



**REPUBLIC OF KENYA**

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

**E.L.C.A NO 10 OF 2014**

**FORMERLY KERUGOYA E.L.C NO 54 OF 2014**

**ASHA AKUMU JUMA.....PLAINTIFF**

**VERSUS**

**JOHN NTHUMBI KAMWITHI.....DEFENDANT**

**RULING**

**INTRODUCTION**

In this application, I am required to give a ruling in a matter which had been argued inter-partes before the high court (*Mr Hon. Justice Olao*) at Kerugoya. The application was for stay of execution of the magisterial ruling dated 18<sup>th</sup> July, 2013. In that ruling, the plaintiff/applicant was ordered to deposit Ksh 300,000 as security for costs. The court below ordered that the deposit be executed within two months failing which thereafter the suit would be dismissed. It is important to point out that the ruling of the lower court is based on *Order 26 Rule 5 of the Civil Procedure Rules of 2010*.

**The Case for the Plaintiff/Applicant**

The plaintiff has applied for stay of execution in this court. According to her, she has filed an appeal in this court being Civil Appeal No. 42 of 2013 against order of the lower court. In her memorandum of appeal, she has set out five grounds of appeal. According to her, the learned acting Senior Principal Magistrate erred in law and in fact in ordering security for costs in favour of the respondent, which she says is contrary to the law. He further erred in law and in fact in ordering for the dismissal of the suit if the appellant did not deposit security for costs within two months from the date of his order which she has also stated to be contrary to the law. She has also stated in grounds 3 and 4 that the magistrate's order contravenes the provisions of *Article 159 of the Constitution of Kenya*. Furthermore, he has also alleged that the learned magistrate was biased in making an order directing her to deposit security for costs.

It is clear from the ruling that the order directing the plaintiff to deposit security for costs in favour of the defendant was made before the trial of the suit which is still pending for hearing in that magisterial court. In computing the amount to be deposited as security for costs, the learned acting Senior Principal Magistrate used the *Advocates Remuneration Order of 2009 in particular Schedule VII* which governs the grant of costs in the magisterial subordinates courts.

**The Case for the Defendant/Respondent**

The defendant has opposed the application for stay of execution pending the appeal in the High Court. He has stated that the plaintiff locked the rental premises for 15 months, that is from March 2009

to May 2010 and the plaintiff was able to access the premises in May, 2010 after obtaining a court order to break into those premises.

In addition to the order to break into the premises, he also obtained an order directing the police to supervise the breaking and taking the inventory of the movable goods that were to be collected from those premises. He says that the rent for this 15 months at the rate of Ksh 6,000/- per month totalled Ksh 90,000/-. In this regard, it is important to mention that he sought and was granted leave to amend his defence in which he included a counterclaim for the sum of ksh 90,000/-.

According to him the intended appeal would not be rendered nugatory if the order for the deposit of the security in the sum of Ksh 300,000 is complied with.

Furthermore, he says that if the same is not stayed pending the hearing of the appeal and in the event that the appeal succeeds, the plaintiff can always have her security back. Finally, the defendant has stated that he will be greatly prejudiced if no security is deposited in court because he does not know the plaintiff's place of residence and he also does not know any of her properties from which he can recover the Ksh 90,000 in the counterclaim together with costs if the trial suit is dismissed and the defendant's counterclaim succeeds. The reason he gives is that the plaintiff no longer lives in Embu.

### **The Applicable Law**

The law that governs the grant of orders for stay of execution pending appeal is set out in **Order 42 of Rule 6 of the Civil Procedure Rules of 2010**. In terms of those provisions the fact that an appellant has lodged an appeal does not operate as stay of execution or proceedings under a decree or order appealed from. The court whose order is appealed against may grant a stay of execution if sufficient cause is established. It may also be granted by the court to which the appeal lies, if the trial court has refused to grant the same.

In considering the grant of an order of stay of execution, the court is guided by the interests of justice. Such an order may be granted if the court is satisfied that substantial loss may result to the applicant unless the order is granted. It must also be satisfied that the application has been made without unreasonable delay in terms of **Order 42 Rule 6(2)**.

According to the case of **Butt v Rent Restriction Tribunal (1982) KLR 417**, the power of the court to grant or refuse an application for stay of execution is a discretionary power. This discretionary power must be exercised in such a way as not to prevent an appeal. That court went further to state that stay must be granted so that an appeal may not be rendered nugatory should the appeal be successful. It may only be refused if there is an overwhelming hindrance to its grant.

Finally, the court stated that it may order security for costs upon application by either party failing which an order for stay will lapse.

### **Issues for Determination:**

In the light of what I have stated above, the issues for determination in this application are as follows:

1. Whether or not the plaintiff has made out a case for the grant of an order of stay of execution.
2. Who should bear the costs of this application.

### **Evaluation of the Facts, the Law and Findings:**

In the light of the foregoing matters, I find that the plaintiff/applicant has made out a case for the grant of suit and execution in terms of **Order 42 Civil Procedure Rules of 2010**. She has an arguable appeal against the magisterial order appealed against. The plaintiff in her memorandum of appeal has

raised weighty issues of law which merit consideration by an appeal court. The memorandum of appeal shows that it is not a frivolous appeal. If stay is not granted, the pending appeal may be rendered nugatory.

### **Verdict and Disposal Orders**

In the light of what I have mentioned above, it is ordered as follows:

1. An order of stay of execution is hereby granted pending the hearing and determination of the appeal.
2. Costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>th</sup>** day of December **2014**

In the presence of M/S Thungu holding brief for Mr Okwaro for the respondent

No appearance for Appellant/applicant

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**