



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 46 OF 2019

VICTORIA MWIKALI MUSYOKA.....APPLICANT

VERSUS

LUCY MUENI MWANDIKWA ALIAS.....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated **26th August, 2019** filed herein on **28th August, 2019** the Applicant seeks stay of execution pending hearing and determination of the Appeal.
2. The Application is premised on grounds that the Appeal has a high chance of succeeding and in event that execution proceeds the Appeal Shall be rendered nugatory which will result into the Applicant being subjected to substantial and irreparable loss. That the Applicant is willing to adhere to any favourable conditions given by the Court for grant of stay of execution and is ready to issue an Insurance Bond for the Judgment sum.
3. By an affidavit in support of the application, **Sarah Weru**, a Senior Legal Officer of **Sanlam Assurance Company, Kenya Limited** depones that the Judgment was delivered in the absence of the Applicant's Advocates without notice. The fact of the Judgment having been delivered was brought to their attention upon receipt of a letter dated **31st July, 2019** from the Respondent's Advocates who enclosed a copy of the draft decree for their consideration. This prompted them to lodge the Appeal. That the decretal sum of **Kshs. 400,000/=** exclusive of costs and incidentals is a substantial sum of money which if paid out to the Respondent, she will not be in a position to refund the same in event that the Appeal is successful.
4. The Respondent, **Lucy Mueni Mwandikwa** filed a Replying Affidavit where she deponed that the award by the Lower Court was not excessive. That she is a women of means capable of refunding the decretal sum in event that the Appeal is successful.
5. The application was canvassed by way of written submissions that I have duly considered.
6. Principles of grant of stay of execution are stipulated in **Order 42 Rule 6** of the **Criminal Procedure Rules** which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

7. In the case of **Sewankambo Dickson vs. Ziwa Abby HCT 00-CC MA 0178 OF 2005** it was held that:

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...”

8. It is urged that the decretal sum awarded is colossal, a sum that the Respondent may not refund in event that the Appeal is successful which will result into substantial loss. The Respondent on her part argues that she is capable of refunding the sum. In the case of **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa, Nairobi HCCA 427 of 2015** it was stated that:

“It is not enough for the respondents to merely swear that fact in an affidavit without going further to provide evidence of his liquidity.”

9. The averment of the Respondent by way of affidavit that she is a woman of means, capable of refunding the decretal sum lacked proof, therefore, she failed to discharge the evidential burden that was bestowed upon her in that respect.

10. The application herein was filed within the time given for appealing against the Judgment hence it was done timeously.

11. On the question of security, it must be considered as it is for purposes of due performance of the Decree. The Respondent has demonstrated that the type of injuries she sustained were serious such that it resulted into a miscarriage.

12. Looking at the Memorandum of Appeal the Complaint of the Applicant is on damages awarded. In the circumstances, I direct as follows:

- a) There be stay of execution on condition that the Applicant deposits **Kshs. 400,000/=** in Court within 21 days from the date hereof.
- b) In default, the conditional stay of execution shall lapse.
- c) Costs of the Application shall abide the outcome of the Appeal.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE