



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL APPLICATION NO. E034 OF 2021

JONAH KIRIMI MUTHAMIA.....APPLICANT

VERSUS

DAVID MUTHAMIA.....RESPONDENT

RULING

[1] The court has considered the Intended Appellant's application dated 9th June 2021 for extension of time to file appeal out of time and for stay of execution pending appeal. The respondent does not oppose the application limb on extension of time and the court does not find that there is any unreasonable delay in the filing of the appeal, the application for leave having been filed only 12 days after the expiry of the 30-day period allowed for filing of appeal.

[2] Upon hearing counsel for the parties on the test for grant of stay of execution and proceedings pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, the court is not satisfied that the applicant shall suffer substantial loss if stay for the payment of the modest sum of Ksh.126,000/- is not granted as it has not been demonstrated by the applicant sufficiently to call upon the respondent to show means or ability to refund the sum in the event of a successful appeal.

[3] The mere averment in paragraph 7 of the supporting affidavit of 8/6/2021 sworn by the intended appellant/applicant that –

“7. That I am informed by our advocates on record which information I verily believe to true that the judgment/Decreee entered is of substantial sum monely and the applicants are apprehensive that if the respondents are paid the same and appeal is successful they might not be able to recover the same from the respondents whose means are unknown.”

does not show any grounds of any reasonable apprehension that the respondent shall not be able to refund decretal sum of Ksh.126,000/- which the court does not agree is **“substantial sum.”**

[4] In response thereto, anyhow, the respondent has at paragraph 9 of his replying affidavit of 16/6/21 deponed that he is *“a businessman at Isiolo with financial resources to refund the decretal sum herein which is quite small”*.

[5] On a balance of probabilities, the court is inclined to agree with the respondent and it does not, therefore, accept the request by the applicant for the payment of the decretal sum into a joint interest earning account in the names of the counsel for the parties.

[6] As attachment of the applicant's property had already been done and costs therefor incurred by the auctioneers, there shall be an order for the payment of the auctioneers' charges to be agreed between the parties or taxed by the taxing master of the court in default of agreement.

[7] The attachment of the property shall, however, be lifted and the attached property released, if possession has already been taken, upon the payment of the decretal sum of Ksh.126,000/- in full to the Respondent As a further condition for the grant of stay of execution by sale of the appellant's property, the auctioneer's costs to be determined by agreement or taxation of the Auctioneer's bill of costs shall be paid within 30 days.

ORDERS

[8] Accordingly, for the reasons set out above the court makes the following orders:

(a) Leave to appeal out of time is granted for the filing of the Memorandum of Appeal within 14 days from today.

(b) The application for stay of execution pending appeal is declined. However, this order is stayed for a period of fourteen (14) days so that the attached goods are not immediately sold in execution, on condition that the decretal sum of Ksh.126,000/- is paid to the

respondent within 14 days from the date of this order.

(c) As a further condition for the stay of execution, the appellant shall pay the auctioneer's costs to be agreed or taxed in default of agreement within 30 days from the date hereof.

(d) For avoidance of doubt, the sale of the attached properties whether in possession of the respondents' auctioneer or the appellant is stayed for the 14 days of the order, and if in possession of the auctioneer, the properties shall be released upon the payment of the decretal sum of Ksh.126,000/- notwithstanding that the determination of the auctioneer's costs and payment thereof has not been made.

(e) In default to the payment of the auctioneer's costs within the period of 30 days set out in (c) above, execution to issue.

(f) The costs of the application shall abide the result of the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 1ST DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kimondo Gachoka & Co. Advocates for the Applicant

M/S Nkunja & Co. Advocates for the Respondent.