



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E016 OF 2021**

**JGK.....APPELLANT**

**VERSUS**

**AMW.....RESPONDENT**

***(Being an Appeal from the Judgement and Orders of Hon. G.A MMASI (MRS)***

***Senior Principal Magistrate, Chief Magistrate's Court, Commercial Courts Milimani,***

***Nairobi, delivered on 23<sup>rd</sup> December 2020 in C.M.C.C NO 2256 of 2019***

***for the Amended Complaint Dated 28<sup>th</sup> September 2019.)***

**RULING**

1. The application dated 18<sup>th</sup> January, 2021 seeks the following orders.

**1. THAT this Honourable court be pleased to order a stay of execution of the Judgement and orders delivered by the subordinate court on 23<sup>rd</sup> December 2021 in CMCC No 2256 of 2019 pending the hearing and determination of the appeal herein.**

**2. THAT the costs of this application be provided for**

The application is supported by the affidavit of the applicants. Sworn on 18<sup>th</sup> January 2021 and further affidavit sworn on 24<sup>th</sup> February, 2021. The respondent filed a replying affidavit sworn on 10<sup>th</sup> February, 2021. The application was determined by way of oral submissions.

Mr. Ruiru, counsel for the applicant, submits that the applicant filed a memorandum of appeal dated 18/1/2021 against the decision of the trial court. The appeal is arguable. If execution is not stayed, the applicant will suffer substantial loss. He was dismissed from his place of work and his only asset is his home which is jointly registered with the Respondent. The two were married before they got divorced. The home is involved in another suit before the family court. If the house is sold, the applicant will be rendered homeless. The respondent earns about ksh. 300,000 monthly and if the appeal is successful she may not be able to refund the decretal sum. The application was filed without inordinate delay. The applicant's co-defendant, Standard Group Limited, filed a separate Appeal No E028/2021. The Co- defendant was ordered to deposit some money as security.

Mr. Ruiru relies on the case of AMAL HAULIERS LIMITED VS ABDULNASIR ABUKAR HASSAN (2017) ECLR and that of BEATRICE NDUNGURI MWAI VS SICILY WAWIRA TITUS & ANOTHER (202) eCLR. In both cases conditional stay of execution was granted by the court. According to MR. Ruiru, the applicant's liability under the decree is ksh 1.5 Million.

Mr. Mwangi, counsel for the Respondent, opposed the application. Counsel maintain that order 42 rule 6 is couched in mandatory terms. There is needed to provide security in the event that the appeal is not successful. The Respondent's Judgement ought to be secured by providing sufficient security. It is submitted that in the other appeal filed by the applicant's co- defendant's, the applicant was ordered to deposit ksh. Two Million (Ksh. 2,000,000) as security. The applicant can be allowed to proceed with his appeal on condition that he provides security. Counsel agrees that there is a house which is jointly registered in the names of both parties and it is valued at ksh. 40 million.

The application seeks stay of execution of the trial courts' decree. There were four (4) defendants before the trial court. The trial court awarded the respondent ksh. 1.5 million as general damages specifically against the applicant herein. There is an award of a further ksh

6,500,000 against all the defendants jointly and severally. The applicant's liability as per the decree is therefore not limited to the award of kshs 1.5 million for violation of the respondent's privacy.

I have read the two affidavits in support of the application as well as the Respondent's replying affidavit. The two parties were married but later got divorced. The Respondent's claim before the trial court was for defamation. The Respondent is not against the applicant's right to pursue an appeal. The Respondent's position is that the applicant must provide security. On his part, the applicant contend that he was relieved of his employment and his only asset is the house which is registered in their joint names.

In the case of BUTT V- RENT RESTRICTION TRIBUNAL (1982) eKLR 417, the court held as follows:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.***
- 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”***

The record shows that the house is involved in another court case before the family court. It may not be the best security as its fate is yet to be determined. The court has to balance between the applicant's right to pursue the appeal and the respondent's right to enjoy the fruits of her favourable judgement. The applicant's co- defendants were condemned to deposit kshs Two million as a condition for stay of execution. Since the applicant has a personal liability of ksh. 1.5 million, I do order that he deposits in court or an interest earning joint account of both counsel half the sum of ksh 1.5 million as security.

The upshot is that the application dated 18<sup>th</sup> January 2021 is merited and is hereby granted in the following terms.

- 1. Execution of the trial court's decree is hereby stayed pending the hearing and determination of the appeal.**
- 2. The applicant to deposit a sum of ksh 750,000 within forty five (45) days hereof either in court or in a joint interest earning account of both counsel.**
- 3. In default of order two (2) above on deposit of ksh. 750,000 as ordered, the Respondent shall be at liberty to execute for the sum of ksh 1.5 million.**
- 4. Costs of the application shall follow the outcome of the appeal.**

Dated and signed at Nairobi this 3<sup>rd</sup> day of June, 2021

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**S. CHITEMBWE**

**JUDGE**