



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. E262 OF 2020**

**COLLINS DEMBA CRISPAS.....APPLICANT**

**VERSUS**

**EMMY MAKHUNGU MBOYA &**

**PURITY SAVALA MBOYA (*Suing as the legal representatives of the Estate of***

***FRANCIS MBOYA EZEKIA-Deceased*).....RESPONDENTS**

**Ruling**

1. The subject matter of this ruling is the Notice of Motion Application dated 9<sup>th</sup> of November, 2020 brought by Collins Demba Crispas, the Applicant herein. It seeks orders that **there be stay of execution of the judgment/decree dated 7<sup>th</sup> October, 2020 in Milimani CMCC No. 7509 of 2018 pending the hearing and determination of the preferred appeal therefrom to the High Court.**
2. The application is grounded on the assertion that the Applicant has preferred an Appeal against the aforesaid Judgment/Decree to this court which Appeal is arguable with chances of success, that if stay of execution is not granted the Appeal will be rendered nugatory occasioning the Applicant substantial loss as the Respondents have no known means of income. That the Respondents are at liberty to execute as the 30 days stay granted by Lower Court on 7<sup>th</sup> of October, 2020 lapsed on 9<sup>th</sup> November 2020, that it is in the interest of justice that stay be granted and that the Applicant is able and willing to furnish security by depositing either half or the entire decretal sum in an interest earning Bank Account.
3. The Respondents in their reply aver that the application herein is misconceived and lacks any merit and that the supporting affidavit contains false allegations and conceals material facts.
4. It is further averred that the Applicant has not demonstrated satisfactorily that his Appeal is arguable with high chances of success and that the averment that the Respondents have no known sources of income is not supported by any tangible evidence. The Respondents depose further that there is no evidence urged by the Applicant to support his assertion that the Appeal would be rendered nugatory if stay is not granted and neither have they offered satisfactory security for the decretal sum. It is the Respondents' contention that the Applicant failed to comply with the reasonable terms of the order for stay given by the trial court hence not deserving of the orders being sort herein. The Respondents urged the court to dismiss the application with costs to the Respondent.
5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.
6. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

***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.***

7. In the instant application, the Applicant posits that the Respondents are not engaged in any known income generating activity and as such they will not be able to pay back the decretal sum in the event the Appeal succeeds. He indicates that he is not in a position to stipulate the financial capabilities of the Respondents and therefore the onus should shift to the Respondents.

8. The Respondents have not said anything about their ability to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

9. The Respondents are the legal representatives of the estate of the deceased. In the event the Appeal succeeds, it will be difficult for the Applicant to follow up on the estate which as it stands has not demonstrated any source of income hence the Appeal may be rendered nugatory.

10. Judgment was delivered on the 7<sup>th</sup> of October, 2020. The Applicant prayed for and was granted 30 days stay of execution. On 26<sup>th</sup> October, 2020, the Applicant instituted this Appeal vide the Memorandum of Appeal filed herein. I do not agree with the Respondents contention that the Applicant did not put into use the stay that was granted. On 9<sup>th</sup> of November, barely 4 days after the 30 days period lapsed on 5<sup>th</sup> of October, the Applicant filed this application. The Applicant acted without unreasonable delay.

11. The Applicant’s averment is that he is ready and willing to deposit security as directed by court.

12. In the upshot, to balance the competing interest of both parties, I allow the application on condition that the Applicant deposits the entire decretal sum in a joint interest earning bank account of the respective counsel for the parties or in court within 30 days from the date hereof. Costs in cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021**

**B. THURANIRA JADEN**

**JUDGE**