



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 9 OF 2019

LIVINGSTONE MUSYOKAAPPELLANT

VERSUS

APHIA WAMBUA.....RESPONDENT

RULING

1. **Livingstone Musyoka**, the Applicant, by way of **Notice of Motion** dated the **12th** day of **February 2019** seeks stay of execution of the decree resultant from the judgment of Hon. F. Nekesa, in Kitui Chief Magistrates Civil Case No. 118/2018 pending hearing and determination of the Appeal filed herein.

2. The application is premised on grounds that the Applicant was ordered to pay the Respondent **Kshs. 700,000/=** within **30 days** plus costs thereon; the appeal has high chances of succeeding; the application has been brought without unreasonable delay; the applicant has regular income being an accountant and employee of National Bank, Kitui; he is willing to deposit 50% of the decretal amount in a joint interest account in the names of both advocates of parties; and he is willing to furnish security for due performance of the decree.

3. The Applicant swore an affidavit in support of the Application where he reiterated what is stated on the grounds upon which the application is based and added that it is in the interest of justice for the order sought to be granted.

4. In a reply thereto, the Respondent by way of affidavit evidence deposed that the applicant had not shown that he is so poor that he will not refund even a portion of the decretal sum in event that the appeal succeeds and as such the appeal shall not be rendered nugatory nor shall the applicant suffer substantial loss.

5. That she owns properties: Land Parcel Number **Kwangwithya/Misewani/1826** that is developed estimated to be valued at **Kshs. 15,000,000/=**, **Kitui Municipality Block 111/293** with (7) 2-bedroomed self contained residential houses all valued at **Kshs. 16,000,000/=**, **Kyangwithya/Mutune/1425** valued at **Kshs. 2,000,000/=**, **Kyangyi/Mandogoi/1684** valued at **Kshs. 1,000,000/=**, an Account No. **0720191901918** with **Equity Bank, Kitui Branch**, with a yearly turnover of **Kshs. 14,000,000/=** and **Kshs. 15,000,000/=**, an account with **KCB Kitui Branch** with a yearly turnover of **Kshs. 23,000,000/=** and **Kshs. 25,000,000/=**, **Motor vehicle Registration NO. KCK 481** valued at **Kshs. 1,500,000/=**, **KCQ 124X** valued at **Kshs. 1,650,000/=**.

6. That the applicant has kept the money since **26/8/2017** and the application is a mere gimmick to punish her by refusing to pay her money.

7. The Application was canvassed by way of written submissions. It was urged by the Applicant that the application has been brought timeously; the appeal is arguable with high chances of success and justice demands that a stay be granted so that the appeal should not be rendered nugatory as held in the case of **Butt vs. Rent Restriction Tribunal (1982) KLR**; he will suffer substantial loss if he is made to pay the 700,000/= to the plaintiff before the appeal is heard which will render the appeal nugatory in event that it is successful.

In this regard he quoted the case of **James Wangalwa & Another –vs. Agnes Naliaka Cheseto (2012) eKLR** where substantial loss was defined thus:

“..... Applicant must establish other factors which show that the essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni [2002] KLR 867, the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

8. Further it was urged that the Respondent had not demonstrated that she would be able to refund the decretal amount in event that the appeal succeeds as the land she stated to own was not valued and the source of money in her accounts had not been produced for purposes of demonstrating if the business was stable for future predictability.

9. On her part the Respondent urged that it had been demonstrated that the Respondent was not a woman of straw who will not be able to repay the decretal sum in event the appeal succeeds. She relied on the case of **Kenya Shell Ltd. Vs. Kibiru (1986) KLR 40** where the court stated that:

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”

And in **Kiwanjani Hardware Ltd vs. Daniel Ndaka & Another** where it was held that:

“It has not come out from the submissions on behalf of the applicants that the Respondents will be unable to refund the decretal sums if the appeals succeed. The decree herein is a Money decree and unless it can be manifestly demonstrated that the respondents are such paupers that they cannot be expected to refund even a portion of the decretal sum, then the Order for Stay shall not issue. In this case, although the applications for stay were filed within reasonable time, the main condition for the granting of a Stay Order has not been met by the applicants, namely that substantial loss will result if the Stay Order is not granted...”

And that having given the Applicant Kshs. 700,000/= in 2017, two (2) years later she is financial sound therefore the issue of substantial loss has not been established.

10. I have considered the rival submissions by both parties.

11. Principles of granting a stay of execution are provided for in **Order 42 Rule 6(2) of the CPRs** that stipulates thus:

i. The application should be brought without undue delay

ii. The court should be satisfied that substantial loss may result to the applicant unless stay of execution is ordered, and

iii. Such security as the court orders for due performance as such decree or order as may ultimately be binding on him has been given by the applicant

12. The impugned judgment was delivered on the **16th** day of **January 2019** and the instant application was filed on the **13th** day of **February 2015** prior to a month elapsing. Therefore there was no delay whatsoever.

13. It is urged that the applicant will suffer substantial loss unless the order sought is granted since the appeal will be rendered nugatory. The Respondent on the other hand has contended and in fact demonstrated that she is not a person of straw such that if the appeal succeeds she can easily refund the money in issue.

14. In the Case of **Wilson Vs. Church (NO.2) (1879) 12 ch.D454 at page 548 Calton L.J. Stated that:**

“...when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory”.

15. The sum awarded is **Kshs. 700,000/=** if execution is enforced the appeal will be of no importance. In fact the matter will have been determined. In the premises this is a case where I must ensure that rights of both parties are upheld so as not to prejudice the appeal that has already been filed.

16. In the premises, I grant stay of execution on condition that the Applicant pays the Respondent **50%** of the decretal sum and the balance thereof to be deposited in an interest earning account in the names of the Advocates of both parties herein within **fourteen (14) days**.

17. In event of default the stay order shall stand vacated.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of October, 2019

L.N. MUTENDE

JUDGE