



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. E006 OF 2020

CHARLES NJOROGE NJERI.....APPELLANT

VERSUS

JOSEPH KAROMO GUCHORA.....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the judgment the Chief Magistrate's Court at Gatundu, L. Wachira, CM dated 4th November, 2020 in CMCC No. 104 of 2019)

RULING

1. **CHARLES NJOROGE NJERI (Charles)** has filed this appeal against the judgment of **CM Court Gatundu Civil Case No. 104 of 2019** where the respondent was awarded judgment for Kshs.232,000/=.

2. Charles has filed an application, Notice of Motion dated 11th February, 2021 where he seeks stay of execution of that judgment pending the hearing and determination of this appeal. The application though served on the respondent was not opposed. **Order 42 Rule 6(2)** of the Civil Procedure Rules sets out the mandatory term, the conditions for granting stay of execution. That Rule provides:-

“(2) No order for stay of execution shall be made under sub-rule (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.”

3. The trial court's judgment was delivered on 4th November, 2020. The application is dated 11th February. The delay of two months in filing the application for stay of execution pending appeal is not inordinate. Charles has therefore overcome one of the obstacles in **Order 42 Rule 6(2)**.

4. Charles alleged that he would suffer substantial loss if stay of execution is not granted because he is unaware whether the respondent would be in a position to refund him the decretal amount in the event this appeal succeeds. The meaning of the word, **substantial loss** was considered in the case of **VICTORY CONSTRUCTION V. BM (a minor suing through next friend one PMM)(2019) eKLR** as follows:-

“15. The same position was adopted by Kimaru, J in CENTURY OIL TRADING COMPANY LTD VS. KENYA SHELL LIMITED NAIROBI (Milimani) HCMCA NO. 1561 OF 2007 where he stated that:

‘The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.’”

5. Charles having stated that he was doubtful the respondent could make refund to him in the event his appeal did succeed it was incumbent upon the respondent to disprove that contention. The respondent did not disprove it and this Court therefore finds that Charles may suffer substantial loss if stay is not granted.

6. Further, the main issue of this appeal relates to land which the respondent filed a caution over and in my view, that caution is sufficient security for the respondent.

DISPOSITION

7. I therefore grant the following orders:-

(a) A stay of execution is granted in respect of **Gatundu CMCC No. 104 of 2019** pending the hearing and determination of this appeal.

(b) The costs of the Notice of Motion dated 11th February, 2021 shall abide with the outcome of this appeal.

RULING DATED and DELIVERED at KIAMBU this 1st day of JULY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Kevin

For the Appellant Mr. Rakoro

For the Respondent : NO appearance

Later Ms. Mwangi holding brief for Muturi Njoroge

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE