



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL APPEAL NO.61 OF 2010**

**JANEROSE MUGAMBI.....APPELLANT**

**VERSUS**

**JAMES MURITHI MWAI.....RESPONDENT**

**RULING**

The application is Notice of Motion dated 17<sup>th</sup> June 2010. It is brought under O.XLI R.4 and SSIA, 3A & 63 (c) & (e) CPA. It is seeking an order of stay of execution of the Decree issued in Meru CMCC No.38 of 2009 and all consequential orders pending the hearing and determination of this appeal.

The application is supported by grounds on the face of the application as follows:-

- i. That the Appellant/Applicant was condemned unheard;**
- ii. That the appeal raises solemn factual and legal issues with overwhelming chance of success;**
- iii. That the application has been brought timeously;**
- iv. That the Appellant stands to suffer substantial loss if this application is disallowed;**
- v. That the appellant implores the honourable court to uphold the overriding objective of doing justice by giving her a chance to defend herself;**
- vi. That the respondent has threatened to execute against the appellant;**

The application is also supported by an affidavit sworn by the Applicant Jane Rose Mugambi. The gist of the Affidavit is that the Applicant contends that she was condemned and hanged on account of a non service of any court process. That the Application to set aside the Exparte Judgment was declined by the trial court and thus this Appeal. She also contends that auctioneers sent by the Respondent stormed into her house intending to seize her household goods and they have threatened to return any time. The

Applicant has annexed a draft of defence.

The application is also supported by a supplementary affidavit in which the applicant has denied knowledge that a motor vehicle Reg. No. KBG 511L was auctioned as pleaded in the Replying Affidavit and she contends that the vehicle does not belong to her.

The Application is opposed. The Respondent James Muriithi Mwai has sworn a Replying Affidavit dated 23.6.2010. The gist of that Affidavit is that the Decree in this case has partially been executed for reason a vehicle seized from the Applicant was sold at a public auction and the sum of Kshs.600,000/= was realized. The Respondent has also sworn a Supplementary Replying Affidavit. The gist of the Replying Affidavit is that the Applicant transferred the vehicle KBG 551L on the 13<sup>th</sup> April, 2010 and it was the same vehicle which was seized in the execution of the Decree. The Respondent also contends that the cell phone number 0722686350 belong to the Applicant and that the advocate proved the same when they sent some through MPESA in which it was confirmed that the money had been sent to the Applicant.

I have considered the submission by Mr. Mbaabu for the Applicant. Mr. Mbaabu has urged the court to find that if the application is not granted the Applicant stands to lose because the decretal sum is substantial and that the economical means of the Respondent is unknown. Mr. Mbaabu also urged that the Application was brought within a reasonable time. He contends further that all the issues raised in the Respondent's Replying Affidavit have been adequately controverted by the Supplementary Affidavit of the Applicant.

I have considered the submission of Mr. Kiama for the Respondent. Mr. Kiama urged that since the decree in this case has been partially executed the stay sought should not be granted. Counsel also urged that the Respondent will suffer if the execution is not completed. He also urged the Applicant was not acting in good faith because she embarked on concealing her property. In order for the application for stay of an execution of a decree pending an appeal can be granted, the Applicant must demonstrate that she stands to suffer irreparable loss and or damage if the stay sought is not granted. It should also be demonstrated that the appeal would be rendered nugatory if the stay is not granted and that sufficient security for the due performance of the Decree has been given by the Applicant.

O41 R4 gives this court power to make an order for a stay of execution for sufficient cause shown but no such order should be made unless the condition set out in O41 R4 (2) are met. That order states as follows:

**“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.”**

The granting of an order of stay of execution is a discretionary matter and the court should take into account all the surrounding circumstances including the merit of the intended Appeal.

The Applicant has appealed against a decision of the lower court in which the court found that there was proper service of Summons to enter Appearance and that therefore the judgment entered in the lower court case was a regular judgment. I have looked at the Memorandum of Appeal which is filed herein. I do not wish to preempt the Appeal. However I am of the view that the Appeal is arguable and that the Applicant should be granted a chance to prosecute her Appeal. What the Applicant is complaining about is that she has been condemned unheard in that the Decree sought to be stayed in this Application arose out of an exparte judgment entered against her without proper service of the Summons to enter Appearance.

I have also considered the other circumstances of the case including the fact that the Decree has been

executed in part. I do not think that there was a partial execution of the Decree is a good reason enough to decline the Application.

The Applicant has annexed a draft defence from the suit before the lower court. That defence inter alia has pleaded particulars of negligence against the Respondent. Those particulars are very strong and if proved would at least justify the trial court to apportion contribution in terms of liability against the Respondent. The defence is therefore reasonable and arguable.

The Applicant has offered to abide by any terms of security the court may order if this Application is granted.

Having carefully considered this Application I am satisfied that for the reasons given herein above that this Application ought to be granted. I therefore grant the Application dated 17<sup>th</sup> June, 2010 in the following terms:-

- 1. A stay of execution of the Decree issued in Meru CMCC No.38 of 2009 on the 4<sup>th</sup> of June 2010 and all consequential orders be and is hereby issued pending the hearing and determination of this Appeal.**
- 2. The Applicant shall deposit the decretal sum of Kshs 2 million in an interest earning account in the joint names of the Applicant and Respondent's advocates within 40 days from the date hereof.**
- 3. The costs of this Application shall abide the costs of this appeal.**

Dated at Meru this 3<sup>rd</sup> day of December 2010.

**LESIIIT J**

**JUDGE**

3<sup>RD</sup> December 2010

Coram:

Lesiit J.....Judge  
Kiriimi/Mwonjaru ..... Court clerks  
Mr. Mbaabu ..... For the applicant  
Mr. Kiama..... For the respondent

Ruling was read, signed and delivered in open court this 3<sup>rd</sup> December 2010.

**LESIIIT J.**

**JUDGE**