



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL 50 OF 2016**

**NICHOLUS MURIUKI MUTUBIE.....APPELLANT**

**VERSUS**

**MWANIKI MBITI.....RESPONDENT**

*(Being an appeal from the judgement in CC No 8 /13 at Siakago Principal Magistrate's Court by Hon  
A.N. Makau – SRM on 19<sup>th</sup> March, 2016)*

**RULING**

1. This is an application brought by way of notice of motion under sections 1A, 1B, 3A and under Order 51 Rules 1, 3, 4, Order 22 Rule 22 and under Order 42 of the 2010 Civil Procedure Rules. The application seeks stay of execution of the magisterial judgement issued by the court of the Senior Resident Magistrate at Siakago on 24<sup>th</sup> August 2016. Additionally, it seeks an order for the provision of costs.

2. The application is supported by the grounds on the face of the motion. The first ground is that the rulings were delivered in the absence of the plaintiff/appellant. In ground 2, the appellant has stated that the decree was obtained through misrepresentation by the respondent in respect of service of the notice of taxation and that judgement was delivered in the absence of the appellant. In ground 3, the applicant has stated that the notice of taxation dated 24<sup>th</sup> March 2016 was deliberately served on 28<sup>th</sup> April 2016 on the appellant's counsel.

3. In ground 4, the appellant has stated that the notice to show cause dated 24<sup>th</sup> August 2016 was not served by a licensed process server. The appellant has further stated that service was effected by proxy of a process server in respect of whom the applicant seeks to cross-examine him and shall pursue him for perjury. In ground 5, the applicant has stated that unless the court grants stay of execution of the judgement appealed against, the appellant's appeal shall be rendered nugatory and he will suffer irreparable damage.

4. In ground 7 he has stated that the respondent will not suffer any prejudice and it is in the interest of justice that the application be granted. The appellant's application is supported by an affidavit. He has deponed to a supporting affidavit which contains 13 paragraphs. I will only concentrate on the major paragraphs. He has deponed that he was never offered an opportunity to be present during the delivery of the judgement and other subsequent applications. He has further deponed that subsequent applications were deliberately done in his absence, for instance, hearing notices were served late on his advocates.

5. He has also deponed that when the judgement was delivered, there was no order made as to costs nor was the appellant informed of his right of appeal. He has further deponed that the notice to show cause

dated 15<sup>th</sup> September 2016 was dropped at his place by a Mr Mwangi, who is not an authorized process server. He has further deponed that he has lodged an appeal which has overwhelming chances of success and that the delay in filing the appeal was due to the late typing of the proceedings. Furthermore, he has deponed that he stands to suffer irreparable loss that cannot be compensated by way of damages and that the appeal will be rendered nugatory. He has also deponed that he is ready to abide by any terms the court may order as long as a stay of execution is granted. Finally, he has deponed that the respondent will not suffer any prejudice if the orders sought are granted.

6. The application is opposed by counsel for the respondent. In that regard, counsel has filed 4 grounds in opposition to the application. In ground 1 counsel has stated that the appeal is incompetent and frivolous and should be struck out. In ground 2 he has stated that the appellant's appeal is full of lies and imaginations. In ground 3, he has stated that the appellant had accepted to liquidate the debt by paying the money in court in regard to which he had given Kshs 30,000/- to the advocate of the respondent amongst other payments.

7. The respondent has filed a replying affidavit in opposition to the application of the appellant. He has deponed that the application has no basis in law because it has been overtaken by events. He has further deponed that the appellant has not come to court in good faith. He has also deponed that after judgement was delivered on 19<sup>th</sup> March 2015, the appellant was given 30 days to appeal and he then instructed his advocate to prepare the bill of costs. The respondent has further deponed that the bill of costs was prepared and the notice of taxation was served on the appellant, who did not attend court for taxation purposes. As a result, the bill of costs was taxed unopposed by the Executive Officer of the court.

8. Finally, the respondent has deponed that the appellant has not annexed to his application a letter requesting for proceedings to prove that the proceedings were typed late and that this application is meant to deny him the right to enjoy the fruits of the judgement. He has concluded that if the court is minded to grant an order of stay of execution, then the appellant should be ordered to deposit adequate security in court and that the appellant has not demonstrated that his application will be rendered nugatory if the decree is executed.

9. The law applicable in this application is ***Order 42 Rule 6 of the 2010 Civil Procedure Rules***. An applicant for such an order has to show that he is likely to suffer substantial loss unless stay is granted. The applicant has also to show that he filed the application without delay. Finally, the applicant may be required to provide security.

10. In the light of the affidavit evidence of both parties and the applicable law, the issues for determination are as follows. First, whether the appellant has demonstrated that he is likely to suffer substantial loss unless an order of stay of execution is granted. Second, whether the appellant has shown that he filed this application without delay. Third, whether the applicant has to provide security.

11. Having considered the affidavit evidence and the applicable law I find that the applicant is likely to suffer substantial loss unless an order of stay of execution is granted in particular his appeal may be rendered nugatory unless stay is granted. Furthermore, I find that the delay has been explained by the appellant. In this regard, the appellant has attached to his affidavit the certificate of delay issued by the court, whose decree is being appealed against. In the circumstances, I grant the appellant's application on condition that the appellant has to deposit security in court in the sum of Kshs 100,000/- within 45 days from the date of this ruling failing which this order will lapse.

12. Costs of this application will be costs in cause.

**RULING DELIVERED, DATED and SIGNED** in open court at **EMBU** this **11<sup>th</sup>** day of **OCTOBER 2016**.

In the presence of Mr Ngari for the appellant and Mr. Siro holding brief for Mr. Kariithi for the respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**11.10.16**