



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**ENVIRONMENT & LAND COURT**

**CIVIL APPEAL NO.52 OF 2008**

JOHN MWANGI KAMAU .....APPELLANT

**VERSUS**

JOHN MARUGU KAMAU.....RESPONDENT

**R U L I N G**

The respondent herein was dissatisfied with the ruling of the Honourable Court given on 30/5/2012 hence filed a Notice of Appeal and applied for certified copies of proceedings and ruling. He had not obtained this documents at the time of filing this application.

On the 1st of November 2012, the court issued a Notice to show cause why execution should not issue against him under the provision of order XXI rule 18 of the Civil Procedure Rules as revised in 1948 and now order 22 of the Civil Procedure Rules revised in 2010. He was to appear in court on 7/11/2012 to show cause.

The above prompted the appellant to come to court for an order of stay of execution pending appeal. He asserts that if the order is executed before his appeal is heard and determined, he stands to suffer substantial loss because the respondent cannot be able to refund this amount in the event the appeal succeeds. He claims that no judgment was entered in accordance with the award in the lower court. He is willing to deposit the amount in the Notice to show cause in an interest earning account to be operated by both advocates in a reputable bank.

The appellant opposes the application and states that the ruling being appealed from was made on 30/5/2012 where the court dismissed the respondents application to review the courts judgment made on 29/1/2009, as opposed to the appeal from the judgment of the court delivered on the 29/1/2009. The notice to show cause was for the costs taxed by the taxing master amounting to Ksh.94,733. He argues that a party cannot apply for stay of execution for costs.

**Order 42 Rule 6 Of The Civil Procedure Rules** provides for a stay in case of appeal and not a stay pending appeal as provided by **Rule 5 (2) b of the Court of Appeal Rules**. The difference between the two is in the principles of granting the same and that in the former, the court can grant a limited stay with conditions whereas in latter the can grant a stay without conditions . Rule 6(2) of Order 42 provides that the court should not grant stay of execution under the sub-rule unless it is satisfied that substantial loss may result to the applicant unless the order is made.

Moreover the application should be made without unreasonable delay. Lastly, the court can impose such security for the due performance of the decree or order.

After considering the application and the submissions of Mr Wachira, the court finds that the respondent(the intended appellant) has not demonstrated that he is likely to suffer substantial loss if the decree is executed. **There is no evidence on record that the appellant/respondent is a person of no means and therefore not likely to refund the money.** The onus is not on the Appellant/respondent to prove that he is a man of means but it is the applicant to prove that the respondent is a man of no means.

Moreover, the court finds that this application having been filed on the 4/12/2012 almost six

months after the ruling appealed from and only after being served with a notice to show cause is an afterthought. The record shows that the Deputy Registrar High Court issued Notice of Taxation dated 6/7/2012 to Karuga Wanderi & Co. Advocates and the same was received on 13/7/2012. This demonstrates that they were aware of the taxation proceedings but never took any action to stay the proceedings and therefore coming to court after being served with notice to show cause amounted to unreasonable delay.

Though the respondent is willing to deposit the money in an account to be jointly opened by the advocates for the parties this court finds that the respondent does not meet the two tests hence the application is disallowed.

***Dated, signed and delivered on 18th day of July 2014.***

**A. OMBWAYO**

**JUDGE**