



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.53 OF 2019**

**HANIF MOHAMED.....APPLICANT/ APPELLANT**

**VERSES**

**BENSON GITERU MUCHOMBA.....RESPONDENT**

**RULING**

1. **The Notice of Motion by the applicant dated 14<sup>th</sup> September 2020 pray that there be stay of execution against him by the respondent pending the determination of this application and the appeal.**

2. **The application prays also that the court do accept motor vehicle registration number KCX 104S, TRAILER ZC 1886 belonging to Promax Limited as well as trailer NO.ZA 7962 as security pending the appeal.**

3. The application is supported by the affidavit sworn on the same date as well as the further affidavit dated 21<sup>st</sup> October 2020. The substance of the application is that the applicant is dissatisfied with the decision of the lower court dated 3<sup>rd</sup> December 2019 which it was delivered according to him without notice. He went on to state that he thereafter filed a Memorandum of Appeal and applied for the proceedings which he has not received to date.

4. He went on to state that this application was filed late because of lack of proceedings as well as the challenges attributable to Covid 19 pandemic thus he has been unable to access the courts. As a result, the respondent has proclaimed his goods and he stands to suffer great loss if he is allowed to attach and that the appeal shall be rendered nugatory.

5. The applicant deponed that he was willing to abide by the conditions of the court which includes offering his movable properties to act as security pending appeal.

6. The respondent in his replying affidavit dated 26<sup>th</sup> September 2020 has deponed that the application is not meritorious at all as the same was filled inordinately late and that the excuse of Covid 19 break out was a lame excuse. He said that the applicant went ahead to participate in the taxation of costs done after the Covid 19 outbreak and he cannot be heard to blame the virus.

7. He said that the security he has offered is in fact encumbered and cannot be sufficient in this regard. He deponed further that should this court be inclined to grant the application then the applicant should pay the half decretal amount and deposit the rest in a joint interest earning account.

8. He said that he was not a man of straw and he was capable of paying back the amount should the appeal succeed. He attached copies of his vehicles logbooks as well as his titles. He nonetheless prayed for the application to be dismissed and the applicant to pay the auctioneer's costs.

9. The parties were directed to file written submissions which the court has perused and does not intent to reproduce them here save to state that both parties agree that the provisions of Order 42 rule 6(1) of the Civil Procedure Rules generally apply in the circumstances.

10. The above portion of the law and its application was well captured in the often cited case of **BUTT VERSES RENT RESTRICTION TRIBUNAL (1982) KLR 417** where the court gave the following guiding principles.;

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

11. Taking cue from the above citation it is apparent that the application as clearly submitted by the respondent was filed late. The reasons and the correspondences between the court and the applicants counsel on record vindicates him though. It is judicially noticed that the novel Covid pandemic disrupted and it is still doing so to date a lot of courts normal proceedings and matters. There has been for example limited staff including the secretarial staff in our courts.

12. The delay in my view of about three months has not been very inordinate given the prevailing circumstances.

13. As to whether the appeal is arguable is not for this court to consider for now. The only condition is whether in allowing or refusing the application the appeal shall be rendered nugatory. The applicant must be given his day in court. The applicant should also not be left at the mercy of the respondent. Whatever the cause of the suit at the lower court both parties ought to have a second chance in this court.

14. It is now acceptable that the court just as indicated in the above cited authority can give conditional stay of execution. The condition should only hold till the appeal is determined. The applicant on this score has argued that he was ready to provide sufficient security pending the appeal and to that end he exhibited some motor vehicle logbooks.

15. The respondent complained that the logbook exhibited is encumbered and that the applicant should pay the decretal sum in full as he is capable of refunding should the appeal succeeds. He said that he has been waiting for a long time and that the applicant's action hampered his businesses.

#### **DETERMINATION**

16. Taking the totality of the facts as exhibited by the parties this court is of the considered view that the applicant should pay to the respondent half of the decretal sum namely of Kshs. 500,000 within the next 30 days from the date herein.

17. The court would have considered the moveable assets suggested by the applicant but the same are transient and too risky considering that the appeal may take time to be determined. The court in the premises orders that the balance of the decretal sum be deposited in an interest earning account in the names of both counsels on record within the next 45 days from the date herein.’

18. This court shall at the same time grant the applicant the liberty to provide a capital asset and in particular land whose value shall be equivalent to the balance of the decretal amount above in lieu of depositing the same in a joint account as directed above. This alternative security if available must be deposited to the court within 45 days from the date herein.

19. In default of paying the sum of Kshs, 500,000 to the respondent within the next 30 days from the date herein or opening the joint account or alternatively providing a capital security as directed above within the next 45 days from the date herein, execution shall issue for the whole amount.

20. The respondent shall have the costs of this application. The applicant shall pay the auctioneers charges if any to be agreed or taxed.

**Delivered, Signed and Dated at Kitale this 11<sup>th</sup> day of December 2020.**

**H K CHEMITEI**

**JUDGE**