



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. 174 OF 2015**

**1. BECHAMEL ENTERPRISES LTD**  
**2. NJOROGE JAMES MWAURA.....APPLICANTS**

**VERSUS**

**1. KANYIVA YUMBI MALOMBE**  
**2 MUTUA UMBI (Suing as the Legal Representatives of the**  
**Estate of Grace Kisilili Umbi (Deceased).....RESPONDENTS**

**RULING**

**The Application**

The application before the court is an Amended Notice of Motion dated 21<sup>st</sup> December 2015, filed by the Applicants under the provisions of Order 42 Rules 4 and 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, and sections 3 and 3 A of the Civil Procedure Act. The Applicants are seeking a stay of execution of the judgment delivered on 30<sup>th</sup> October 2015 in Machakos CMCC No 147 of 2013, pending the hearing and determination of the appeal filed herein.

The Applicants' grounds are set out on the face of the Amended Notice of Motion and in a supporting affidavit sworn on 11<sup>th</sup> December 2015 by Gibson Kamau, the Claims Manager of the Applicants' insurer. The main ground is that the Applicants are aggrieved with the award of damages of Kshs 4 million in the judgment delivered in Machakos CMCC No 147 of 2013, and that they have filed an appeal against the judgment. Further, that they were granted a stay of 30 days by the lower court from 30<sup>th</sup> October 2015, and applied for typed proceedings of the lower court on 6<sup>th</sup> November 2015 which had not supplied to them by the date of filing their instant application. The Applicants averred that they are ready to provide security in the form of an insurance security bond in case their appeal does not succeed.

Manthi Masika & Company Advocates, the learned counsel for the Applicants, reiterated these grounds in written submissions dated 3<sup>rd</sup> June 2016 that were filed in Court. It was further urged therein that the Applicants had met the conditions provided in Order 42 Rule 6 of the Civil Procedure Rules, in that the Applicants would suffer substantial loss as their appeal would be rendered nugatory if the Respondents institute execution proceedings against them, since the judgment was entered for a substantial sum of Kshs 4 million. It was alleged that the Respondent is not a person of means, being an elderly lady and a farmer, and may not be able to refund the said sum should the appeal succeed. Reliance was also placed on various judicial authorities in this regard.

## The Response

The Respondents relied on a replying affidavit sworn by the 1<sup>st</sup> Respondent filed in Court on 18<sup>th</sup> December 2016. It was alleged that the application is defective, was served late on the Respondent's Advocates on 16<sup>th</sup> December 2015, and that the deponent in the supporting affidavit has deponed to facts not within his knowledge as regards the Respondents inability to refund the judgment sum of Kshs 4 million. Therefore, that no valid or legal reason has been advance by the Applicants for stay of execution.

The Respondent's learned counsel, Mulu and Company Advocates, reiterated the above arguments in submissions filed in Court dated 14<sup>th</sup> June 2016.

## The Issues and Determination

I have read and carefully considered the pleadings filed. The issue before the Court is whether the execution of the judgment of the trial Court should be stayed and if so on what terms. 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.

As regards whether the stay of execution should issue, I note that the 30 days stay granted by the lower court expired on 30<sup>th</sup> November 2015 and the initial Notice of Motion was filed by the Applicants on 11<sup>th</sup> December 2015 which was after a period of slightly over ten days. There was thus no inordinate delay in filing the application.

The Applicants have in this respect stated that the Respondents will not be able to refund the amount paid to her as the decretal sum in the event of the appeal succeeding, and gave the reasons for this opinion. The Respondent on the other hand stated that there is no basis for this averment. I am of the view that since the Respondents have not demonstrated that they are in a position to refund the sum of Kshs 4 million in the event this appeal succeeds, there is thus a reasonable basis laid by the Applicants as regards the substantial loss they are likely to suffer. Lastly, the Applicants have offered security by way of an insurance bond.

The orders that accordingly commend themselves to me arising from the foregoing is that the Applicants' Amended Notice of Motion dated 21<sup>st</sup> December 2015 is allowed on the following terms:

1. There shall be a stay of execution of the judgment in Machakos CMCC No 147 of 2013 and any consequential orders arising therefrom pending the hearing and determination of this appeal, only on condition that the Applicants shall deposit in court the decretal sum of Kshs 4 million within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Applicants' Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 19<sup>th</sup> day of September, 2016.

**P. NYAMWEYA**

**JUDGE**