



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ELC APPEAL NO. E001 OF 2021

LUCY WAMBUI MWANGI.....APPELLANT

VERSUS

MONICAH WAMBUI MWANGI.....1ST RESPONDENT

BEATRICE WANGUI MWANGI.....2ND RESPONDENT

GRACE NJOKI MWANGI.....3RD RESPONDENT

ELIZABETH WAITHIRA MWANGI.....4TH RESPONDENT

RULING

The Appellant brought the application dated 13/9/2021 seeking to restrain the Respondents from executing the decree by her committal to civil jail for failure to pay the sum of Kshs. 168,327/=. At the time she filed the application the matter was scheduled to come up on 28/9/2021 for her to show cause why she should not be committed to civil jail for failing to pay that sum. The Appellant swore the supporting affidavit in which she deponed that she had filed a memorandum of appeal and while waiting for her appeal to be heard, the Respondents proceeded to take out a notice to show cause in Nanyuki Chief Magistrates Court ELC Suit No. 138 of 2018. She averred that she stood to suffer irreparable loss and damage if the Respondents were not restrained by the court. She attached a copy of the application for execution to her application.

The 1st Respondent swore the Replying Affidavit in opposition to the application for stay of execution. She denied that the Appellant stood to suffer any prejudice or substantial loss if her application were not allowed. She added that the application sought stay relating to the distribution of the assets of the Estate of the late Francis Mwangi Eustace. She maintained that the Respondents had a valid judgement and decree from the trial court and that this application for stay was intended to frustrate execution and deprive the Respondents of the fruits of their judgement. She pointed out that the Appellant had not furnished any security and that if the court were to stay execution of the decree, it would occasion an injustice to the Respondents. She attached copies of the decree dated 13/7/2021, certificate of costs for Kshs. 166,377/= dated 25/8/2021 and the notice to show cause dated 3/9/2021.

Before the application could be heard, the Appellant was arrested and committed to civil jail on 8/10/2021. On 13/10/2021 the court directed that the Appellant would be released for 12 days to enable her file her submissions on her application for stay of execution.

Parties filed submissions which the court has considered. The Appellant submitted that she was dissatisfied with the judgement of the trial court which she claimed contained errors regarding the assets of the Estate of the late Francis Mwangi Eustace. That some of those assets were transferred to her years before her husband died and that they ought not to form part of the assets of his estate. She urged that her appeal raised weighty issues meriting interrogation by this court. Further, that she had made a case for grant of the orders for stay of execution. She added that she had been in prison despite being old and that her appeal stood a high chance of succeeding. She maintained that she had met the conditions for the grant of an order for stay of execution.

The Respondents submitted that the application was limited to seeking stay of execution for non-payment of the party and party costs of Kshs. 168,327/=. They submitted that the Appellant had failed to demonstrate that she would suffer substantial loss or that her appeal would be rendered nugatory if she paid the party and party costs. They argued that the Appellant had failed to meet the conditions prescribed by Order 42 Rule 6 of the Civil Procedure Rules. The Respondents further urged that the application for stay of execution had already been overtaken by events and that granting it would not serve any useful purpose because execution of the decree had commenced. While relying on the decision in **Francis Kabaa v Nancy Wambui and Another [1996] eKLR**, the Respondents urged that there cannot be stay of taxed costs while urging the court to dismiss the application.

The issue for determination is whether this court should stay execution of the decree for costs issued by the trial magistrate by restraining the Respondents from causing the Appellant to be arrested and committed to civil jail. It is apparent from the decree issued by the trial court that the decree is not a monetary one and that the Appellant seeks to stay execution for costs.

Order 42 Rule 6 sets out the conditions which must be met before an order for stay of execution can be made. The application must be made without unreasonable delay and the court must be satisfied that substantial loss may result if stay is not granted. In addition, the applicant is to give security as the court may order for the due performance of such decree or order that may ultimately be binding on the applicant. From the documents exhibited by the Respondents, the Principal Magistrate delivered the impugned judgement on 13/7/2021 and the certificate of costs was issued on 25/8/2021. The instant application for stay of execution relating to the taxed costs was filed in court on 28/9/2021. Without the benefit of the court record of the proceedings which took place before the Learned Magistrate, it is difficult to tell whether the Appellant had notice of the taxation of the costs. The Appellant ought to have moved the court swiftly for orders to stay execution and further proceedings when the judgement was delivered on 13/7/2021. The court notes from its record that the Appellant filed another application on 10/8/2021 seeking stay of execution of the orders granted on 13/7/2021 but did not pursue the hearing of that application.

The Appellant has not furnished any security for the payment of the costs which were awarded to the Respondents. The court is not persuaded that substantial loss will result to the Appellant if an order for stay of execution is not issued by this court. If the Appellant succeeds on appeal the costs she will have paid would be refunded to her. The court declines to grant the orders sought in the application dated 13/9/2021.

DELIVERED VIRTUALLY AT NANYUKI THIS 27TH DAY OF OCTOBER 2021.

K.BOR

JUDGE

In the presence of:-

Lucy Wambui, the Appellant

Mr. Joseph Mwangi for the Respondents

Mr. Mahmoud Mohammed- Court Assistant