



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

**AT NAKURU**

**CIVIL APPEAL NO.169 OF 2013**

**ESTHER WANJIRU.....APPELLANT/APPLICANT**

**VERSUS**

**JACKLINE AREGE..... RESPONDENT**

**RULING**

The Notice of motion dated 29th October, 2013 seeks, among other prayers, an order for stay of execution of the judgment and/or decree issued in **Nakuru CMCC NO. 1015 of 2011** pending the hearing and determination of the appeal.

The application is supported by the affidavit of the applicant's advocate and is premised on the grounds that dissatisfied with the ruling in Nakuru CMCC No.1015 of 2011 delivered on 17th September, 2013, she has preferred an appeal. The application is described as being made without unreasonable delay. The applicant fears that the respondent may proceed to execute, and that she is ready and willing to furnish security for due performance of the decree. Further that the applicant may not recover the decretal sum or any part of it from the respondent if the appeal succeed, that the appeal may be rendered nugatory, if the court does not grant the orders sought.

The application is opposed by the respondent's advocate who has deposed that the application should be dismissed because it is an abuse of court process. It is highly prejudicial to the respondent in terms of time and cost. The respondent maintains that he followed the laid down procedures after the appellant failed to make use of opportunities that were available to her; and litigation must come to an end.

In arguing the application learned counsel for the appellant, pointed out that at the time the interlocutory judgment was entered the appellant had already entered appearance and filed a statement of defence. For this reason he submitted that the interlocutory judgment was entered erroneously. Counsel also faulted the trial magistrate for allowing the respondent to proceed with the formal proof without any evidence of service on the appellant who had already entered appearance. Pointing out that the trial magistrate allowed the respondent to amend its plaint before proceeding with the formal proof, he argued that the appellant ought to have been served with the amended plaint before the respondent could proceed with his case on the basis of the amended plaint. For these reasons he believes that the appellant has an arguable appeal which, unless this court grants the orders sought, might be rendered nugatory.

Counsel also argued that the decretal sum is colossal and if released to the respondent, the appellant is likely to suffer irreparable loss since it is not demonstrated that she has ability to refund the decretal sum.

On his part, counsel for the respondent submitted that the trial magistrate cannot be faulted for entering

the judgment hereto, as the appellant neither entered appearance nor filed a statement of defence within the time stipulated in law, and in the summons to enter appearance. Despite having been informed of the date for formal proof, through a letter, the appellant neither attended the hearing nor sought to set aside the proceedings in good time or at all. He further submitted that having failed to move the trial court to set aside the interlocutory judgment when he had time and opportunity to do so, the appellant should not be heard to complain about service. He contends that it would be inequitable to grant the orders sought as the respondent has incurred a lot of time and expenses.

An order of stay of execution will be granted where the court is satisfied that substantial loss may result to the applicant, if the order is not made, and the application for stay has been brought without unreasonable delay. The applicant must also demonstrate willingness and readiness to abide by any order as to security. (See **Cecilia Nyambura Murunga V. Stephen Kuhora**; Nakuru High Court Civil Appeal No. 176 of 2011). See also Order 42 Rule 6 (2).

The applicant has challenged the lower court's judgment in this appeal and the subject matter is the decretal sum which she argues is colossal. She is apprehensive that if she complies with the decree and pays the decretal sum to the respondent, the respondent might be unable to refund the decretal sum which is Kshs.971,855/=. It is such fear, if genuine, that must be weighed against the respondent's right to enjoy the fruits of the judgment given in her favour.

I have considered the submissions made by the advocates for the respective parties and the law applicable. Instead of addressing me on the requirements for granting of stay of execution stated hereinabove counsel for the appellant sought to prove that the appellant has an arguable appeal. The High Court has stated, in numerous authorities, that in considering an application for stay of execution in the High Court, the applicant is not required to prove that he/she has an arguable appeal. See this Court's decision in Nakuru HCCC No.241 of 1998; **Martha Njeri Wanyoike & 3 Others v. Peter Macharia Mwangi & 5 others.**

Under order 42 Rule 6 Subrule 2 of the Civil Procedure Rules for a court to grant stay of execution pending appeal it has to be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay (subrule 2(a)).

Under subrule 2(b) the applicant is obligated to furnish such security as the court may order for the due performance of such decree or order as may ultimately be binding on him.

The instant application was filed on 4th November, 2013 to challenge a ruling delivered on 17th September, 2013 (about 30 days later). In my view the delay of about 5 weeks before filing of the application was not unreasonable.

As regards security, the applicant has in her supporting affidavit averred that she is prepared to furnish security for the performance of the decree. On whether the applicant will suffer substantial loss unless the order sought is granted, I note that the respondent has not disputed the appellant's contention that if the decretal sum is released to her she may not be able to refund it to the appellant if the appellant succeeds in her appeal.

As the application was brought without undue delay and the applicant has given an undertaking to provide security I allow the application and grant a stay of execution pending hearing and determination of the appeal on condition that the applicant shall deposit into a joint interest earning account in the name of her Counsel and counsel for the respondent within thirty (30) days from the date hereof, the entire decretal sum being Kshs. 971,855/= failing which this order of stay stands vacated.

**Dated, Signed and Delivered at Nakuru this 21st day of February, 2014.**

**H.A OMONDI**

**JUDGE**