there is an appeal does not itself warrant the court to order stay.

When the above came before me on 9<sup>th</sup> December 2015 it was agreed that the above application be argued by way of written submissions. When the matter came before me again on 19/04/2016 both parties had filed their written submissions.

Having considered the above application by the appellant, his supporting affidavit and annexures, the replying affidavit by the respondent and their respective written submissions, the only issue presented before this court for determination is whether the appellant has satisfied the conditions for granting stay of execution.

The relief of stay of execution pending appeal is governed by **order 42 Rule 6 of the Civil Procedure Rules**. The relief is discretionary and the said discretion must be exercised judicially. In determining whether sufficient cause has been shown the court should be guided by three prerequisites provided under **order 12 Rule 6 of the Civil Procedure Rules** which are:-

(a) The application is brought without undue delay

(b) The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the appellant.

1. Was the appellant's application timely?

The appellant's application for stay of execution was brought to this court fourteen (14) days after judgment/decree of the trial court's decision thus the appellant's present application was made timeously.

2. Substantial loss occurring to the appellant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. In the case of **Bungoma High Court Misc. Application No.42 of 2011 James Wangalwa & Another -vs- Agnes Naliaka Cheseto** it was held that:-

**"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 are of the Applicant as the successful party in the appeal that is what substantial loss would entail."**

In **Antoine Ndiaye -v- African Virtual University [2016] eKLR Gikonyo J** observed the following on substantial loss-

**"So the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of rearing his money should the appeal succeed. Therefore, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the**

**appeal is successful lies with the applicant follows after the long ago age legal adage that he who alleges must proof. ....this legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Accept, however once the applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent."**

On the basis of the above observation by **Gikonyo – J.** in my humble view the appellant has not established that substantial loss will occur unless stay of execution is made. The appellant also seems to rely more on the success of the appeal. With all due respect to counsel for the appellant the inquiry for purposes of stay pending appeal under **order 42 rule 6 of the Civil procedure Rules** is not about the merits of appeal but rather the loss which will be occasioned to his client which will be occasioned by satisfaction of the appeal in the event appeal succeeds. Furthermore, I note that the appellant has not offered any form of security in the supporting affidavit to his application. Accordingly and in my humble view there is no room for stay of execution given the fact that the appellant has not even attempted to convince this court that he is more than willing to comply with any condition in terms of security set by this court. If anything I completely agree with the respondents reply to the appellants, application that the applicant has not offered to furnish security for the performance of the decree not even demonstrated that in the event the amount claimed in the decree is paid, the respondent shall not be able to pay it back in the event the appeal succeeds.

In the circumstances, I reject prayer no 3 of the appellants application. The costs of this application shall be borne by the appellant.

It is so ordered.

**Dated and delivered at Nyamira High Court this 5<sup>th</sup> day of August 2016.**

**C.B. NAGILLAH**

**JUDGE**

In the presence of:-

Okemwa hold brief for Ogari for Appellant

Gisemba (absent) for the Respondent

Mercy -Court Clerk