



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 246 of 2009**

**FRED MWANGO.....1<sup>ST</sup> APPELLANT**

**CATHERINE MWANGO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PROF. MUNYAE MULINGE.....1<sup>ST</sup> RESPONDENT**

**DR. MARGARET M. MUNYAE.....2<sup>ND</sup> RESPONDENT**

**E. MWAKA MUSAU t/a MWAKA MUSAU CONSULTANTS.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. By a judgment delivered on 29<sup>th</sup> April, 2009 by a Senior Principal Magistrate in Nairobi CMCC No. 3258 of 2007, Fred Mwango and Catherine Mwango (hereinafter referred to as the applicants), were required to pay the sum of Kshs.1,100,000/= together with interest at Court rates, and costs of the suit, to Prof. Munyae Mulinge and Dr. Margaret M. Munyae (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents). Being aggrieved by that judgment, the applicants lodged an appeal in this Court on 18<sup>th</sup> May 2009.
2. A day later, by a Notice of Motion dated 19<sup>th</sup> May, 2009, the applicants moved this Court seeking *inter alia* an order of stay of execution of the judgment and decree, and all consequential orders in Nairobi CMCC No. 3258 of 2007 pending the hearing and determination of their appeal.
3. The motion is supported by an affidavit sworn by Catherine Mwango in which she depones that the applicants have an arguable appeal with high chances of success. The applicants contend that the decretal sum is of such magnitude, that unless the orders sought are granted, the applicants will be forced to dispose of their matrimonial home to raise the money. The applicants therefore plead that they will suffer substantial loss unless the orders sought are granted.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have objected to the application through a replying affidavit sworn by Prof. Munyae Mulinge. Prof. Mulinge depones that the applicant's appeal has absolutely no chances of success. He maintains that the appeal has no merit as there was evidence and admissions made in Court by the applicants, and acts or conduct openly ratifying the actions of their agent the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that there is nothing to show that the applicants will suffer substantial loss if they are forced to pay the decretal sum, the amount being in any case a refund of amounts unjustly earned by the applicants.
5. The respondents further maintained that they were both in gainful employment and financially able to refund the decretal sum in the event that the applicants succeed in their appeal. The respondents contend that the applicants have conceded through the affidavit of Catherine Mwango, that they would have difficulties raising the decretal sum, and therefore in the likely event that the appeal is unsuccessful, the 1<sup>st</sup> and 2<sup>nd</sup> respondents would have difficulties recovering the decretal sum. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that there is nothing to warrant the Court exercising its discretion in the applicant's favour and therefore an order for stay of execution would amount to denying the 1<sup>st</sup> and 2<sup>nd</sup> respondents the fruits of their judgment.
6. There was no replying affidavit or grounds of opposition which were filed on behalf of the 3<sup>rd</sup> respondent. The Court was informed from the Bar that the 3<sup>rd</sup> respondent was not objecting to the application.
7. I have given due consideration to this application, the affidavit in support and in reply, the annexures thereto and the submissions of counsel. Much was said about the merits and demerits of the pending appeal. Nevertheless, I do not find it appropriate to comment on that as it is not within my mandate at this stage to determine the merits of the appeal. Suffice it is to note, that from the contending arguments made before me, it is evident that the appeal does raise arguable issues.

8. As I stated in *University of Nairobi & Another vs. Peter Kiplangat Tum (2008) eKLR* which was cited by the applicant's counsel.

*“Order XLI Rule 4(2) of the Civil Procedure Rules is very explicit as to the matters the Court should take into account when considering an application for stay of execution pending appeal. First the Court must be satisfied that there is sufficient cause for order of stay of execution of the decree to issue. Ordinarily this is established by the presence of an arguable appeal. Secondly, the Court must be satisfied of the following: -*

- (a) That the applicant may suffer substantial loss unless the order is made;*
- (b) That the application has been made without unreasonable delay;*
- (c) That such security as the Court may order for the due performance of the decree or order has been given by the applicant.”*

9. As already observed above, the first requirement has been met. The application has also been brought without undue delay having been brought just a day after the appeal was filed, and the appeal having been filed within the statutory period.

10. The applicants have claimed that they will suffer substantial loss if the order of stay of execution is not granted as they will have to dispose of their matrimonial home to raise the required amount. A copy of the decree was not availed to this Court, nevertheless it is evident that the decree is well in excess of the principal sum which was Kshs.1.1 million. Obviously that is not a small amount for an individual. However, this Court has the responsibility to balance the interest of both parties. Pursuant to orders made by Honourable Waweru, J. the applicant did deposit a sum of Kshs.250,000/= in Court as interim security.

11. Taking into account the decretal sum, I find it necessary to increase the amount of the security that should be provided by the applicant. I will therefore grant a conditional order for stay of execution on the following terms:

- (i) That the applicants shall deposit half the decretal sum into an interest earning account in the joint names of the advocates for the applicants and advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondents within 45 days from the date hereof.
- (ii) That the sum of Kshs.250,000/= deposited into Court, by the applicants shall be released to the applicants' counsel to comply with condition No.(i) as aforestated.
- (iii) That the applicants shall file and serve a record of appeal within 90 days from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.
- (iv) That if the appeal herein is not disposed of within 12 months from the date hereof, the order for stay of execution shall lapse unless otherwise extended by the Court.
- (v) Costs of the application shall be in the cause.

Those shall be the orders of the Court.

**Dated and delivered this 29<sup>th</sup> day of July, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Charagu holding brief for Odera for the applicant

Advocate for the respondent, absent