



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO.83 OF 2018**

**ANGIENDA JOSEPH OKETCH .....PLAINTIFF**

**VERSUS**

**SAMWEL KIMANI NDUNGU.....DEFENDANT**

**RULING**

The Applicant filed an application dated 29<sup>th</sup> October, 2018 seeking Orders for Stay of Judgment which the Court delivered on 18<sup>th</sup> September, 2019 in Eldoret CMCC No.264 of 2012 together with all consequential Orders. The application was brought under Order 42 Rule 6 of the Civil Procedure Rules 2010.

**APPLICANT'S CASE**

The applicant filed his submissions on 13<sup>th</sup> March, 2019. The appellant provided a brief history of the events leading upto the Judgment and the appeal. He cited Order 42 Rule 6 and submitted that the Appellant is not required to furnish security as the conditions under Order 42 Rule 6 do not apply to stay of proceedings which encompasses all activities in the file appealed from.

The Applicant relied on the following cases; ***NAIROBI HCCA.168 of 2004 – AMERICAN LIFE INSURANCE CO. –VS- DAVID OYATTA and the Court of Appeal decision of NAITONAL BANK OF KENYA LIMITED -VS- FIRST INTERSTATE TRADING COMPANY and OTHERS (2006)1 EA 287 (CAK).***

The Applicant brought this application under the limb of stay of proceedings which invariably includes stay of execution but at the same time is exempt from the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules.

The subject of the Appeal discloses a gross violation of the rules of natural justice and there has been a miscarriage of justice. The Appellant has been greatly prejudiced by the actions of the trial Court and seeks stay to enable him pursue his appeal.

**RESPONDENT'S CASE**

The Respondent filed his submissions on 30<sup>th</sup> April, 2019. The subject of the appeal are the orders of the subordinate court dated 2<sup>nd</sup> July, 2018 declining to grant the Applicant an adjournment. No leave was sought to appeal against the said Ruling and therefore there are no proper proceedings before the Court. Leave to appeal was mandatory and omission of the same is fatal. There is no competent appeal upon which the application for stay can be anchored. The Respondent cited the case of ***JORAM THUO WAIREGI -VS- KENYA COMMERCIAL BANK (2004) eKLR*** in support of his submission.

The Respondent submitted that the Applicant has not satisfied the threshold set out under Order 42 Rule 6. The impugned ruling declining to grant adjournment was made on 2<sup>nd</sup> July, 2018 whereas the present application was filed on 30<sup>th</sup> October, 2018, a period of more than 4 months since the order was made. The application has been filed under inordinate delay period which is unreasonable and inexcusable. There has been no explanation for the delay. The Respondent cited the case of ***of RYCE MOTORS LIMITED -VS- JONATHAN KIPRONO RUTO & ANOTHER (2015) eKLR.***

The Applicant has failed to demonstrate the loss he stands to suffer if stay is not granted. The Judgment is a money decree and it is not in issue that the Respondent is a person of means. It has not been shown that the Respondent is a person of straw or proved that he may not repay the decretal amount if the appeal succeeds. The Respondent cited the case of ***MASIS MWITA -VS- DAMARIS WANJIKU NJERI (2016)eKLR.*** He also cited the case of ***ANTOINE NDIAYE -VS- AFRICAN VIRTUAL UNIVERSITY (2015) eKLR.***

The Applicant has not furnish security for the due performance of the decree being appealed from. This is a mandatory tenet under which the application is brought. The Respondent referred to the Masisi Mwita case (Supra) in this regard. The application fails on all limbs under Order 42 of the Civil Procedure Rules.

## **ISSUES FOR DTERMINATION**

a) Whether the application meets the threshold for Orders of stay under Order 42 of the Civil Procedure Rules.

***Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 states:-***

***(2) No Order for stay of execution 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 that the application has been made without unreasonable delay and***

***(b) 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.***

Substantial loss

The applicant has not demonstrated that substantial loss will be occasioned if stay is not granted. The applicant has not even submitted on this limb at all.

### **Unreasonable delay**

The ruling appealed from was delivered on 2<sup>nd</sup> July 2018. The application for stay was filed on 29<sup>th</sup> October 2018. This was close to 4 months after the ruling. The applicant has not given any explanation for the delay.

### **Security**

The applicant has not furnished any security for due performance of the decree and has not made any proposal on the same. He argues that the conditions for stay under order 42 rule 6 do not apply to stay of proceedings which encompass all activities in the file appealed from. I disagree with this particular submission as the applicant seek orders under Order 42 but the Applicant decided to pick and choose which parts of the threshold set should apply to his case. Further, there are no ongoing proceedings to be conducted save for execution. Therefore, he cannot rename execution as mere proceedings in order to avoid satisfying the threshold set in law. If the case had not been concluded, then the applicant's argument based on proceedings would be worth considering.

From the foregoing considerations, it's vivid that he application does not meet the threshold provided under Order 42 Rule 6. It's unmerited, and it accordingly dismissed with costs to the Respondent.

**DATED, SIGNED and DELIVERED at ELDORET this 19<sup>th</sup> day of November 2019**

S. M. GITHINJI

JUDGE

In the Presence of:

Miss Koech for the Appellant

Mr. Kibii for the Respondent – Absent

Ms. Abigael – Court assistant

S. M. GITHINJI

JUDGE

**Miss Koech**

We seek leave to appeal. We apply for certified copies of proceedings and ruling.

**Court**

Application is granted. Applicant to meet the fee for certified copies of proceedings and the ruling.

S. M. GITHINJI

JUDGE