



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KIAMBU  
CIVIL APPEAL NO. E143 OF 2021

BETWEEN

**BILLMAN ONGANGA ONDIEKI.....PLAINTIFF**

**VERSUS**

**MERCY NYAMBURA KIMANI....RESPONDENT**

**RULING**

1. Before me is the Notice of Motion application dated 25<sup>th</sup> August, 2021. It is filed by the appellant. The appellant seeks stay of execution of the trial court's judgment pending hearing and determination of this appeal. The trial court, Kiambu Chief Magistrate's Court, in Civil Case No. 128 of 2018 entered judgment for the respondent for Kshs.424,151.25 in respect to the injuries suffered by the respondent following a motor vehicle accident. The appellant has filed this appeal against that judgment.

2. **Order 42 Rule 6(1)** of the Civil Procedure Rules (hereafter the Rules) provides that no appeal or second appeal operates as stay of execution of the decree or order. **Order 42 Rule 6(2)** of the Rules 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. From the above, it is obvious that the appellant is required to satisfy this Court that he will suffer substantial loss if stay of execution is not granted; he has to satisfy the court he will provide security for the due performance of the decree he has to show that the application for stay of execution was filed without undue delay.

4. The application before court is supported by the affidavit of the appellant's learned counsel, *Salinder Gulenywa*, who deponed the appellant is prepared to provide a Bank guarantee from Diamond Trust Bank. The learned counsel further depend that unless stay is granted the appellant will suffer irreparable loss and damage. There is no more said of what such loss entails.

5. In the case **HGE VS. SM (2020) eKLR** the court had this to say on the substantial loss:-

**“11. As to what substantial loss is, it was observed in JAMES WANGALWA & ANOTHER VS. AGNES NALIKA 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.”**

6. The application is opposed by the respondent. The respondent is not satisfied that a bank guarantee is sufficient security.

7. When the court considers a stay of execution application it is always a case of balancing the two different interests of the appellant and respondent. Those conflicting interests were considered in the case TASSAM LOGISTICS LTD VS. DAVID MACHARIA & ANOTHER (2018) eKLR thus:-

**“16. They cite the authority of KENYA COMMERCIAL BANK LTD –VS- SUN CITY PROPERTIES LTD & 5 OTHERS [2012] eKLR where it was held:**

**“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”**

8. Having considered this matter, I find interest of justice will be served by granting conditional stay of execution.

#### **DISPOSITION**

9. There shall be stay of execution of Kiambu CMCC No. 128 of 2018 on condition that the appellant does provide the decretal sum and deposit the same into a joint interest earning account of both advocates within 45 days from this date hereof. In default execution to proceed.

10. Orders accordingly.

**RULING DATED AND DELIVERED AT KIAMBU THIS 5<sup>TH</sup> DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Ndege

For the appellant: Ms. Ngulanya

For the respondent : Mr. Ojienda

#### **COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**