



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

**CIVIL APPEAL NO. 45 OF 2016**

**SILAS NICHOLAS MBALUKA MAWIA .....APPELLANT**

**VERSUS**

**JOHN MUSAU MUTIE.....RESPONDENT**

**RULING**

**The Application**

The application before the court for ruling is a Notice of Motion dated 18<sup>th</sup> May 2016, filed by the Appellant under the provisions of Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act. This Court gave directions that the said application be canvassed by way of affidavits and written submissions.

The Appellant is seeking orders that there be a stay of execution of the judgment delivered 19<sup>th</sup> April, 2016 in Makueni PMCC No. 13 of 2013 and all consequential orders arising therefrom, pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 18<sup>th</sup> May 2016 by Betty Isoe, the Legal Officer of Kenya Orient Insurance Limited, the Appellant's insurer. The main ground is that the Appellant is aggrieved with the lower court's judgment, in which he was held 100% liable and to pay damages of Kshs 200,000/= , and that he has preferred the appeal herein against the said judgment. Further, that he was granted a stay of execution for 30 days by the trial Court which was to expire on 19<sup>th</sup> May 2016, but that the typed record of the judgment, order and proceedings, as requested in a letter dated 17<sup>th</sup> May 2016 which was sent to the Executive Officer in the Principal Magistrates Court at Makueni, is yet to be made available to the Appellant for purpose of filing a Record of Appeal. The Appellant contended that if the Court does not provide for the stay of execution sought, the Appellant's goods which are central to his business are in real danger of being attached and proclaimed to his detriment.

Okong'o Omogeni & Company Advocates, the learned counsel for the Appellant filed written submissions on the Application dated 24<sup>th</sup> June 2016. It was urged therein that stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules, 2010 and that various judicial decisions have explained the conditions set out in the said provisions including in **Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & Another [2014] eKLR** and **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR**. Further, that the Appellant had fulfilled the said conditions including that he will suffer substantial loss

**The Response**

The Respondents opposed the Appellant's application in a Replying Affidavit he swore on 3rd June 2016, wherein he detailed out the merits of his case and stated that he was awarded damages of Kshs 200,000/= for serious injuries he incurred in an accident in which he was a passenger, and therefore the judgment of the lower court on liability at 100% is fair and just. Further, that the Appellant has not offered costs as security.

Anne M. Kiusya & Company Advocates, the Respondents' Advocate also filed submissions dated 25<sup>th</sup> July 2016, wherein it was argued that the Appellant's application shows that it does not indicate that any loss would be suffered should the orders not be granted. Reliance was placed on **Meteine Ole Kilelu & 19 Others vs Moses K. Nailole NRB Civil App No. 340 of 2008**, where the court opined that where the decree appealed against is a money decree, the applicant has to show that either once the execution is done after refusal of the application, the applicant may never get back that money even if his appeal succeeds.

Reliance was also placed on the decisions in **Kenya Shell Ltd vs Kibiru & Another, NRB Civil App No. 97 of 1986** and **Nganga Kabae vs Kahunyo Kimani, NRB HCCA No. 182 of 1999** for the position that the Appellant has not clearly stated what loss they stand to suffer, nor have they offered any security for the due performance of the decree.

It was also submitted that the Appellant does not have an arguable appeal as the lower court's judgment was reasonable considering the degree of injury suffered, and his application is thus an abuse of the court process and merely seeks to deny the Respondent his right to enjoy the fruits of his judgment.

### **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. 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 in terms of the right to enjoyment of a judgment by the successful litigant, and the right to appeal by the unsuccessful litigant.

As regards whether the stay of execution should issue in the instant application, I note that the decision in the lower Court was delivered on 19<sup>th</sup> April 2016 and the application herein was filed on 18<sup>th</sup> May 2016, after a period of one month. There was thus no inordinate delay in filing the application.

On the fulfillment of the second condition, the Appellant needs to show what specific loss or prejudice she will suffer if she pays the decretal sum. The Appellant has in this respect stated that he risks his business goods being attached and proclaimed in the event that stay is not granted. This averment in my view is sufficient and specific enough as to the substantial loss that the Appellant will suffer if the application is not granted.

Lastly, on the third condition, the Appellant did not indicate that he is willing and able to furnish security for satisfaction of the decree in the event that his appeal does not succeed. I also note in this regard that the Appellant did concede that the Respondent did suffer injuries arising from the subject accident and only disputes the extent of the injuries and his liability for the same.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 18<sup>th</sup> May 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment delivered on 16<sup>th</sup> April 2016 in Makueni PMCC No. 13 of 2013 and all consequential orders arising therefrom, pending the hearing and determination of the Appellant's appeal filed herein, only on condition that the Appellant shall pay to the Respondent Kshs 200,000/= , and deposit the balance of the decretal sum in an interest earning account in the joint names of the Appellant's and Respondents' Advocates on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Appellant's 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 December, 2016.

**P. NYAMWEYA**

**JUDGE**