



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 477 OF 2018**

**FRANCIS MUTUKU WAMBUA.....APPELLANT**

**VERSUS**

**THE NAIROBI WOMEN'S HOSPITAL.....RESPONDENT**

**RULING**

1. The Notice of Motion dated 24<sup>th</sup> October 2018 filed by the appellant (hereinafter the applicant) principally seeks orders of stay of execution of the judgment and decree of the lower court in CMCC No. 7664 of 2016 pending the hearing and determination of the appeal herein.

2. The application is anchored on the grounds stated on its face which are replicated in the supporting affidavit sworn on 24<sup>th</sup> October 2018 by *Mr. Reuben Waweru*, the applicant's Director for Finance and Corporate Services.

In the main, the applicant contends that it is aggrieved by the decision of the learned trial magistrate hence this appeal; that the appeal has good chances of success and if the stay sought is not granted, the applicant will suffer substantial loss since the respondent is a person of unknown means and if execution is successfully levied, he may be incapable of refunding the amount if the appeal succeeds and this will render the appeal nugatory. The applicant pledged to provide any security that the court may order for the performance of the decree.

3. The application is opposed. The respondent swore a replying affidavit on 16<sup>th</sup> November 2018 in which he deponed that the application amounts to an abuse of the court process as in his view, it is meant to delay enjoyment of the fruits of his judgment. He urged the court to dismiss the application but in the event that the court was inclined to allow it, he prayed that this be done on condition that the applicant would pay him half of the decretal amount and the other half in the sum of KShs.585,250 would be deposited in a joint account.

4. By consent of the parties, the application was canvassed by way of written submissions which I have duly considered together with the application and the affidavits on record. I have also considered the authorities cited by the parties and the relevant law.

5. The law governing stay of execution pending appeal is set out in *Order 42 Rule 6 (2) of the Civil Procedure Act*. This provision makes it clear that in order for an applicant to be deserving of the exercise of the court's discretion by being granted orders of stay pending appeal, he must demonstrate to the satisfaction of the court the following three conditions:

- i. That he is likely to suffer substantial loss if the orders sought are not granted;
- ii. That the application was filed without unreasonable delay; and
- iii. That such security as the court may ultimately order for the due performance of the decree had been given.

6. Starting with the requirement that the application should be filed timeously, I find that the judgment subject matter of the appeal was delivered on 25<sup>th</sup> September 2018; the appeal was filed on 8<sup>th</sup> October 2018 and the application was filed on 24<sup>th</sup> October 2018 about two weeks later. Given this fact, there is no doubt that the application was filed without unreasonable delay.

7. On substantial loss, the applicant has maintained that if stay orders are not granted, it will suffer substantial loss as the respondent's means are unknown and if execution issues, it is unlikely to recover the decretal amount in the event that the appeal is successful. The respondent in his replying affidavit supported the position taken by the applicant by averring that he has been relying on handouts from his friends and relatives to meet his financial needs.

8. Given that the decretal amount in this case is about KShs.1,000,000 which is obviously not a small amount, it is my finding that the applicant's apprehension that it is unlikely to recover the decretal amount from the respondent in the event that its appeal is successful is well founded. I am thus satisfied that the applicant has demonstrated that it is likely to suffer substantial loss as defined by *Gikonyo, J* in *James*

Wangalwa & Another V Agnes Naliaka Chesoto, [2012] eKLR if the stay orders sought are not granted. See also – Equity Bank Limited V Tanga Adams Company Limited, [2016] eKLR.

9. Given that the applicant has offered to provide any security that the court may order for the due performance of the decree and considering my foregoing findings, I am satisfied that the applicant has met the legal threshold for grant of orders of stay of execution pending appeal. I consequently allow the application on condition that the applicant shall deposit the entire decretal amount in an interest earning bank account operated by counsel on record for both parties within the next 30 days failing which the stay granted will automatically lapse.

10. Costs of the application will abide outcome of the appeal.

11. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day July, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Ngira for the applicant

No appearance for the respondent

Mr. Salach: Court Assistant