



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Appeal 85 of 2007**

**ONESMUS MBURU NJUGUNA.....APPELLANT**

**VERSUS**

**SAMSON KITIRE KUNA *alias* SAMSON KETER.....RESPONDENT**

**RULING**

The appellant, Onesmus Mburu Njuguna was aggrieved by the ruling of the trial magistrate in Nakuru CMCC No.2049 of 2004 which required him to deposit the entire decretal sum of Ksh.140,000/= as security pending the hearing and determination of the appeal filed herein. The appellant thereafter filed a notice of motion under the provisions of Order XLI Rule 4 of the Civil Procedure Rules seeking to stay the execution of the judgment and the decree of the subordinate court pending the hearing and the determination of the appeal. The grounds in support of the application are on the face of the application. The appellant stated *inter alia*, that the order by the trial magistrate that he deposits the entire decretal amount as security pending the hearing and determination of the appeal was oppressive to him. He stated that as a taxi operator, he was not able to raise the said decretal sum as ordered by the subordinate court. He pleaded with the court to instead accept the deposit of a title in respect of parcel No.Kiambogo/Kiambogo Block 2/2024 (*Mwariki*) as security pending the hearing and determination of the appeal. The appellant pleaded with the court to allow him to deposit the said substituted security so that he could pursue his appeal, which in his view, has a high chances of success. The application is supported by the annexed affidavit of the appellant.

The application is opposed. The respondent, Samson Kitire Kuna alias Samson Keter swore a replying affidavit in opposition to the application. In the said affidavit, the respondent deponed that the appellant had advanced no ground that would persuade this court exercise its discretion in his favour and grant him stay of execution of the decree of the subordinate court on the terms that he proposed as security. He deponed that the appellant had made the current application with a view to frustrating him from realizing the fruits of his judgment after he failed to abide by the order of the subordinate court that he should deposit the entire decretal sum pending the hearing and determination of his intended appeal. The respondent further deponed that the security offered by the respondent was not acceptable because the appellant had not exhibited to the court the actual status of the said parcel of land. It was the view of the respondent that the present application had been presented to this court with a view of delaying the just determination of the case. He asked the court to dismiss the appellant's application with costs.

At the hearing of the application, I heard the rival submissions made by Ms. Njoroge for the appellant and Mr. Rodi for the respondent. I also read the pleadings filed by the parties in support of their opposing positions. The issue for determination by this court is whether the appellant established a case to enable this court grant him the order of stay of execution of the decree of the subordinate court pending the hearing and determination of the appeal. The appellant filed a similar application before the subordinate court, which application was granted on conditions that the appellant found to be onerous. The appellant therefore renewed his application for stay of execution of the said decree to this court. **Order XLI Rule 4(1) of the Civil Procedure Rules** allows a party who is aggrieved by the decision of a subordinate court when considering an application for stay of execution, to renew his application to the appellate court. The principles to be considered by this court is determining whether or not to grant an application for stay of execution are well settled. In **Butt vs Rent Restriction Tribunal [1982] KLR 417** at page 419, Madan JA, held that;

***“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if***

*successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being rendered nugatory...”*

In the present application, the appellant was dissatisfied with the conditional stay of execution granted by the subordinate court. He complains that the order that he deposits the entire decretal sum in court was onerous in view of his limited source of income. He urged this court to consider an alternative property as security pending the hearing and determination of the appeal. The respondent on the other hand is opposed to the appellant depositing the proposed security. The respondent is of the view that the status of the said security is unknown and cannot therefore be accepted by the court.

The judgment against the appellant is a money decree. In the circumstances, it would be fair and just that the security to be deposited should be in form of money and not a title deed of a parcel of land. I think it would be unjust to the respondent if this court were to accept the proposal by the appellant that he deposits a title deed instead of cash as security pending the hearing and determination of the appeal. The purpose of security is to secure the interests of a respondent pending the hearing of the appeal. In the instant application, the respondent was awarded a money decree. The security should therefore be in form of money. I therefore hold that the security offered by the appellant is not appropriate for the circumstances of this case.

I have however considered that the condition imposed by the trial magistrate may be onerous to the appellant to an extent that it amounts to the said court denying the appellant his constitutional right of appeal. I will therefore set aside the said conditions attached to the grant of stay of execution by the subordinate court and substitute with an appropriate order of this court. The appellant is granted stay of execution pending the hearing and determination of the appeal. He shall deposit half of the decretal amount in a joint interest earning account in the names of the counsel of the parties to this suit in a reputable bank within fifteen (15) days of today's date. In default thereof, the respondent shall be at liberty to execute. The costs shall be in the cause.

**DATED at NAKURU this 23<sup>rd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**