



**JEREMIAH MWANZA.....APPELLANT**

**VERSUS**

**DANIEL KAKUI KIOKO.....RESPONDENT**

**RULING**

1. The Application before the Court is dated **2<sup>nd</sup> December, 2010** (“Application”). It prays that this Court sets aside the orders of stay granted by the **Senior Resident Magistrate’s Court at Makueni on 17/11/2010** and direct the Appellant/Respondent (the original defendant and judgment-debtor in Civil Suit No. 42 of 2007) (hereinafter, “Respondent”) to pay the judgment debt or face execution. In the alternative, the Respondent/Applicant (the original plaintiff and judgment-debtor in Civil Suit No. 42 of 2007)(hereinafter, “Applicant”) requests that the Respondent be required to provide security for the due performance of the decree appealed from by depositing the decretal sum in an interest earning by the advocates jointly.

2. The Application is supported by the Supporting Affidavit of the Applicant sworn on **2<sup>nd</sup> December, 2010**. The Applicant contends as follows:

- a. That the Respondent filed the appeal in **June 2010** but has taken no steps to prosecute it;
- b. That the stay of execution granted by the Senior Resident Magistrate was granted after inordinate delay and without any just terms as to security;
- c. That the decree, the subject matter of the appeal is a money decree and that therefore no irreparable harm will be suffered by the Respondent if he is ordered to pay it; and
- d. That the effect of the state of affairs is to unreasonably and without good reason deny the Applicant the fruits of his judgment.

3. The Respondent opposes the application and responds to each of the Applicant’s contentions thus:

- a. That he diligently sought to perfect and prosecute the appeal. The Respondent avers that the delay in prosecuting the appeal has not been of his making but is caused, first, by a delay in getting the typed proceedings, and then in getting the appeal admitted at the High Court. To this last point, the Applicant responds that the appeal was filed under the old Civil Procedure Rules when there was no need to admit appeals.
- b. That the stay was applied for promptly and granted justly by the Senior Resident Magistrate.
- c. That the decree is not purely monetary; the decree also ordered the eviction of the Respondent from the disputed land – a fact which would cause him substantial loss.

4. The parties appeared before *Justice Kihara Kariuki* on **10/03/2011** when they agreed to canvass the Application by way of written submissions. **On 19/05/2011**, the parties appeared before **Justice Kihara Kariuki** again and confirmed that they had filed their written submissions. Ruling was slated for 27/09/2011 but by then, *Justice Kihara Kariuki* had left the station. The matter was placed before me for a mention on 25/11/2011. Both parties, through their counsel, requested for a ruling based on the record as it stood.

5. The legal principles governing the granting of a stay of execution of a decree when the Application was filed were laid out in **Order XLI, Rule 4(2)** of the **Old Civil Procedure Rules** (which is exactly the same as **Order 42, rule 6(1)** of the New Rules. It provides:

i. “(2) No order for stay of execution shall be made under sub-rule (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

ii. 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.”

6. The various cases applying this legal provision, some of which have been cited by the advocates for both parties are unanimous in the conditions for grant of a stay of execution pending appeal:

a. That there is sufficient cause for the grant of the order for stay;

b. That substantial loss may result to the judgment-debtor unless the order is made;

c. That the application for stay was made without unreasonable delay;

d. That any security ordered by the court for the due performance of such decree or order must be supplied by the judgment-debtor.

7. The same principles govern an application to set aside a stay of execution.

8. For the Respondent, it has been submitted that there is sufficient cause to retain the stay because he would suffer substantial loss if the same is lifted. The loss would include loss of his welding business which he says he carries out in the suit property because the decree includes an order for eviction. He is also apprehensive that if he pays the decretal amount, he might not be able to recover the same from the Applicant if his appeal is successful hence rendering his appeal nugatory. Finally, the Respondent indicates that he is willing to provide reasonable security “within reasonable time as the court may direct.”

9. While not bound or even required to give deference to the decision by the Learned Senior Resident Magistrate, I have taken into account that the Learned Senior Resident Magistrate had, upon due consideration, deemed it fit to grant the stay. I have also taken into account that the decree covers more than monetary damages. Execution of the decree is, therefore, likely to result in substantial loss to the Respondent.

10. On the issue of substantial loss, the Respondent has also argued that he is apprehensive that if the decretal sum is paid to the Applicant, he might not be able to recover it if he prevails on appeal. He is uncertain about the Applicant’s financial status. The Applicant did not address the issue at all and offered no reassurances about his ability to repay the decretal amounts if paid. Since the Respondent raised the concern, it was incumbent upon the Applicant to place on the record evidence of his ability to refund the decretal sum if he does not prevail on appeal. As the Court of Appeal has stated in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (CA No. NAI 238 OF 2005 (UR 144/2005) in elaborating analogous legal principle:

(a)The Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has.

Hence the burden shifted to the Applicant to demonstrate that the Respondent would not suffer substantial loss if the order for stay is not granted. In my view, the Applicant failed to do so.

11. Finally, I have taken into account the offer by the Respondent to comply with an order to provide security if ordered by the Court. I have also concluded that the Respondent has not been tardy or negligent in the prosecution of the appeal or in seeking the original stay of execution. The Applicant's complaint is that the Respondent waited for four months to seek the order for stay. That is easily explained by the fact that no decree had been extracted and therefore there was no credible fear of execution. The Application for stay was filed soon after the decree was extracted.

12. In the circumstances, I order that the stay of execution will remain in place subject to the following conditions:

a. The Respondent (**Jeremiah Mwanza**) to deposit the decretal sum in an interest earning account held jointly by both advocates within fourteen (**14**) days from the date hereof the same to act as security for the due performance of the decree appealed from;

b. Failure to strictly adhere by the terms of this order will cause the stay of execution to lapse automatically.

13. Costs of this Application shall abide with the outcome of the Appeal.

**DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.**

---

**J.M. NGUGI**  
**JUDGE**