



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E121 OF 2021**

**SHOKO MOLU BEKA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**STANLEY WAHORU OMELAE.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**AUGUSTINE GWARO MOKAMBA.....RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants have lodged the Notice of Motion dated 19<sup>th</sup> March, 2021. The Motion is supported by both the grounds laid out on the body thereof and the facts stated in the sworn affidavit of advocate Joyce Chichi. The applicants are seeking an order that there be a stay of execution of the judgment and decree issued by the trial court pending the hearing and determination of an appeal against the same. The applicants are equally seeking costs of the Motion.

2. The Motion stands opposed by way of the replying affidavit sworn by the respondent on 22<sup>nd</sup> April, 2021.

3. The Motion was dispensed with through written submissions. I have considered the grounds laid out on the face of the Motion, the facts deposed in the affidavits in support of and in opposition thereto, and the rival written submissions.

4. Before I address the merits of the Motion, I deem it necessary to consider a preliminary issue which was raised by the respondent in his replying affidavit: that the instant Motion is fatally defective for the reasons that it does not disclose the magistrate whose judgment is being appealed against and that it makes reference to a different trial magistrate from that mentioned in the memorandum of appeal.

5. Concerning the argument on disclosure of the trial case details, upon perusal of the Motion and its supporting affidavit, I did not come across anything to indicate the heading of the case whose judgment is being appealed against. Nevertheless, I note from the memorandum of appeal that the case is headed as Milimani CMCC NO. 9510 OF 2018 and which heading is confirmed by the record. Consequently, I find that the failure of the applicants to include the trial case number in the Motion does not necessarily render it fatally defective.

6. On the second argument, upon perusal of the Certificate of Urgency accompanying the Motion, I observed that the trial magistrate referred to is also mentioned in the memorandum of appeal, save for one section of the memorandum of appeal, which could plausibly be the result of a typographical error. Even if the position were to be different, I am not convinced that this would solely constitute grounds for declaring the entire Motion fatally defective.

7. On the merits thereof, it is clear that the instant Motion concerns itself with the granting of an order for a stay of execution. In that case, the relevant provision is Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 which sets out the conditions to be met when it comes to an application for a stay of execution as follows:

***a) The application must be brought without unreasonable delay;***

***b) The applicant must demonstrate that substantial loss may result; and***

***c) Provision should be made for security.***

8. I will begin with the first condition. From perusal of the record, I note that none of the parties availed a copy of the impugned judgment to this court. Be that as it may, going by the averments of the parties, the impugned judgment was delivered on 12<sup>th</sup> February, 2021. The present Motion was filed slightly over one (1) month later on 25<sup>th</sup> March, 2021. I am thus convinced that there is no indication of unreasonable delay in bringing the Motion.

9. This brings me to the second condition of substantial loss. In her supporting affidavit, Joyce Chichi deposes that unless the order for a stay is granted, the respondent will proceed to execute the decree, thereby rendering the appeal nugatory and resulting in substantial loss to the applicants. In their submissions, the applicants went on to argue that the decretal amount is colossal in nature.

10. In response, the respondent states and contends that the applicants have not satisfied the legal requirements for granting a stay of execution and that he is lawfully entitled to the fruits of his judgment.

11. The significance of substantial loss in any application for a stay of execution was aptly addressed in the Court of Appeal case, namely *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* thus:

*“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”*

12. The legal position therefore is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* cited in the submissions filed by the respective parties, rendered itself thus:

*“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. This is what substantial loss would entail...”*

13. Upon consideration of the rival arguments and taking into account the above legal principles, I am of the view that the applicants have not brought any substantiated arguments or credible evidence to show the manner in which they stand to suffer substantial loss. In the circumstances therefore, I find that substantial loss has not been demonstrated.

14. Having determined so, I see no need to address the third condition which is the provision of security for the due performance of the decree.

15. The upshot therefore is that the Motion dated 19<sup>th</sup> March, 2021 is hereby dismissed for lack of merit, with costs to the respondent.

**DATED AND SIGNED AT NAIROBI THIS ..... DAY OF ....., 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

Beage for plaintiff

Nanjira for M/s Chichi for defendant