



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

**MISC. APPLICATION NO. 107 OF 2013**

**JACINTA NJERU KAITHA.....1ST APPLICANT**

**CATHERINE RWAMBA GICHOVI.....2ND APPLICANT**

**VERSUS**

**DAVID K. KANYIRI.....RESPONDENT**

**RULING**

This application dated 01/12/14 seeks for orders of stay of taxation execution and any adverse process towards realizing costs in this matter pending hearing inter parties. It also seeks for orders for stay of the execution process pending finalization of civil Appeal No. 50 of 2015.

The applicant Jacinta Njeru Kaitha in her supporting affidavits relies on the following grounds;-

1. *That she has already filed an appeal against the judgment of the trial court which has overwhelming chances of success.*
2. *That the issue of lost is a subject of the appeal.*
3. *That if the orders sought are not granted, the appeal may be rendered nugatory.*

The respondent opposed the appeal on grounds that;-

1. *That the applicant has no basis of stopping the assessment of costs.*
2. *That the respondent is not a man of straw and will be ready and willing to refund the costs paid to him in the event of a successful appeal.*
3. *That in the event that the appeal is unsuccessful the applicant may not be in a position to pay the costs*
4. *that in the alternative the costs should be assessed and deposited in court pending the hearing and determination of the appeal.*

The law applicable in this application is Order 42(6) of the Civil Procedure Rules 42(6)

*Rule 6. (1) No appeal or second 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) (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.*

It was held in the case of **BUTT VS RENT RESTRICTION TRIBUNAL 1982 KLR** that:-

(a) *The power of the court to grant or refuse stay of execution is discretionary. The discretion should be exercised in such a way as not to prevent an appeal.*

(b) *The general principle in granting or refusing stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judges discretion.*

(c) *A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

(d) *The court in exercising its discretion will consider special circumstances of the case and unique requirements.*

(e) *The court in exercising its powers can order security upon application by either party or its own motion. Failure to put security for costs as ordered will cause orders for stay to lapse.*

The power of the court in granting stay is discretionary and the applicant has a duty to satisfy by the court that he deserves the exercise of the said discretion by putting forth good ground.

In the case of **CHRIS MUNGAI N. BICHAGE VS RICHARD NYAGAKA TONGI & 2 OTHERS (2013) KLR**, the court held that the applicant must have an arguable appeal in order to succeed in an application for stay. Secondly, the court must be convinced that if the appeal is successful, it will not be rendered nugatory.

I have perused the proceedings and judgment my sister Ongudi J delivered on 30th May 2014 as well as the grounds relied on this application. The appellant has filed an appeal against the ruling of the Hon. Judge. The applicant has not convinced this court that his appeal is arguable and that it has any chances of success. Neither has he shown that he will suffer any prejudice if the orders sought are denied. If the cost of the suit are assessed, how will they affect the appeal? This court has not been explained how the applicant will be affected. The applicant has also failed to demonstrate existence of any special circumstances in this case.

I find this application not merited and dismiss it with costs. It is hereby so ordered.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 16TH DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Kathungu for respondent**