



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL NO.18 OF 2018**

**LYDIA WANGARI.....APPELLANT**

**-VERSUS-**

**ANDREW GITHINJI MWIHURI.....RESPONDENT**

*(Being an appeal from the Ruling and Orders of Hon. W. Kagendo, Chief Magistrate, delivered on 14<sup>th</sup> March 2018 in Nyeri CMCC No.509 of 2012)*

**RULING**

The application before me is the one dated 27<sup>th</sup> March 2018 brought under certificate of urgency of Duncan Waweru Macharia Advocate. It is Notice of Motion brought under Order 42 rule 6 and Order 22 rule 22 and 25 of the CPR.

The applicant seeks orders: -

- 1) *THAT the application dated the 27<sup>th</sup> day of March 2018 be certified urgent, be heard on a priority basis and service thereof upon the respondent be dispensed with in the first instance.*
- 2) *THAT there be a stay of execution of the judgment and decree of the lower court dated 28<sup>th</sup> June 2017 as well as the ruling and order dated 14<sup>th</sup> March 2018 and all subsequent orders in Nyeri CMCC 509 OF 2012 Andrew Githinji Mwihuri -Vs- Kate Nyambura Karuku & 3 others pending the hearing and final determination of this appeal.*
- 3) *THAT there be a stay of execution of the judgment and decree of the lower court dated 28<sup>th</sup> June 2017 as well as the ruling and order dated 14<sup>th</sup> March 2018 and all subsequent orders in Nyeri CMCC 509 of 2012 Andrew Githinji Mwihuri –vs-Kate Nyambura Karuku & 3 others pending the hearing and final determination of this application.*
- 4) *THAT the costs of this application be provided for.*

The grounds for the application are that: -

1. *Judgment was entered against the applicant/defendant on 28<sup>th</sup> June 2017 and an application for setting aside and stay of execution was dismissed on 14<sup>th</sup> March 2018.*
2. *The judgment may be executed any time and the respondent has now fixed the matter for notice to show cause why the applicant should not be jailed on 4<sup>th</sup> April 2018.*
3. *After the judgment, the applicant should not be jailed on 4<sup>th</sup> April 2018.*
4. *The applicant's appeal is merited and has good chances of success.*
5. *It is the interest of justice that there be a stay of execution pending the hearing and determination of the appeal.*
6. *The threat of execution is real and imminent as the notice to show cause is coming up on 4<sup>th</sup> April 2018.*
7. *The applicant will suffer substantial loss if the stay is not granted.*

8. *The application has been brought without delay.*
9. *There is urgency in this application as the execution may take place any time.*
10. *If the execution proceeds this application as well as the appeal shall be rendered nugatory.*
11. *The applicant is ready to comply with such orders as may be issued by this court.*
12. *No prejudice will be suffered by the respondent by the grant of the orders now sought.*

It is supported by the affidavit of Lydia Wangari Waithaka sworn on 27<sup>th</sup> March 2018 and further affidavit of 3<sup>rd</sup> May 2018.

The application is opposed vide the Respondent's affidavit sworn on 13<sup>th</sup> April 2018. The application was argued orally by counsel for the applicant, and the respondent in person. The appeal arises out of the Ruling of Hon. W. Kagendo –CM dated 14<sup>th</sup> March 2018 in CMCC No.509 of 2012.

From the record, on 28<sup>th</sup> June 2017 the learned Magistrate entered judgment for the plaintiff against the defendant for Kshs.2.4 million plus costs and interest at court rates from date of filing suit. She stated:

*“The plaintiff had sued initially 4 defendants by a plaint dated 28<sup>th</sup> November 2012. Subsequently he brought an application which was allowed and the 1<sup>st</sup> defendant who relocated to America and the 2<sup>nd</sup> Defendant who has passed on during the pendency of the suit were substituted by the 3<sup>rd</sup> defendant. She held a Power of Attorney.*

*Before the substitution, the 1<sup>st</sup> and 4<sup>th</sup> defendants had not filed any statement of defence. The 2<sup>nd</sup> defendant had filed a statement of defence dated 21<sup>st</sup> December 2012. He had stated that he was just a commission agent and had no contract whatsoever with the plaintiff and that he was not aware of the occurrences as pleaded by the plaintiff. The statement by the 3<sup>rd</sup> defendant is more interesting. It is actually an admission and she sets out the history of the entire matter and she concludes that she is a witness that the plaintiff did a commendable job.*

*The plaintiff gave evidence which was not challenged. The 3<sup>rd</sup> defendant did not attend even though she had been served with the hearing notice. The plaintiff basically reiterated the contents of his statement and produced documents to support his claim”*

The applicant then filed an application vide of Notice of Motion dated 1<sup>st</sup> December 2017 seeking the setting aside of the judgment and decree of 28<sup>th</sup> June 2017, leave to defend the suit, stay of execution of the judgment, and since at that time she was in civil jail – an order of discharge from civil jail.

In a considered ruling dated 14<sup>th</sup> March 2018 the learned Magistrate refused to set aside the judgment and ordered that the matter be fixed for notice to show cause.

I heard the arguments by both counsel for the applicant and the respondent. The grounds for granting stay pending appeal are set out in Order 42 rule 6.

Rule 1 provides for the necessity to apply for stay of execution in any appeal if a party so desires as an appeal per se will not operate as stay.

Rule 2; that no stay of execution shall be made unless the applicant demonstrates –

- i) That substantial loss may result
- ii) application made without undue delay
- iii) security for the due performance of the decree or order that may ultimately be binding on the applicant.

The decretal sum herein was Kshs.3, 984,000/- as at 31<sup>st</sup> July 2017.

After considering the rival submissions, the only issue for determination is whether the applicant has fulfilled the three conditions: -

- 1) On filing the application without undue delay. The same was filed 14 days after the Ruling hence there is no undue delay in filing the application.
- 2) As for substantial loss, the decretal sum as at 27<sup>th</sup> September 2017 when a warrant of arrest was issued for the applicant the total sum being claimed was Kshs. 4,106,310/-. The applicant raises valid legal points of law in the appeal especially whether she was privy to the contract out of which the judgment arose, whether the power of attorney she had would operate retrogressively, whether she is bound by the actions of a known principal.

These are issues that when the appeal is finally heard which need to be determined and if the stay is not granted she may suffer substantial loss of almost Kshs.5 million.

Hence it is my view that this 2<sup>nd</sup> ground is satisfied.

3) On security- it is the respondent's view that he would have no problem with a stay of the applicants deposits the entire decretal sum in court. I think that is the purport of Rule 6 (2) (b). He explained the kind of expenses he went through to have the applicant arrested and detained in civil jail a process which is also under attack in the intended appeal. The applicant has not made any proposal with regard to this 3<sup>rd</sup> issue.

4) I would find it as only fair that if she is to get stay of execution , then the decretal sum be deposited in a joint interest earning A/C in the names of the counsel for the applicant and the respondent.

Hence the application is granted in the following terms: -

a) Stay is granted.

b) Applicant to deposit the decretal sum of Kshs. 3,984,000/- in a joint interest earning A/c in the names of the counsel for the applicant and the respondent to be withdrawn only at the determination of the appeal and by an order of this court.

c) Deposit to be within 30 days hereof in default the stay to lapse.

d) The Respondent to have costs of this application

**Dated, delivered and signed at Nyeri this 7<sup>th</sup> day of March 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Juliet: Court Assistant

Respondent Present

N/A for Waweru Macharia for applicant.