



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. E50 OF 2021**

**GEOFFREY KIMANI WAWERU.....APPELLANT**

**VS.**

**LEAH WANJIRU KIHUHA.....RESPONDENT**

**RULING**

1. **LEAH WANJIRU KIHUHA**, the respondent in this appeal, filed a suit before the Limuru Senior Principal Magistrate's Court and because **GEOFFREY WAWERU KIMANI**, the appellant, failed to file a memorandum of appearance in that case within the requisite period default judgment was entered in favour of the respondent. The appellant filed before Limuru Court an application to set aside the default judgment. By that court's ruling dated 17<sup>th</sup> March, 2021 the application was dismissed. It is that dismissal that provoked this appeal.

2. The appellant by Notice of Motion application dated 31<sup>st</sup> March, 2021 seek stay of execution of the default judgment pending the hearing and determination of this appeal.

3. The appellant filed an affidavit dated 31<sup>st</sup> March, 2021, in support of the application for stay of execution. In that affidavit the only ground upon which the appellant seeks the stay is as follows:-

***“That there is a real risk that if stay of execution is not granted, I will suffer great loss and the appeal will be rendered nugatory.***

***That it is in the interest of justice that the said appeal be heard and determined on its merits.”***

4. The respondent opposed the application through her replying affidavit dated 15<sup>th</sup> April, 2021. In that replying affidavit the respondent drew the attention of the court of that the application to set aside default judgment was mainly dismissed by the subordinate court for lack of a draft defence. The respondent further deponed in her affidavit that the appellant had no defence to her claim.

**ANALYSIS**

5. I have considered the parties affidavit evidence and the Ruling which is the subject of this appeal. The grant of stay of execution is provided under **Order 42 Rule 6** of the Civil Procedure Rules as follows:-

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(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.”***

6. Whether the court does grant or not to grant stay of execution is an exercise of discretion. The fact execution is in motion is not proof on its own that there will be substantial loss. This was clearly stated in the case of JAMES WANGALWA & ANOTHER VS. AGNES NALIAKA CHESETO (2012) eKLR that:-

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

7. The appellant other than stating that, if stay of execution is not granted he would suffer great loss, he failed to give particulars of the loss. The appellant had the legal and evidential burden of proof to prove the loss he would suffer if execution proceeded. The appellant did not at any time suggest that the respondent would be unable to refund the decretal sum if he succeeded in his appeal. Applying the tests provided under **Order 42 Rule 6**, I find that the appellant failed to establish that stay of execution should be granted.

8. Accordingly, the Notice of Motion application dated 31<sup>st</sup> March, 2021 is dismissed with costs.

**RULING DATED, SIGNED and DELIVERED at KIAMBU this 3<sup>RD</sup> day of JUNE, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

Appellant: Mr. Nganga

Respondent: No appearance

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**