



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 464 of 2002

MARY MUMBI NDERITU.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. By a notice of motion dated 15th December, 2009, Mary Mumbi Nderitu, (hereinafter referred to as the applicant), has moved this court for an order of stay of execution of the judgment delivered in Nairobi CMCC No.1308 of 2002, pending the hearing and determination of the appeal, which the applicant has filed in this court. The applicant also seeks an order for a ruling issued on 23rd November, 2009 in the same suit to be set aside.
2. From the grounds stated on the face of the application and the affidavit of Mary Mumbi Nderitu, it is evident that the applicant was on 23rd November, 2009, granted an order in the lower court for stay of execution of the decree pending appeal, on condition that she deposits the full decretal amount then standing at Kshs.664,476.10. The applicant pleads that she is just a housewife and therefore the order for deposit of the sum of Kshs.664,476.10 is oppressive, punitive and tantamount to refusing to grant her a prayer for stay of execution pending the hearing of the appeal. The applicant urges this court to order the deposit of reasonable security by allowing her to deposit the principal amount of Kshs.215,739/= only as security. The applicant further contends that she has an arguable appeal with high chances of success.
3. The respondent objects to the appeal through a replying affidavit sworn by its General Manager – Credit Remedial and General Services, Zipporah K. Mogaka. Mogaka depones that the applicant has been indebted to the respondent for over 10 years, and therefore the respondent should be allowed to execute the judgment granted by the lower court in its favour after a full hearing. Mogaka further depones that the respondent is a reputable banking institution with perpetual succession, and therefore able to refund the applicant any monies legally found to be due to her in the event that the applicant succeeds on appeal. The court was urged to dismiss the application as the applicant has failed to meet the provisions of Order XLI Rule 4(2) of the Civil Procedure Rules.
4. I have given due consideration to this application. Under Order XLI Rule 4(2), this court is obligated to issue an order of stay of execution pending appeal where the following circumstances have been satisfied:
 - (a) That substantial loss may result to the applicant unless the order for stay of execution is made; and
 - (b) That the application for stay of execution pending appeal has been made without unreasonable delay; and
 - (c) Such security as the court may order for due performance of the decree has been given by the applicant.
5. In this case, the applicant merely explains that unless the orders sought are granted, she will be denied an opportunity to pursue her appeal as she cannot raise the full decretal sum which currently stands at Kshs.664,476.10. No averment has been made that the respondent will not be able to refund the decretal sum to the applicant if she is successful on appeal. Indeed, the respondent is a reputable bank and the issue of its failure to repay the money does not arise.
6. The applicant has not established substantial loss, but is simply relying on her own inability to pay the decretal sum. Such inability cannot be an excuse for this court to grant an order for stay of execution. The court has an obligation to protect the interests of both parties. The respondent has a lawful judgment in its favour and what the applicant is asking this court to do is simply to protect the applicant from execution because she is unable to meet the decree.

7. The applicant is attempting to use her status as a housewife to elicit the sympathy of this court. Nevertheless, the applicant's status as a housewife is neither here nor there, as it does not excuse her from meeting her financial obligation. Indeed, it provides a good reason for her to be ordered to meet the requirement for security to demonstrate that she will be able to meet the decree. In this case, meeting the decree is not just payment of the principal sum which the applicant is offering to deposit as security, but the full decretal amount arising from the lower court's judgment.
8. I find that the applicant has failed to establish that substantial loss may result to her unless the order for stay of execution is granted. The applicant has also failed to demonstrate her ability and willingness to comply with the order for security for the performance of the decree. For the above reasons, I find no merit in her application. It is accordingly dismissed with costs.

Dated and delivered this 4th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Kamar H/B for Gichachi for the appellant/applicant

Ms Koske H/B for Milimo for the respondent

Eric - Court clerk