



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 1 OF 2008

JAMES KIRONCO ITUMA RWITO.....PLAINTIFF

VERSUS

MARY KINGORI.....1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

INTERNET DATA SERVICES LTD.....3RD DEFENDANT

RULING

1. Before the court is an application dated **26.8.2021** seeking for stay of execution pending hearing and determination of the appeal. The same is supported by an affidavit sworn on **26.8.2021** by **Mary Kingori**.
2. The grounds in support of the application are that an appeal has been made against the judgment rendered on 10.2.2020; the proceedings are yet to be supplied; the appeal has high chances of success; if stay is not granted, the substratum of the appeal shall be lost; the applicant is willing to offer security; there has been no inordinate delay; that the respondent is unlikely to be prejudiced; the execution is imminent; the respondent is not able to refund the amount should the appeal succeed.
3. The plaintiff has opposed the application through grounds of opposition dated 22.9.2021.
4. In her submissions, the applicant urges the court to find she has met the conditions under **Order 42 rule 6**. On substantial loss, she claims her assets have been attached and sold and the appeal will remain an academic exercise.
5. Secondly it is submitted the respondent has not specified the prejudice he will suffer.
6. Thirdly it is submitted the notice of appeal has been filed, proceedings have been sought though there has been delay on the part of the court in availing them.
7. Fourthly, it is submitted the respondent is not in a position to refund the sum and should not be entrusted with such a sum. He has not stated his financial standing and hence capacity to refund.
8. Reliance is made on ***Kenya Orient Insurance Co. Ltd –vs- Paul Mathenge Gichuki & Another [2014] eKLR*** on the proposition that the burden to prove financial capacity to refund shifts to the respondent once raised by an applicant while the legal burden remains on the applicant. This may include cash in bank and land.
9. Regarding security, the applicant submits her willingness to offer security through an interest earning account. Reliance is based on ***M.A. Koinange –vs- Joyce Gachuku & 2 Others [2015] eKLR, Jared Kiprotich Biwott and Another –vs- Jonathan Kibe [2020] eKLR.***
10. **Order 42 rule 6 of Civil Procedure** Rules provides for three parameters to be met by a party seeking stay of execution namely substantial loss, application is made without unreasonable delay and furnishing of sufficient security. There is no dispute judgment was rendered on 10.2.2020 subsequent to which a review order was made on 28.7.2021 as regards the liability of 2nd and 3rd defendants to pay costs. The applicant did not apply for stay until warrants of attachment were issued against her.
11. My finding is that there was inordinate delay in applying for stay. In any event the post judgment application was not on whether costs payable to the plaintiff were to be met by all the defendants. There was therefore no need for the applicant to await until action was taken

against her so as to apply for stay of execution.

12. Concerning substantial loss, in ***Kenya Shell Limited –vs- Benjamin Karuga Kibiru & another [1986] eKLR 410*** it was stated a party must substantiate this through empirical and documentary evidence. It not enough for the applicant to assert the amount is substantial. The amount is with regard to a deposit of purchase price which the applicant has kept with her for over 15 years. There must be good reason given why the respondent who has been thrown out of the premises should be kept away from his deposit for another extra day. The applicant in the trial court admitted receiving the money which assisted her and her son to undertake some business and eventually pay off the loan. It is within the court's knowledge that even after selling the property to the 2nd and 3rd defendants the applicant did not offer any refund to the plaintiff.

13. As regards the inability of the respondent to refund the sum in the event the appeal is successful, the applicant in her affidavit has raised some apprehension that the respondent may not be in a position to do so. The said fear was raised on oath. Unfortunately the respondent has not sworn an affidavit to counter that accusation and perhaps demonstrate his financial health.

14. In ***National Industrial Credit Bank Ltd. –vs- Aquinas Francis Wasike & Another [2006] eKLR*** the Court of Appeal took the view that once reasonable fear is expressed by an applicant of the inability to refund, the evidential burden shifts to the respondent to demonstrate the resources he has as per **Section 112** of the **Evidence Act**. The respondent has not discharged that burden, by way of counter-evidence.

15. As to the issue of security for the due performance of the decree in the event the appeal does not succeed, the applicant has offered security in terms of depositing the decretal amount in an interest earning account.

16. Over and above the conditions set under **Order 42 rule 6** the court must also look at the overriding objective set out in **Sections 1A, 1B** of the **Civil Procedure Act** and **Article 159 of the Constitution**.

17. Though the application was filed late and the applicant has not demonstrated any substantial loss to suffer, it is my finding that in the interest of wider justice, the application has merits. The same is allowed on the following terms:-

a. Stay be and is hereby granted for a period of one year from the date hereof.

b. Kshs. 2,000,000/= be deposited in interest earning account in a reputable bank in the joint names of the advocates for the plaintiff and the 1st defendant within 14 days from the date hereof.

c. The applicant to deposit Kshs. 350,000/= with the plaintiff's advocates as security for costs and costs for the auctioneer.

d. In default of any single condition, the stay orders to stand vacated.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Kurauka for respondent

Miss Masamba for applicant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE