



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

**MISC. APPLICATION NO. 32 OF 2013**

**JAMES NJIRU MABUTE .....PLAINTIFF/APPLICANT**

**VERSUS**

**GILBERT H. MWANIKI .....DEFENDANT/RESPONDENT**

**RULING**

This application seeks the stay of execution pending appeal and also an extension of time within which to appeal. What is sought to be stayed is the decree/judgment issued on 2<sup>nd</sup> February 2012 in KERUGOYA CIVIL CASE NO. 124 of 2009.

The application is premised on the ground that the applicant's advocate failed to disclose to him the outcome of his case and that the applicant stands to suffer irreparable damages if the orders sought are not granted. There are other grounds raised which are not really necessary as they go to the merit of the appeal which is not a relevant consideration in such an application.

The application is opposed and in his replying affidavit, the respondent has deponed, inter alia, that the applicant was in Court when the judgment was delivered on 2<sup>nd</sup> February 2012 and so he cannot blame his advocate and in any case, the applicant attended court severally thereafter for the assessment of costs and notice to show cause. Further, that the applicant obtained the proceedings on 6<sup>th</sup> March 2012 and he has not explained why it took him upto 15<sup>th</sup> May 2012 to file this application.

Both Mr. Chomba and Mr. Ngigi advocates for the applicant and respondent respectively have filed their written submissions which I have considered together with the application and rival affidavits.

**Order 42 Rule 6 (2) of the Civil Procedure Rules** provides for the following conditions that must be fulfilled before an order of stay of execution pending appeal can be granted.

1. ***The Court must be satisfied that substantial loss may result to the applicant if the stay is not granted.***
2. ***The application must be made without un-reasonable delay***
3. ***That such security as the Court orders for the due performance of such decree or order has been given by the applicant***

The above conditions which are the essence of **Order 42 Rule 6 of the Civil Procedure Rules** share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting a stay.

This was reinforced by the Court of Appeal in **MUKUMA VS ABUOGA 1988 K.L.R. 645** see also the

case of **TERESIA KIMANI VS GITHERE INVESTMENT LTD H.C. CIVIL APPEAL NO. 944 of 2003** where Visram J. (as he then was) addressed himself as follows while considering such an application:-

***“A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused”.***

In his affidavit in support of the application, the applicant has deponed in paragraph 8 that he stands to

***“---- suffer irreparable damage if the order sought shall not be granted as the defendant will stand to benefit from unlawful and/or unjust decree---“***

There is therefore a bare statement by the applicant that he stands to ***“suffer irreparable damage”*** which has not even been expounded on. There is no mention of the ***“substantial loss”*** if any, that the applicant may otherwise suffer as provided for in **Order 42 Civil Procedure Rules** and in the circumstances, the Court has no evidence on which to gauge if indeed such loss would ensue. The applicant’s advocate has only alluded to the issue of substantial loss in his submissions but submissions are not evidence. A submission from the bar cannot take the place of a sworn affidavit.

Applicant’s counsel has also raised in his submissions the issue of applicant having an arguable appeal. In an application before the High Court for stay pending appeal, the grounds are as stated above. **Order 42 Rule 6 (2) of the Civil Procedure Rules** makes no mention of whether or not the applicant has an arguable appeal. The issue of whether an appeal is arguable or not is only relevant in the Court of Appeal by dint of its own rules. There being no evidence of what substantial loss would ensue if the stay is not granted, this application lacks merit and must be dismissed.

On the prayer for extension of time within which to file the appeal, the law allows the Court to grant such extension for ***“good and sufficient cause”*** - see **Section 79 G of the Civil Procedure Act**. The applicant’s explanation for not filing the appeal in time is that his advocate did not disclose to him the result of his case and it was only when he changed advocates that he came to know of the judgment – see paragraph 6 of his supporting affidavit. However, in his replying affidavit in opposition, the respondent has deponed in paragraph 6 as follows:-

***“The applicant cannot blame his previous advocate as he was in court when the judgment was read on 2<sup>nd</sup> February 2012”.***

It is instructive to note that there was no further affidavit controverting the averments in the respondent’s replying affidavit which not only states that the applicant was in court when the judgment was read but is also being un-economical with the truth. Nothing would have been easier than for his previous advocate (the record shows it was Ms Thungu) to depon to that fact if at all it is the truth. Being satisfied that the applicant was in court on the day the judgment was read, I find no sufficient cause to allow the application. If anything, the evidence before me shows that the applicant has been less than candid and is not deserving of this Court’s discretion.

Even if it is correct that the applicant only came to learn of the judgment later, there is a certificate of delay. (annexture ***J N M – 3***) showing that he obtained the typed proceedings and judgment on 6<sup>th</sup> March 2012. This application was filed on 15<sup>th</sup> May 2012. That delay of over two (2) months is unexplained. There is no basis upon which this Court can exercise its discretion in this matter.

Finally, the prayer being sought is the stay of execution of the decree/judgment issued on 2<sup>nd</sup> February 2012. The order issued on 2<sup>nd</sup> February 2012 was an order dismissing the suit in Kerugoya Senior Principal Magistrate’s Court Civil Case No. 124 of 2009. That was a negative order which is not capable of execution. It is not an application for stay of execution of the decree on costs of the dismissed suit – see **EXCLUSIVE ESTATES LTD VS KENYA POSTS & TELECOMMUNICATIONS CORPORATION & ANOTHER C.A. CIVIL APPEAL NO. 62 of 2004 (NBI)**.

In the circumstances therefore, the applicant's Notice of Motion dated 15<sup>th</sup> May 2012 is hereby dismissed with costs.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**

**18/7/2014**

**Before**

**B.N. Olao – Judge**

**Mwangi – CC**

**Mr. Ngigi for Respondent – absent**

**Mr. Murage for Chomba for Applicant – present**

**COURT: Ruling delivered in open Court this 18<sup>th</sup> July 2014**

**Mr. Ngigi for Respondent absent**

**Mr. Murage for Mr. Chomba for Applicant present.**

**B.N. OLAO**

**JUDGE  
2014**

**18<sup>TH</sup> JULY,**