



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. E 035 OF 2021**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT**

**VERSUS**

**GEOFFREY MUGA.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Ian Mudavadi, Advocate for the Appellant**

**Kirui Kamwibua & Co. Advocates**

**RULING**

This application was brought by a Notice of Motion under Order 42, Rule (6) of the civil procedure Rules, 1A, 1B and 3A of the Civil Procedure Act for orders that:

1. There be a stay of execution of the ruling delivered on 16/4/2021 and orders dated 26/4/2021 in Misc. Application No. E004 of 2021 at Mariakani directing that the motor vehicle registration number KBC 749 be re-weighed, and any excess load removed and based on the fresh weight, a new ticket be issued and the overload fees be assessed and the motor vehicle released without payment of any storage charges.
2. Pending the hearing and determination of the appeal, the grounds of this application are contained in the notice of motion and the accompanying affidavit of the applicant Eng. Kennedy Ndujire. The respondent was served but failed to enter appearance.

**Determination**

**The law:**

**This application being premised under order 42 Rule 6 of the CPR provide that an appeal to the High court shall not operate as a stay of proceedings/execution except in so far as the court may order nor shall execution of decree be stayed for reason only of an appeal having been preferred, from the decree unless the applicant demonstrates sufficient cause for the order of stay to be granted. The applicant under this rule must satisfy the following conditions before the order on stay of execution is made**

- i) The application has made without unreasonable delay**
- ii) That the applicant would suffer substantial loss not remediable by way of damages.**
- iii) That the applicant is ready and willing to give a security for the due performance of the decree or order as may ultimately be binding against him or her.**

Whereas in exercising discretion the above conditions must be appraised as a whole, nevertheless, the test on substantial loss carries more weight than the other two conditions. It is trite law that when considering issues of stay one of the key parameters revolves around substantial loss as expressed in **Tropical Supplies Ltd & 2 others versus International Credit Bank Ltd (2004) 2 EA 331. The court defined substantial loss not to represent any particular amount or size, it cannot be quantified by any particular mathematical formula. It refers to any loss great or small of real worth or value as distinguished from a loss. (That is merely nominal.)**

Similarly, the **Court of Appeal in Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 others (2013) EKL**R held as regards applications for stay of execution, stay of proceedings or injunctions is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs which are: First that his appeal or intended appeal is arguable, that is to say it is not frivolous, Secondly, that if the application is granted the success of the appeal, were it to succeed, would be rendered nugatory. These two threshold issues must both be demonstrated and it would not be enough that only one is fulfilled.

This court also relies on the decision in **Antoine Ndiaye vs African Virtue University, Nairobi Civil Suit No 422 of 2006 in which Gikonyo J.**, observed as follows with regard to the grant of orders of stay:

***So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove (sic). Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.***” (Emphasis added)

The Court went on to state that:

“This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See Harlsbury’s Law of England on this subject. In my view, substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money. ....I say all these things because both parties have rights; the Applicant to his appeal which includes prospects of success; and the Respondent to the fruits of his judgment and that right should only be restricted or postponed where there is sufficient cause to do so.

The Court concluded that:

“On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. **The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds.** I have extensively discussed this matter above and I cite the case of Jason Ngumba [2014] eKLR that: ‘...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process. But what was stated in the case of **Absalom Dova vs Tarbo Transporters [2013] eKLR** is relevant, that: “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”. How, therefore, will the court balance the rights of parties in the circumstances of this case”

Despite my findings above, I reckon that the Applicant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may **M A & Another v Honourable Attorney General & 4 others [2016] eKLR** Petition 562 of 2012 | Kenya Law Reports 2017 Page 9 of 10. ultimately be binding on the Applicant...” (Emphasis added)

My view is that the same principles must apply even in the instant case, where an appeal has been lodged with the High Court against the decision of the trial Magistrate at Mariakani. The court takes the position that substantial loss may result to the applicant if the Notice of Motion for stay of execution is not granted.

On the other hand, the implementation of the impugned decision under appeal may effectively render the intended appeal nugatory. In the circumstances, I find it appropriate for purposes of securing the ends of justice of the intended appeal stay of execution of the order be granted pending the hearing and determination of the appeal. The order as to costs in the appeal shall abide the costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF MAY, 2021

.....

**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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