



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCA NO. E16 OF 2020**

**RAPHAEL KALAMA MWATIKA.....1<sup>ST</sup> APPLICANT/APPELLANT**

**-VERSUS-**

**PAUL MUNYILU NZIOKA.....1<sup>ST</sup> RESPONDENT**

**VERONICAH NDINDA WAMBUA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is an application dated 2/11/2020 brought under Article 159 of the Constitution and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, as well as section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21). The application has 6 prayers, some of which have been spent, as follows –

**1) (spent)**

**2) (spent)**

**3) That this honourable court be pleased to grant stay of execution of the judgment of the trial court delivered on 1<sup>st</sup> October 2020 against the appellant/applicant pending the hearing and determination of the appeal herein MAKUENI HCCA NO. E16 OF 2020, RAPHAEL KALAMA MWATIKA –VS- PAUL MUNYILU NZIOKA & VERONICAH NDINDA WAMBUA.**

**4) Any other relief this honourable court may deem fit and appropriate to grant.**

**5) That costs be in the cause.**

2. The application has grounds on the face of the Notice of Motion. The grounds are that the 30 days stay period granted by the trial court had now lapsed, that the appeal had good chances of success, and that the appeal would be rendered nugatory if the stay of execution orders sought were not granted.

3. The application was filed with a supporting affidavit sworn by Raphael Kalama Mwatika the appellant on 2<sup>nd</sup> November 2020, which supports the grounds of the application.

4. The application is opposed through grounds of opposition filed by counsel for the respondents J.M Tamata & Company on 17/2/2021, in which it was stated that the application did not satisfy the legal requirements of Order 42 Rule 6 of the Civil Procedure Rules, and that it was meant to deny the respondents enjoyment of the fruits of their judgment.

5. The application proceeded by way of filing written submissions, and I have perused and considered the submissions of counsel in both sides.

6. This being an application for stay of execution of judgment or decree, it is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. In such an application, the applicant has to show that he has filed the application without unreasonable delay. Secondly, he has to show that if the stay orders sought are not granted, then he will suffer substantial loss if the appeal is ultimately allowed. Thirdly, the applicant has to offer security for due performance of the decree.

7. The grant of stay is discretionary. In the present case, there is no dispute that the decree herein is a money decree. With regard to the requirements under Order 42 Rule 6, I am of the view that the application for stay was filed without unreasonable delay, as it was filed on 4<sup>th</sup>

November 2020 while the initial 30 days stay was to lapse on 7/11/2020.

8. Considering also that this is a case of alleged defamation, and the appeal is on whether the trial court was correct in finding that the elements of defamation were proved, I am of the view that if stay is not granted, the appeal if it succeeds might be rendered nugatory. I will thus allow the application for stay of execution, but order that the appeal be fast tracked.

***9. Consequently, I allow the application and grant prayer 3 therein and, in addition, I order that the appeal be fast tracked and heard within the next 12 months. The costs of the application will follow the determination of the appeal.***

**DELIVERED, SIGNED & DATED THIS 6<sup>TH</sup> DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.**

.....

**George Dulu**

**Judge**