



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 68 OF 2015

1. **JOHN WANDETO**
2. **WELLS FARGO LIMITED.....APPELLANTS**

VERSUS

VIRGINIA NJERI GATONYE.....RESPONDENT

RULING

1. The Appellant have filed a Notice of Motion dated 8th April, 2014 seeking the following orders:-
 - i. *That the orders granted by Hon. Chesang' on 2nd April, 2015 in Civil Suit No. 5709 of 2012 be set aside and/or be varied.*
 - ii. *That there be stay of execution of the judgment and decree of Hon. Chesang' dated 22nd April, 2015 in Civil Suit No. 5709 of 2012 pending hearing and determination of this appeal.*
2. This application is based on the grounds set out on the body of the application and the supporting affidavit of the Assistant Manager, Claims Department with ICEA LION General Insurance Company Limited Caroline C. Kimeto filed on 8th April, 2015. She stated that prior to the entry of the judgment, an application for stay of execution was filed on 30th March, 2015 but which prayer was denied. That the parties consented that the Appellant be granted thirty (30) days stay of execution which expired on 4th April, 2015. That if the said orders are not set aside and/or varied, the Respondent shall proceed to prosecute and the appeal shall be rendered nugatory. That the decretal sum is a substantial amount and the Appellant may not be able to recover the same from the Respondent in the event this appeal succeeds since the Respondent's means are unknown. She expressed the Appellant's willingness to furnish security.
3. In response thereto, the Respondent filed a Replying Affidavit on 7th July, 2015. She contended that; the affidavit in support of the application is by a non-party who has no authority to depose; that no means of the Appellants has been disclosed or the kind of loss they may suffer; that subrogation does not permit an insurer to personally step into the arena and act as a party; that there has been undue delay in bringing this application since 22nd January, 2015; that she is able to refund the decretal sum and she is ready to deposit in court an irrevocable and renewable bank guarantee for the entire decretal sum and costs within 14 days which will remain in place pending the appeal and that this being a money decree, there can be no substantial loss and she urged court to impose conditions of stay in the event it is persuaded to grant the orders sought by the Appellants.
4. This application is based on Order 42 Rule 6 (1) and (2). That Rule provides:

“6.(1) No appeal or second appeal shall operate as a stay of 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 sub-rule (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.”

5. The above provision was discussed in the case **Peter Ondande t/a Spreawett Chemis v. Josephine Wangari Karanja [2006]eKLR** where it was held as follows:-

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”

6. In the instant case, there is no dispute that there was delay from the 22nd January, 2015 to the time of filing the application. That delay in my view was unreasonable.
7. As for substantial loss, the Appellants are apprehensive that the Respondent will be unable to refund the decretal sum in the event the appeal succeeds. On this point **see the case of Rose Mbithe Ndetei v. Mathew Kyalo Mbobu Civil Appeal No. 86 of 2008** where the Respondent rebutted not being a man of straw and proved his financial capability. In this case, there is no evidence tendered by the Respondent as to her financial standing. She merely states that she is able to refund the decretal sum and she is ready to deposit in court an irrevocable and renewable bank guarantee for the entire decretal sum and costs within 14 days which will remain in place pending the appeal. Where an applicant alleges that the Respondent is a man of straw, the burden to prove otherwise shifts to the Respondent. See the Court of Appeal's decision in the case of **ILRAD v. Kinyua(1990) KLR 403 at Page 406** where it was held as follows:-

“We have considered what Mr. Sehmi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.

8. Be that as it may, I note that the Appeal is only in respect of quantum only. The Respondent swore that the Appellant had submitted for damages of Kshs.600,000/=. However, a judgment of Kshs.1,500,000/= was entered against the Appellant. This fact was not denied at all. There is no appeal on liability. That being the case and considering the justice of the case, i am minded to allow the application on the following conditions:-
- a. The Appellant do pay to the Respondent a sum of Kshs.600,000/= within 30 days of the date of this ruling.

- b. The Appellant do deposit the balance of the decretal amount in an interest earning account in the joint names of the advocates on record for the parties herein within 30 days of the date of this ruling.
- c. In default of any of the orders in (a) and (b) above the application shall stand dismissed and the stay discharged without the necessity of making any other order and consequently execution to issue forthwith.
- d. Costs to abide the outcome of the appeal.

It is so ordered.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 17th day of September, 2015.

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JUDGE