



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL APPEAL 148 OF 2010**

**GEOFFREY MUTHINJA.....APPELLANT**

**VERSUS**

**BARNABAS KIMATHI .....RESPONDENT**

**RULING**

The applicant herein by an application dated 15<sup>th</sup> February, 2012 brought under Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules seeks the following orders:-

- 1. That this honourable court be pleased to order stay of execution of decree, order and or judgment in CMCC No.23 of 2005 pending the hearing and determination of this appeal.**
- 2. That the court be pleased to order any further orders and conditions pursuant to Order 42 Rule 2(b) on reasonable terms and reasonable period.**
- 3. That this application do abide by the results of this appeal.**

The application is grounded on the following grounds:-

**(i) This application be and is hereby certified urgent.**

**(ii) That there be an order of temporary stay of execution of the decree, order and judgment of the lower court in CMCC NO.23 of 2005 pending the hearing and determination of this application interpartes on condition that the applicant do deposit in court a sum of Kshs.200,000(Two hundred thousand only) within a period of 45 days, in default execution to proceed.**

**(iii) That the application be served upon the respondent for interpartes hearing on 8<sup>th</sup> May, 2012.**

The application is supported by an affidavit of the applicant dated 15<sup>th</sup> February, 2012 in which affidavit the applicant has stated as follows: That the applicant was the plaintiff in CMCC No.23 of 2005. That the Respondent upon filing defence he also filed a counterclaim. That the applicant was owner of motor vehicle KAM 173R Nissan Matatu which collided with Respondents motor vehicle registration No.KPR 848 along Meru-Nanyuki Road. That after trial, the trial court gave judgment on 29<sup>th</sup> November,

2010. That applicant being aggrieved by trial court's judgment preferred this appeal. The applicant content that his appeal has good chances of success. He has further stated that he has been advised that the court has discretion to order conditional stay or order deposit of security and that the applicant is ready to abide by any reasonable condition that the court may direct within a reasonable time.

The appellant has further stated that if execution proceeds he is likely to suffer irreparable loss and damage incase his appeal succeeds either fully or in part. The applicant has stated that the respondent has taken out Notice to Show Cause for the decretal sum plus costs as per annexed copy of NTSC marked GM-02. The decretal amount as per decree(GM-02) is Kshs.393,240/- plus costs of Kshs.61,695.

The respondent filed a replying affidavit dated 23<sup>rd</sup> February, 2012 opposing the applicant's application. The respondent has in his affidavit dated 23<sup>rd</sup> February, 2012 stated as follows: That the applicant's application dated 15<sup>th</sup> February, 2012 has been made with unreasonable delay to the judgment in Meru CMCC NO.23 of 2005 which was made on 29<sup>th</sup> November, 2010. The respondent further averred that he is capable of refunding the decretal amount in Meru CMCC No.23 of 2005 in case the appellants appeal succeeds.

He averred therefore the appellant will not suffer substantial loss in case the orders sought in this application are not granted. He further contended the appellant has not demonstrated what loss he is likely to suffer in case the order of stay of execution of the decree in Meru CMCC No.23 of 2005 is not granted.

When the matter came up for hearing the learned Counsel Mr. Ondari for applicant relied on grounds on the face of the Notice of Motion and the supportive affidavit. He submitted that the appellant has arguable appeal and further submitted that pursuant to the court's Order dated 16/2/2012 the appellant has deposited the security of Kshs.200,000/= as per court receipt No.B 568768 of 30/3/2012.

Mr. J. G. Gitonga, the learned Counsel for the respondent opposed the applicant's application. In doing so he relied on the respondent's replying affidavit dated 23/2/2012. He submitted that the appellant/applicant has not satisfied the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules. He argued that the applicant has not shown he would suffer substantial loss if the orders sought are not granted.

He argued that the respondent is capable of refunding the decretal sum incase appellant's appeal succeeds. He further submitted that there has been unreasonable delay in bringing up this application since the lower court judgment had been delivered on 29/11/2010. He argued the delay is of a period over 1 year. He concluded by praying that the application be dismissed with costs.

