



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 158 OF 2014**

**JAMES OLLELE OLE NGITI.....APPELLANT**

VERSUS

**NATIONAL BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

**DONALD WAMARI.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment of Hon. L. KOMINGOI SENIOR PRINCIPAL Magistrate delivered delivered on 23<sup>rd</sup> October 2014 in Nakuru CMCC No. 667 of 1995)*

**RULING**

1. On the 23<sup>rd</sup> October 2014, the trial court pronounced Judgment for the 1<sup>st</sup> Respondent against the Applicant in the sum of KShs.671,859.65/= and upon application, an order of stay of execution of the decree was issued pending an intended appeal. A Memorandum of Appeal was filed on the 14<sup>th</sup> November 2014 and a request for proceeding and judgment were made.

By his application brought under certificate of urgency on the 28<sup>th</sup> May 2015, the applicant was granted an order of stay of execution pending hearing and determination of the application as the trial court's order of stay of execution had lapsed.

2. The application is brought under the provisions or **Order 42 rule 6 (1) and (6)** of the **Civil Procedure Rules**, which empower the court to exercise its discretion to order stay of the execution pending appeal on terms as it may deem proper; and upon being satisfied that there lies sufficient grounds to grant such order.

**Order 42 Rule 6(2)** States

“No order of 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.”

4. The applicant in his affidavit in support of the application deposes that he is willing to deposit security upon terms as the court may order. He has attached copies of his payslips from his employer, and as he states, the only source of his income.

5. In opposing the application, the 1<sup>st</sup> respondent in its grounds of opposition filed on the 9<sup>th</sup> June 2015 states that being a money decree it is incapable of being rendered negatory should the appeal succeed, and that the 1<sup>st</sup> Respondent being a bank is capable of refunding the decretal sum if the appeal succeeds. It urges that the application be dismissed.

6. The court has considered the application, supporting affidavit and submissions by both counsel.

I am satisfied that the application was brought without undue delay and that the applicant is ready to offer security for the due performance of the decree.

The court has also considered that this is a very old case but then, judgment was delivered in October 2014 – and that the respondent is not seriously opposing the application save urges that clear provision for security be spelt out, and that a deposit of the decretal sum be ordered in a joint interest earning account both in both advocates names.

7. An order for stay of execution is intended to preserve the subject matter in dispute so that the rights of an appellant exercising his right of appeal are safeguarded and the appeal if successful is not rendered negatory while at the same time balancing the need with the respondent's right to execute in order to realise the fruits of its judgment in his favour. It is a balancing act out of the two conflicting interests.

See **HCA No. 86 of 2010 (Nakuru) A.I.C. Health Ministries -vs- Joyce Wanjiru & Others.**

8. In exercise of my discretion, I shall allow the application and grant an order of stay of execution of the trial court's decree in **CMCC No. 667 of 1995** in terms of prayer **Number 3** of the application dated 28<sup>th</sup> May 2015 upon the following terms that:

1. The applicant shall deposit 70% of the decretal sum in a joint interest earning account in the names of the Applicants and 1<sup>st</sup> Respondents Advocates in a bank to be agreed upon by the Advocates within 21 days of this ruling.
2. That the Applicant shall file the Record of Appeal within 60 days of this order failing which the order of stay hereof shall automatically lapse
3. That costs of this application goes to the 1<sup>st</sup> Respondent

It is so ordered.

**Dated, signed and delivered in open court this 29<sup>th</sup> day of October 2015**

**JANET MULWA**

**JUDGE**