



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 216 OF 2014

(Being an appeal from the judgment of Hon. P. N. Gesora delivered on 25/9/2014 in Machakos CMCC No. 256 of 2011)

HARRIET MUMBUA NTHENYA.....APPELLANT

VERSUS

SARAH NZULA MUTIE.....RESPONDENT

RULING

1. The application dated 18th February, 2015 seeks orders that pending the hearing and determination of Machakos High Court Civil Appeal No. 216 of 2014 there be a stay of execution the judgment delivered in Machakos CMCC No. 256 of 2011 on 25th September, 2014 and any subsequent order and/or decree.
2. According to the affidavit in support and the further affidavit sworn by the Applicant, judgment was entered against the Applicant on 25th September, 2014. The Applicant applied for a stay of execution before the lower court and the same was allowed on condition that the decretal sum of Ksh 500,000/= be deposited in a joint interest account within 14 days. The Applicant's position is that she is not able to meet the said condition which may render her appeal nugatory as the Respondent will not be able to refund the decretal sum. The Applicant has further asserted that the appeal has overwhelming chances of success.
3. The application is opposed. It is stated in the replying affidavit that a conditional stay was granted by the lower court but the Applicant has failed to comply with the same. That consequently, this court has no jurisdiction to grant stay in the circumstances.
4. **Order 42 rule 6(1)** provides as follows:

“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.”

5. This court therefore has the requisite jurisdiction to hear the application.

6. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(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.”*

7. The application herein has been made without undue delay.

8. The Respondent is silent on the question of her means and the capability to refund the decretal sum in the event that the appeal is successful. As stated in the case of **National Industrial Credit Bank Ltd – vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – See for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

9. The Respondent’s resources are unknown. If execution is allowed to proceed the Applicant is likely to suffer substantial loss if the appeal is successful.

10. With the foregoing, I allow the application. I vary the condition imposed by the lower court and instead order that the Applicant do provide security for the decretal sum within 21 days from the date hereof. Costs in cause.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 30th day of July, 2015

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B. THURANIRA JADEN

JUDGE