Mr. Ondari the learned Counsel for the applicant on the other hand, in reply, pointed out that there has been no unreasonable delay. He submitted judgment was delivered on 26/11/2010 and appeal was filed on 20/12/2010. That the respondent moved court for execution in February, 2012 and as such the applicant was not obliged to move court for stay of execution unless there was a threat to attach his properties.

The issue for consideration in this application is whether the applicant has met the conditions for granting stay of execution of the decree, order and/or judgment in CMCC 23 of 2005 pending hearing and determination of this appeal.

The conditions for granting stay of execution in an appeal are set out under Order 42 rule 6(2) of Civil Procedure Rules 2010 which provides as follows:-

***(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***

***(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.***

In view of the above-mentioned order for an application of stay of execution to be granted, the applicant has to satisfy the following conditions:-

***(1). That substantial loss may result to the applicant unless the under is made.***

***(2). That application has been made without unreasonable delay.***

***(3). That security has been offered for the due performance of such a decree or order.***

In the case of New Stanley Hotel Limited – V- Arcade Tobacconist Limited(1986) KLR 757. Porter J, as he then was held:

***“ Before making an order staying the execution of the judgment, the court has to be satisfied that substantial loss may result to the applicant unless the Order was made and that the application was made without unreasonable delay.”***

The respondent in his replying affidavit dated 23/2/2012 under paragraph 4 stated as follows:-

***“4. That I am financially capable of refunding the decretal amount in Meru-CMCC No.23 of 2005 in case the appellants appeal succeeds. The appellants therefore will not suffer substantial loss in case the orders sought in the aforesaid application are not granted.”***

The respondent has not disclosed his occupation or profession, his income or his assets. It is not always enough for one to aver that he is financially capable of refunding the decretal amount. One has to go further and disclose his financial might as well as list properties registered in his name, show their value and disclose any liabilities for court to be satisfied that indeed the party is financially capable before the court comes to the conclusion that the applicant will not suffer substantial loss in case the orders for stay are refused and he proceeds to succeed on appeal.

In the case of BLUE SHIELD INSURANCE CO. LTD – V – GEORGE THURANIRA Misc. application No.3 of 2008(Meru)Hon. Justice W. Ouko stated as follows:-

***“It is applicant’s Contention that the respondent does not have the means to refund to it if it was paid to him and the appeal was to be allowed. The burden was therefore on the respondent to rebut that claim. That is impecunious. He instead has merely stated that he is a prosperous businessman. That is not sufficient. He ought to have gone further than that by disclosing either his income or any form of asset in his name. See ABN AMRO BANK – VS – LE MODE FOODS LTD Civil application No.Nai 15 of 2002. I come to the conclusion that the applicant’s apprehension is justified.”***

I am persuaded by the above-mentioned authority and I am in an agreement with the holding of the court. In considering this application I have to consider whether the applicant’s appeal would be rendered nugatory unless stay sought is granted. The respondent in his replying affidavit under paragraph 4 has averred that he is financially capable to refund the decretal amount in case the applicant succeeds in the appeal. The respondent’s averment under paragraph 4, as I have already stated is insufficient for the court to conclude that the respondent has substantial means to pay back if the applicant is successful in his appeal. Further I find and hold in a situation where the respondent is capable of refunding the decretal sum in case the appeal succeeds, in money decree the appeal cannot be rendered nugatory by allowing the execution to proceed and more so where the respondent is in a position or has substantial means to refund the money back once the applicant succeeds in the appeal.

In the instance case the applicant has demonstrated that substantial loss may result to him unless the orders sought are granted. He has further demonstrated that immediately the respondent threatened to execute he moved to court for appropriate orders without unreasonable delay.

Lastly the applicant has deposited kshs.200,000/- with court as security for due performance of the decree or order.

I therefore find the conditions for granting stay of execution as set out under Order 42 rule 6(2) of the Civil Procedure Rules has been met. In the end the applicant's application dated 15<sup>th</sup> February, 2012 is allowed. Costs of the application shall be in the cause.

Dated, signed and delivered at Meru this 24<sup>th</sup> day of May, 2012.

**J. A. MAKAU**

**JUDGE**

***DELIVERED IN OPEN COURT IN PRESENCE OF:***

1. Mr. Ondari for the applicant
2. Mr. J. G. Gitonga for the respondent

**J. A. MAKAU**

**JUDGE**