



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.31 OF 2018**

**JOYCE LANGAT.....APPELLANT/APPLICANT**

**VERSUS**

**ROSE SELLAH AUMA.....RESPONDENT**

*(Appeal originating from Judgment in Kericho CM CC No.420 of 2016 by Hon. S. K. Ngetich)*

**RULING**

1. This is a Notice of Motion dated 25<sup>th</sup> October 2018 brought under Order 42 Rule 6, Order 22 Rule 22 of the Civil Procedure Rules 2010, as well as section 1A, 1B and 3A of the Civil Procedure Act (cap. 21) seeking the following orders:

- 1. That the application be certified as urgent and interim orders be granted at the first instance pending hearing of the application inter-parties.**
- 2. That there be a stay of execution of the decree and the order of the court dated 21<sup>st</sup> September 2018 in Kericho Chief Magistrate's Court Civil Case No.420 of 2010 and or any other subsequent orders of the court pending the hearing and determination of this application.**
- 3. That this court be pleased to order stay of proceedings in Kericho Chief Magistrate's Court Civil Case No.420 of 2016 pending the hearing and determination of this application.**
- 4. That there be a stay of execution of the decree and or Order of court dated 27<sup>th</sup> September 2018 in Kericho Chief Magistrate's Civil Case No.420 of 2016 and or any other subsequent orders of the court pending the hearing and determination of the appeal.**
- 5. That this honourable court be pleased to grant any other orders and or relief befitting the circumstances.**
- 6. That the costs of the application be provided for.**

2. The application has grounds on the face of the Notice of Motion, that the appeal had raised pertinent issues with high chances of success, and that the appeal would be rendered nugatory if stay the orders were sought not granted.

3. The application was also filed with a supporting affidavit sworn by Joyce Langat, the applicant, stating that she had filed an appeal which would be rendered nugatory if the stay orders sought were not granted. A copy of the Memorandum of Appeal was annexed.

4. The application was opposed through a replying affidavit sworn by Rose Sellah Auma the respondent sworn on 3<sup>rd</sup> December 2018, in which it was deponed that the judgment was obtained procedurally, after the parties were afforded equal opportunity to present their cases.

5. On the hearing date, Mr. Nyadimo for the applicant submitted that the respondent would not be prejudiced if the application was allowed and relied on the case of **Butt –vs- Rent Restrictions Tribunal – Nairobi (CA), Civil Appeal No.6 of 1979** on the exercise of this court's discretion in such matters. According to counsel also since the respondent had no known source of income, if the decretal sum was paid to her, then the appeal would be rendered nugatory if it succeeded. Counsel urged this court to allow each party its day in court on this appeal.

6. The respondent's counsel, Ms Ngeno in response relied on the replying affidavit. Counsel stated that the applicant had delayed for 3 months before filing the application. Counsel further submitted that the grounds of appeal filed herein were mere allegations, and provided no indication that the appeal had chances of success. According to counsel, the application was merely meant to delay the respondent in enjoying the fruits of her judgment. Counsel relied on the case of **Masisi Mwita -vs- Damaris Wanjiku Njeri- Muranga High Court Civil**

**Appeal No.107 of 2015 – [2016] eKLR** on the considerations for such an application under Order 42 Rule 6 of the Civil Procedure Rules. Counsel concluded by stating that if the application was allowed, then the applicant be ordered to deposit the decretal sum in court within 30 days.

7. This is an application under Order 42 Rule 6 of the Civil Procedure Rules which gives the parameters for consideration by the court, the relevant parts, of which states as follows:

6 (1) .....

(2) **No order of stay shall be made under sub-rule (1) unless –**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and**

**(b) Such security on the court orders for the due performance of such a decree or order as may ultimately be binding on him has been given by the applicant.**

8. Granting stay of execution of judgment pending appeal is a discretionary power of the court. See **Butt -vs- Rent Restriction Tribunal, Nairobi Civil Appeal No.6 of 1979**. The main reason for such discretion is not to render an appeal nugatory. Each case must be considered on its own special facts.

9. With regard to delay, counsel for the respondent has opposed the application on that account. Counsel does not dispute the date of the trial court's decision, but says it took three (3) months for the appellant to file the present application.

10. I have seen the typed copy of the judgment filed after the application was filed, delivered on 27<sup>th</sup> September 2018. I note that, the application was filed on 26<sup>th</sup> October 2018, which is a month thereafter. In the circumstances of this case, I find that the one (1) month delay is not an unreasonable delay. It appears that the applicant was not availed the judgment in time. That disposes of the element of delay.

11. An applicant in such an application is required to demonstrate that he or she will suffer substantial loss if the stay of execution is not granted. The applicant's counsel has argued that the respondent was a person of no known source of income and therefore if payment was made and the appeal succeeded, then the respondent would not be able to refund the amount of the decree so paid. I am aware that courts have held that if the respondent is a "man of straw", then stay may ordinarily be granted. However, each case has to be considered on its own merits.

12. The applicant's counsel has addressed this issue of means, but the respondent's counsel has kept mum over the same. The respondent's counsel however, submitted that the appeal did not have chances of success. I find that the applicant has demonstrated that the respondent is a person of straw. The appeal, based on the grounds of appeal is arguable. I find that the applicant will suffer substantial loss if stay is not granted.

13. The third consideration is whether the applicant will be able to provide security for the decretal sum. The applicant's counsel has not addressed this issue, but the respondent's counsel is of the view that if the application is allowed, then the decretal sum be deposited in court.

14. Since the applicant has not been keen to address this issue, but the court has discretion to grant conditional stay, in the interests of justice for all parties in this money decree- I will grant stay of execution as requested as it is not clear from the judgment of the trial court whether a search certificate for the subject motor vehicle was produced in evidence.

15. Consequently, I allow the application and grant a stay of execution of decree pending appeal as requested. However, the appeal has to be fixed for hearing by January 2020. If not the stay of execution granted herein will automatically lapse.

16. The costs of this application are in the cause, that is the appeal filed herein.

Dated at Kericho this 18<sup>th</sup> day of July 2019.

**George Dulu**

**JUDGE**