



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 242 OF 2018**

**MUSTANO ROCCO..... APPELLANT**

**VERSUS**

**ANIELLO STERELLI.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated the 14<sup>th</sup> day of December, 2018, the Appellant **Musitano Rocco** brought an application seeking from this court the following orders: -

a) *Spent*

b) *Spent*

c) *That this honourable court be pleased to order that there be a stay of execution of the judgment and decree entered herein against the defendant/Applicant on the 7<sup>th</sup> November 2018 pending hearing and determination of this Application inter-parte.*

d) *That this honourable court be pleased to order that there be a stay of execution of the judgment and decree entered herein against the defendant/Applicant on the 7<sup>th</sup> November 2018 pending hearing and determination of the Defendant /Applicant Appeal .*

e) *That the costs of this application be provided for.*

2. The application is supported by grounds in the Appellant's supporting affidavit sworn on the 28<sup>th</sup> November 2018 where he deposed as follows:

**(a)That judgment was entered against him on the 7<sup>th</sup> November 2018 for a principal sum of Kshs. 2,772,480/= plus costs and interest and being dissatisfied with the whole of the said judgment he has lodged an appeal.**

**(b)The appellant avers that unless the order sought in his application are granted, then he is bound to suffer substantial loss as the Respondent may embark on the execution process before the lodged appeal is determined and the judgment sum will be beyond the defendants reach in the event the appeal is successful**

**(c)The appellant avers that his appeal has a high chance of success, the Appeal will be**

**rendered nugatory if a stay of execution is not granted.**

**(d) The appellant also avers that he is ready to comply with any such conditions as may be determined by this Court.**

3. On his part, the Respondent has opposed the application by way of Grounds of Opposition dated 19<sup>th</sup> February 2019 on the following grounds:

*(a) That the applicant has exercised unreasonable delay and inordinate delay in filing the application.*

*(b) The applicant has not shown any substantial loss it may suffer should stay orders sought in the application be denied*

*(c) The applicant as not offered security that may be binding upon it for the due performance of the decree.*

*(d) That the application is bad in law and incurably defective.*

*(e) The application is a delaying tactic designed to bar the respondent from realizing the fruits of its judgment delivered on the 17<sup>th</sup> November 2018.*

*(f) The applicant has failed to establish the prerequisite to warrant grant of stay orders*

*(g) In particular the applicant has failed to existence of an arguable appeal with high likelihood of success.*

*(h) The applicant has also failed to establish irreparable harm.*

*(i) The applicant has failed to demonstrate that the appeal is likely to be rendered nugatory if the stay orders are not granted.*

*(j) The orders sought are discretionary and to that effect the applicant has failed to demonstrate he is deserving of this court discretion.*

The application proceeded for hearing on 26.3.2019 with the counsel submitting orally. The counsel also filed authorities in support of their respective stands.

#### **ANALYSIS AND DETERMINATION**

4. I have considered the Application filed herein, the grounds on its face before me and the affidavit filed in support thereof and Grounds of opposition thereto. I have also considered the oral submissions by the parties and the case law cited.

5. In the case of **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR** where it was held as follows:-

***“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.***

6. In the case of **Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil**

**Case No. 2143 of 1999**

***“ ..... From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability....”***

7. Similarly in the case of **Mohammed & Another vs. Haidara [1972] E.A 166** at page 167 paragraph F-H, **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

***“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent’s affidavit gives no material facts and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”***

8. With regard to the foregoing authorities, I find the Respondent only filed grounds of opposition there being no replying affidavit to the application, the facts deponed to in the supporting affidavit are therefore considered unrebutted and I take them to be true. However, where the averments made in the affidavit fall short of the legal threshold expected in a matter, this Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed.

**DETERMINATION**

9. The conditions for granting a stay of execution pending Appeal are now settled. An order of stay of execution is a discretionary one but that discretion is fettered by the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which are that: -

*i. The application must be made without undue delay.*

*ii. That the Applicants must demonstrate that they will suffer substantial loss unless the order sought is granted.*

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

10. On the first condition on whether the application was filed without undue delay, it is noted that the judgment by the trial was delivered on the 7<sup>th</sup> November, 2018. The Application herein was filed on the 17<sup>th</sup> December, 2018. This was a period of fifteen (15) days from the date of the Judgment which, in my view, was reasonable time, within which the application was brought.

11. Regarding the second condition of substantial loss likely to be suffered by the Appellants if stay of execution is not granted, it was deponed that the Respondent’s advocate has already threatened execution and that the Applicant is afraid that the judgment sum will be beyond its reach if the appeal is successful.

12. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge. The Court of Appeal while dealing with a similar situation in the case **National Industrial Credit Bank Limited –vs- Aquinas Francis Wasike and Another (UR) Nairobi Civil Application No. 238 of 2005** the Court of Appeal stated as follows...

***“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential***

*burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”*

13. Similarly, in Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR it was held that:

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”*

14. In my view, the Respondent was unable to discharge his burden because no replying affidavit was filed. Therefore, I find that the Applicant has proved that he will suffer substantial loss.

15. On the third condition, the court has noted the offer by the appellants to comply with any such conditions/terms as may be determined by this Court.

16. Consequently, I am persuaded that the applicant has met the requirements for grant of stay of execution. I find that the application dated 14<sup>th</sup> December 2018 has merit.

17. The stay of execution, however, is granted on condition that the full decretal sum is deposited in a joint interest earning account in the joint names of both Advocates for the parties herein within 30 days from today’s date failing which the stay of execution shall lapse.

18. Costs will be in the cause.

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

**D.**  
**JUDGE**

**O.**

**CHEPKWONY**