



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 67 OF 2018

PURITY NJERI GITONGA.....APPELLANT

VERSUS

LUCY MUKWANYAGA MBABU.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is for the application for stay of execution pending appeal dated 18/01/2019 where the appellant argues that she will suffer irreparable loss and damage if the judgement is executed before the appeal is determined.
2. The respondent herein secured judgement against the appellant to the tune of Kshs. 390,000/= as well as costs in Embu CMCC No. 234 of 2017 delivered on the 19th November 2018.
3. In rejoinder, the respondent deposed a replying affidavit on 14/03/2019 in which she deposes that the application for stay is unmerited as the appellant has not justified the substantial loss she is likely to suffer and further that she should be ordered to deposit security in the amount of the decretal sum.

B. Appellant's Submissions

4. The appellant submits that she will suffer substantial loss and damages if the lower court decree is implemented and further that this will render the pending appeal nugatory. She further submits that the application for stay was brought without unreasonable delay and as such should be allowed.

C. Respondent's Submissions

5. The respondent submits that the appellant is before the court with unclean hands as she was ordered to pay advocates cost on the 7/05/2018 and she has failed to do the same and as such her application should fail.
6. Further, the respondent submits that the appellant should be ordered to deposit the decretal sum of Kshs. 390,000/= pending the hearing of this appeal failure to which the appeal should be dismissed with costs.

D. Analysis of Law

7. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. **Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010** empowers this court to grant orders for stay execution of either its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under subrule (1) unless—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 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.”

8. It is the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if

he or she was successful.

9. As can be seen hereinabove, there was no affidavit evidence by the respondent on the court record. This therefore has left the court in a quagmire especially as regards the ability of the respondent to pay back the decretal sum in the event the appellant was successful in his appeal herein. In the absence of proof of her ability to pay back the said sum; this court is satisfied that the appellant would suffer substantial loss. She has thus satisfied the first condition of being granted a stay of execution pending appeal.

10. On the second issue, this court finds the period of two (2) months for filing the present application is not too long to be termed as inordinate delay. In any case there is no prejudice or injustice upon the respondent if this court proceeds to determine this application. This is because there is no evidence that was adduced before this court to demonstrate that the respondent has obtained the Certificate of Costs and Decree or made an application for execution of the decree that would have been thwarted midstream by the filing of the present application.

11. The Appellant has not demonstrated her willingness to furnish security. There is no affidavit evidence pointing to the fact that she is willing to furnish security. The wording of Order 42 Rule 6 connotes the satisfaction of all three requirements to trigger the grant of orders of stay of execution.

12. The appellant has given general averment in his affidavit that she is ready to give security for the due performance of the decree. I do appreciate that the appellant has a constitutional right to pursue his appeal and I note that in the instance case the issue revolves around a monetary decree. Although the respondent has not shown her ability to refund in the event that the appeal is successful. I take note the fact that this court is at liberty to set the terms and quantity of the security where no particulars have been given.

13. Further, in the case of Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263, the court therein invoked its jurisdiction and ordered the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus: -

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

14. As this very court held in the case of Siegfried Busch vs MCSK [2013] eKLR,

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

15. Having considered all the foregoing, I find the application for stay merited and it is hereby granted in the following terms: -

a) That the applicant deposits Kshs. 200,000/= being half of the decretal amount in an interest earning account in the names of the advocates for the parties within twenty-one (21) days pending hearing and determination of the appeal.

b) That in default of compliance on the deposit, the stay orders will be automatically vacated.

c) That the costs of this application be costs in the cause.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Okwaro for Muthoni for Applicant