



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL CASE NO. 13 OF 2019**

**ROBERT NZOMO MASILA ..... 1<sup>ST</sup> APPLICANT/RESPONDENT**

**CHARITY MARIGU KIKUMU .....2<sup>ND</sup> APPLICANT RESPONDENT**

**-VERSUS-**

**ANTHONY KITHUKU KATHYOLO and MARIETTA SYEVU SITA**

*(Suing As the Administrators of The Estate Of)*

**DANIEL NYAMAI KATUA ..... APPELLANT/RESPONDENT**

**RULING**

1. Before me is a Notice of Motion filed under section 1A, 1B, and 3A of the Civil Procedure Act (Cap 21) and Order 51, and Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders –

**1) (spent)**

**2) (spent)**

**3) That this Honourable court be pleased to grant an order of stay of execution of its judgment delivered on 29/07/2020 and the decree subsequent thereto, pending hearing and determination of the appeal.**

**4) That the costs of the application be provided for.**

2. The application has grounds on the face of the Notice of Motion. The grounds are that the intended appeal has high chances of success, and that if stay of execution is not granted the appeal will be rendered nugatory.

3. The application was filed with a supporting affidavit sworn by Robert Nzomo Masila one of the Applicants on 23<sup>rd</sup> September 2020 in which it was deponed that the Applicants were dissatisfied with part of the judgment and intended to file an appeal, that the appeal had good chances to success, that the Respondent was currently at liberty to execute if no stay orders were granted, and that the appeal would be rendered nugatory if the orders sought were not granted. Annexed to the affidavit is a copy of the judgment and a Notice of Appeal to the Court of Appeal.

4. In response, the Respondents filed a replying affidavit sworn by Anthony Kithuku Kathyoli on 5<sup>th</sup> October 2020 in which it was deponed that when judgment was delivered, the Applicant did not seek a stay of execution that the Notice of Appeal was filed outside the required timelines, that the Applicants had not demonstrated that they have an arguable appeal and that the application is only geared to ensuring that the estate of the late DANIEL NYAMAI KATUA did not benefit from the judgment herein.

5. The Applicants filed a further affidavit sworn on 19<sup>th</sup> November 2020 by Robert Nzomo Masila in which it was deposed that the judgment was delivered electronically hence they could not seek stay at that time, that the application was filed about one month of delivery of judgment, that the Respondents also filed a Notice of Appeal on 2<sup>nd</sup> October 2020 and thus could not say that the application herein was aimed at denying them the fruits of the judgment as they were also dissatisfied with the judgment by dint of their Notice of Appeal so filed.

6. The Applicants counsel M/s O.N Makau & Mulei filed written submissions on 22<sup>nd</sup> October 2020 in which they relied on the case of **Butt –vs – Rent Restriction Tribunal (1982) KLR 417, Elena D Korir –vs- Kenyatta University (2012) eKLR, Mukuma –vs- Abuoga (1988) KLR 645, Housing Finance Company of Kenya –vs- Sharok Kher Mohammed & Another (2015) eKLR and Kenya Commercial Bank –vs- Suncity Properties Ltd & 5 Others (2012) eKLR.**

7. The Respondent's counsel M/s Mutuku Wambua & Associates filed their written submissions on 9<sup>th</sup> December 2020 in which they relied on the case of **Masisi Mwita –vs- Damaris Wanjiku Njeri (2006) eKLR**, and the case of **Parmuat Oloihorua Kore –vs- Philip Santamo Wuantai & 4 Others (2019) eKLR** on the parameters for granting stay of execution under Order 42, Rule 6(1) & (2) of the Civil Procedure Rules.

8. I note that this court has already granted maintenance of status quo in the interim pending the determination of this application.

9. The parameters for consideration by the court in an application for stay of execution of judgment pending appeal are clearly spelled out under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, especially Rule 6(2) which states as follows –

**6(2) No order for stay of execution shall be made under subrule (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.

10. With regard whether the application herein was without delay, judgment was delivered on 29<sup>th</sup> July 2020 and the application was filed on 23<sup>rd</sup> September 2020 which is a period of more than two and a half months. The Applicants lodged a Notice of Appeal to the Court of Appeal on 28<sup>th</sup> August 2020 within the period of 30 days allowed by law and took a further 25 days thereafter to file the present application.

11. On the face of it, there appears to be an unexplained delay in the filing of the application. However, in view of the known prevailing COVID -19 pandemic situation globally and Kenya in particular which created a peculiar and uncertain situation to individuals and institutions, I find that there was no inordinate delay in filing the application.

12. The 2<sup>nd</sup> consideration is whether the Applicant will suffer substantial loss if the stay is not granted. In this regard, the Applicant deposed in his supporting affidavit sworn on 23<sup>rd</sup> September 2020 that the appeal will be rendered nugatory if the stay orders are not granted. The application is also based on grounds inter alia that the appeal has high chances of success.

13. I have not seen the Memorandum of Appeal, but only the Notice of Appeal. The matter however relates to a money decree to Kshs.76,500/= arising from a road traffic accident in which the High Court overturned the decision of the trial court and awarded a net figure of Kshs.328,000/=. In the circumstances of this money decree, this court can only grant stay subject to payment of part of the decretal amount.

14. With regard to provision of security, the Applicant in the further affidavit deposed that they will abide by any conditions set by the court. In my view that is an adequate undertaking on provision of security.

15. In the circumstances of this matter, I allow the application to the extent that I order as follows:-

***a) Stay of execution of decree or judgment is hereby granted by the court, subject to the Applicant paying the Respondent of the application part of the decretal amount of Kshs.150,000/= within thirty days from today.***

***b) If the Applicant fails to pay the Respondent the amount of Kshs.150,000/= above, the stay granted herein will automatically lapse on the expiry of the 30 days from today.***

***c) The costs of this application will follow the results of the appeal to be filed in the Court of Appeal.***

**Dated and delivered this 3<sup>th</sup> day of March 2021, in open Court at Makueni.**

**GEORGE DULU**

**GEORGE.**