



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 433 OF 2019

AMOS MANTHI.....APPELLANT

VERSUS

FLORENCE MUTANU MUNYWOKI.....RESPONDENT

RULING

1. In his Notice of Motion application dated 25th September 2019 and filed on 26th September 2019, the Applicant sought an order for stay of execution of the judgment that was delivered against him on 28th June 2019 pending hearing and determination of the appeal herein. He swore his Affidavits in support of his application on 25th September 2019 and 11th November 2019.

2. He averred that he was granted a stay of thirty (30) days from the date of delivery of the judgment and he immediately instructed his advocates to appeal against the same. He was emphatic that he had an arguable appeal with high chances of success because the Trial Court directed him to pay loan and interest on a loan that had been taken by the Respondent herein who was his aunt, that the award of interest was arbitrary and that he was denied a chance to tender his evidence and documents. In his Supplementary Affidavit, he, however, admitted that she had given him a friendly loan to enable him start a business. He was vehement that it was not for purposes of a business venture with her.

3. He was apprehensive that he would suffer irreparable and substantial loss if the order he had sought was not granted because she was not in a position to refund him the decretal sum of Kshs 2,156,665.30. He also pointed out that he had filed his present application without delay.

4. In opposition to the said application, on 25th October 2019, the Respondent swore a Replying Affidavit. The same was filed on 29th October 2019.

5. She contended that she advanced the Appellant herein a sum of Kshs 800,000/= in a partnership business agreement between them and that he admitted owing her the money. She pointed out that he proposed a mode of payment but he defaulted and as a result, she was entitled to her fruits of judgment.

6. She indicated that in the event the court was to allow his application, then he ought to be ordered to deposit the decretal sum in a joint interest earning account in the name of her advocates and the name of his advocates.

7. Both the Appellant and the Respondent were agreed upon on the conditions under which an order for stay of execution pending appeal could be granted. In this regard, the Appellant placed reliance on the cases of **Antoine Ndiaye vs African Virtue University [2015] eKLR** and **Charles Ngatia Nguto vs Ekira Gathoni Kariithi & Another [2014] eKLR** while the Respondent relied on the cases of **Lucy Kimani vs Lawrence Mburu Muthiga [2006] eKLR** in support of their respective cases.

8. As can be seen in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, a court will only grant an order for stay of execution pending appeal if it satisfied that the applicant has demonstrated:-

- a. **That substantial loss may result unless the order is made.**
- b. **That the application has been made without unreasonable delay.**
- c. **Such security as the court orders for the due performance of the decree has been given by the applicant.**

9. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

10. This court did not analyse whether or not the Appellant had met all the conditions for the granting of an order for stay of execution

pending appeal for the reason that the Respondent was not averse to him being granted the order he had sought provided that he deposited the decretal sum as she had proposed. This was a reasonable proposal that had been adopted by this court in similar applications.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 25th September 2019 and filed on 26th September 2019 be and is hereby allowed in terms of Prayer No (3) therein in the following terms:-

1. There shall be a stay of execution of the decree in Milimani CMCC No 4108 of 2016 on condition that the Appellant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the sum of Kshs 1,992,331.30 within thirty (30) days from the date of this Ruling.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 11(1) hereinabove, the conditional stay of execution shall automatically lapse.

3. Either party is at liberty to apply.

4. Costs of the application will be in the cause.

12. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of May 2020

J. KAMAU

JUDGE