



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 93 OF 2012**

**NICKSON MUTHOKA MUTAVI.....APPELLANT/ RESPONDENT**

**VERSUS**

**KENYA AGRICULTURAL RESEARCH INSTITUTE.....RESPONDENT/APPLICANT**

**RULING**

**The Application**

The Appellant herein instituted a suit in the Chief Magistrate's Court at Machakos (Civil Case No. 1234 of 2008), seeking special and general damages for injuries sustained while working for the Respondent on 14th January, 2008. The trial Court dismissed the suit with costs to the Appellant on 11th January, 2012 leading to the filing of an appeal herein by the Appellant. The Appellant's appeal was allowed by this Court in a judgment delivered on 20th January 2016, and this Court substituted the judgment and order of the trial court and awarded the Appellant total damages amounting to Ksh 2,437,718.10.

The Respondent then filed an application in the trial Court seeking stay of execution of the amended decree, which court dismissed the application citing lack of jurisdiction. The Respondent has now moved this Court in an application by way of Notice of Motion dated 23rd May 2016, seeking a stay of execution of the decree in Machakos CMCC No. 1234 of 2008 as amended pursuant to the judgment and order dated 20th January 2016, pending the hearing and determination of its appeal to the Court of Appeal.

The grounds for the application are that the Respondent being dissatisfied by the decision of this Court has filed a Notice of Appeal to the Court of Appeal, and is apprehensive that the Appellant may execute the decree by this Court at anytime. Further, that if the Respondent is compelled to pay the decretal sums to the Appellant, it is unlikely that the sums paid will be recovered in the event the appeal succeeds, as the Appellant sources of income are unknown. The Respondent averred that it is thus likely to suffer substantial loss and it may render its appeal nugatory and a mere academic exercise, and that it is ready to furnish the court with security for the grant of the orders sought. Lastly, that the application has been brought without undue delay. These grounds were reiterated by Pauline Masila, the Chief Legal Officer of the Respondent, in a supporting affidavit she filed sworn on 23rd May 2016.

Anthony Burugu & Company Advocates, the learned counsel for the Respondent, filed written submissions in Court dated 15th June 2016. It was urged therein that the setting aside and substitution of the judgment of the lower court by this Court provided a basis for the amendment of the decree issued by the lower court, and that once the Appellant has in his possession the amended decree, he is likely to execute the decree speedily making the application and the appeal nugatory.

Reliance was placed on the decision in **Juma Ali Mbwana & Geoffrey Kithuku Lindu v Umi Omar**

**Musa, Civil Appeal No. 52 of 2013**, for the grounds for stay of execution as prescribed by Order 42 rule 6 the Civil Procedure Rules, and it was submitted that the Respondent shall suffer substantial loss should the Appellant execute the amended decree before their appeal is heard to completion because the amounts awarded by this Court are rather substantial, and the Appellant has not at any point demonstrated the ability to refund the moneys should the appeal be decided in the Respondent's favour. Further, that the Appellant has not disclosed alternative sources of income that would enable him reimburse the moneys.

The Respondent also cited the holding in **Africa Eco-camps Limited and Exclusive African Treasurers Limited, Civil Application No. 183 of 2014** where the Court of Appeal in granting stay of execution stated that once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed, since that is a matter likely to be peculiarly entirely within the knowledge of the respondent. Therefore, that the Appellant in this case is charged with the responsibility of satisfactorily demonstrating to the court that they shall be in a position to refund the decretal amount should the appeal succeed.

### **The Response**

The Appellant's learned counsel, Andrew Makundi Advocate, filed a replying affidavit he swore on 6th June 2016, wherein he averred that the Respondent's application is incompetent and bad in law, and seeks the stay of execution of a non-existent decree. Further, that the Respondent had not complied with the mandatory provisions of the law, and as the decree herein is a money decree it will not suffer any substantial loss.

The Respondent's counsel also filed submissions filed in Court dated 6th July 2016, wherein reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, 2010 for the position that the Respondent has not demonstrated that it will suffer substantial loss if the orders sought are not granted, and has no intentions of filing the intended appeal against the judgment delivered on 20<sup>th</sup> January, 2016 as there is no request for records filed to effect the same.

It was further submitted that the application is made in bad faith and actuated to deny the Appellant the fruits of the judgment of this Court. The decision in **Kenya Shell Ltd vs Kibiru & Another (1986) KLR, 410** was cited for the position that a money decree is capable of being repaid, and the Respondent will not suffer irreparable harm in the event that the appeal is allowed. It was contended that that should the appeal be allowed the Appellant can repay the Respondent, that the appeal lacks merit and has no chances of success, and without this evidence it is unfair to keep the respondent out of the money he is legally entitled to. Various judicial decisions were cited in support of these averments.

### **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 this 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.

The Respondent has in this respect stated that the Appellant will not be able to refund the amount paid to him as the decretal sum in the event of the appeal succeeding. The Appellant on the other hand stated that there is no substantial loss that can be suffered in this appeal as it involves a money decrees, as the money is refundable. The Appellant however did not demonstrate his means and how he will be able to refund the said money. I am of the view that there is thus a reasonable basis laid by the Respondent as regards the substantial loss it is likely to suffer.

I accordingly order that the execution of the judgment delivered herein on 20<sup>th</sup> January 2016 and any consequential decree arising therefrom be stayed pending the lodging, hearing and determination of the Respondent's appeal in the Court of Appeal, only on condition that the Respondent shall deposit as security the decretal sum of Kenya Shillings 2,437,718/10 in a joint interest earning account that shall be opened in the joint names of the Appellant's and Respondent's Advocates on record within thirty days of this ruling. In the event of default by the Respondent, the Appellant shall be at liberty to execute the judgment delivered herein on 20<sup>th</sup> January 2016 and any consequent decree.

The Respondent shall meet the costs of the Notice of Motion dated 23rd May 2016.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11<sup>th</sup> day of October, 2016.

**P. NYAMWEYA**

**JUDGE**