



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CIVIL CASE NO. E002 OF 2020

YOBESH T. TINEGA.....APPLICANT

- VRS -

GERTRUDE WAKIO NYANGE & PETER ONDARI OMAYO (Suing

as the Legal Administrators of the Estate of FRANCIS NYAGWA

CHIOMAYO (Deceased).....RESPONDENTS

RULING

The applicant filed an application seeking orders that there be a stay of execution of the judgement and decree issued on the 29th September 2020 in Nyamira CMCC No. 128 of 2017 pending hearing of the Notice of Motion dated 16th November 2020; that there be a stay of further execution of the warrants of attachment dated 11th September 2020 and the proclamation dated 12th November 2020 issued pursuant to the judgement and further that the court be pleased to grant leave to file an appeal against the judgement of the trial court delivered on 29th September 2020 out of time.

In response to the application Counsel for the respondents filed a replying affidavit contending that the application is an afterthought since the applicant had 30 days to settle the decretal sum but defaulted forcing the respondents to instruct Hegeons Auctioneers to proclaim the applicant's moveable property to recover the decretal sum and it is only pursuant to the auctioneers knock that the applicant has awoken from slumber to file the instant application. Counsel further contended that the application is maliciously brought to delay and frustrate the respondents from enjoying the fruits of their lawful judgement and the same should be dismissed with costs.

When the application came up for hearing on 3rd December 2020 the parties took directions that the same be canvassed by way of written submissions.

The issues for determination in the application are: -

- a. Whether the applicant has satisfied the conditions for grant of stay of execution.**
- b. Whether the applicant is entitled to leave to file an appeal out of time.**

This application is brought pursuant to **Order 42 Rule 6 (2) of the Civil Procedure Rules** which sets the conditions a party must meet before they can obtain a stay of execution. The said requirements are that: -

- a. A party must demonstrate that they stand to suffer substantial loss unless the order sought is granted.**
- b. That the application has been made without unreasonable delay.**
- c. That the applicant has given security for the due performance of the decree.**

In the case of **Machira t/a Machira & Co Advocates v East African Standard (No 2) [2002] 2 KLR 63** Kuloba J held and I agree with him: -

“1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended

appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interests of one party.

2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage.

3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.

4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.

5. In this kind of applications for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars.

6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.

8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.....”

Similarly, in the case of **Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema [2012] eKLR Odunga J** held: -

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgement and that would be denying a successful litigant of the fruits of judgement which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

In this case it's the applicant's contention that the decretal sum, being Kshs. 7,303,492.80/=, is a substantial amount and that the respondents are men of straw who may not be in a position to refund the same should the same be paid to him and the appeal succeeds. Counsel for the respondents contends that this submission is discriminatory. I do not agree with him. The applicant having demonstrated that the respondents may not be in a position to refund the decretal sum the onus fell upon the respondents to prove that indeed they are in a position to do so in the event that the appeal succeeds. I am not persuaded that requiring that of the respondents amounts to discrimination. The decretal sum is indeed substantial and were the respondents not to be in a position to refund the same it would be lost and the applicant would suffer substantial loss. Secondly, the applicant has demonstrated that he is willing to deposit security. However, the nature of that security ought to be left to this court to determine but it is not in the discretion of the applicant. It is not for the applicant to dictate what security he wishes to deposit.

As to whether the application was brought without unreasonable delay this court was not furnished with the proceedings of the lower court and it is therefore not in a position to determine whether judgement was to be delivered on notice or whether the date was given in court in the presence of both advocates. I am prepared therefore to give the applicant the benefit of doubt and find that the delay is excusable and that the application for stay and for leave to appeal out of time was made timeously. I do also find that there exist sufficient reasons to grant the leave sought because **Section 79 G of the Civil Procedure Act** only requires the applicant to show good and sufficient cause which condition I am satisfied the applicant herein has fulfilled. Accordingly, the application is allowed and orders are granted as follows: -

- a. That leave to appeal out of time be and is hereby granted.
- b. That the appeal be filed within 30 days of this ruling.
- c. That there be a stay of execution of the decree pending the hearing and determination of the appeal.
- d. That the stay of execution is conditioned upon the applicant depositing the entire decretal sum either in court or in an interest earning account in the joint names of the advocates acting for the parties within fourteen (14) days of this ruling.
- e. That the costs of this application be to the respondents.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED ELECTRONICALLY ON THIS 1ST DAY OF MARCH 2021.

E. N. MAINA

JUDGE