



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. CIVIL APPLICATION NO. 36 OF 2018**

**GREENFIELD LIMITED.....APPLICANT**

**VERSUS**

**STEPHEN KIOKO MUTUA.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling is for the application dated 6<sup>th</sup> April 2019 seeking for orders for stay of execution of the judgement of the court in Embu CMCC No. 77 of 2017 pending hearing and determination of the intended appeal.
2. It is the applicant's case that there was a delay in filing an appeal, caused by the trial court's delay in availing certified proceedings thus necessitating his filing of an application to file his appeal out of time that is pending.
3. It is the applicant's case that the respondent has threatened to execute the aforementioned judgement which would occasion it substantial loss considering that the applicant has an arguable appeal with high chances of success and further since the respondent is not in a position to refund the decretal sum if the same is paid out to him.
4. In rejoinder, it is the respondent's case that the instant application is an abuse of the court process meant to deny the respondent fruits of his judgement and that there is a pending judgement dated 10<sup>th</sup> July 2018 all which be allowed on the condition that the applicant pays half the decretal sum to the respondent and deposit the other half in an interest earning account in the name of both advocates.
5. The parties disposed of the application by way of written submissions.

**B. Applicant's Submissions**

6. It is submitted that the applicant stands to suffer substantial loss if orders of stay are not granted because the respondent is not in a position to refund the decretal sum in the event the intended appeal succeeds as he has not tendered any evidence to show that he is a person of means as was held in the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan (2007) eKLR.**
7. It is also submitted that the applicant has demonstrated an arguable appeal with overwhelming chance of success by annexing a draft memorandum of appeal and further that there is risk that the intended appeal will be defeated as the respondent has threatened to execute the judgement in his favour.
8. It is also submitted that the instant application has been brought without unreasonable delay as the parties were trying to negotiate payment of the decretal amount out of court.

**C. Respondent's Submissions**

9. It is submitted that there was a delay in bringing the instant application as it was brought after the lapse of 30 days stay of execution granted by court during the delivery of judgement on the 28<sup>th</sup> May 2018. The applicant further states that no reasonable explanation has been offered by the applicant even after one year of delay.
10. It is also submitted that the applicant has not demonstrated that he would suffer substantial loss or that the respondent is a person of straw not capable of repaying the said sum in the event the appeal succeeds.

11. It is also submitted that the applicant has not offered or proposed any security for the due performance of the decree of the lower court as the offer for security must come from the applicant as a price for stay as was held in the case of Masisi Mwita v Damaris Wanjiku Njeri [2016] Civil Appeal 107 of 2015.

12. It is submitted that in the alternative the court needs to ensure a balancing act and order the applicant to pay half the decretal amount to the respondent plus costs and the other half be deposited in a joint interest earning account as was held in the case of Edward Kamau & Another v Hannah Mukui Gichuki Misc. No. 78 of 2015.

#### **D. Analysis & Determination**

13. In the cases of Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Benjamin Karuga Kibiru [1986] KLR 410, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

14. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

*1. Substantial loss may result to the applicant unless the order was made;*

*2. The application was made without unreasonable delay; and*

*3. 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.*

15. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**”. It connotes that all three (3) conditions must be met simultaneously.

16. It is the considered view of this court that substantial loss does not have to be a lot of money. It is 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.

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

18. In that regard, I have come to the conclusion that the applicant has satisfied the condition of demonstrating that he would suffer substantial loss if the order for stay of execution pending appeal was not granted.

19. The other issue is whether this application was filed without delay. In my view, the period of over one year for filing the present application is long. As the respondent correctly pointed out, the applicant did not explain the delay and/or proffer a reason why he failed to file the said application timeously. However, the applicant stated that the delay was caused by continuing negotiations between the parties herein on settlement of the decretal sum. Notably, delay must not only be inordinate, it must also cause prejudice to the opposing party. In my view, the delay herein was explained and it will not cause the respondent to suffer prejudice or injustice if the orders are granted.

20. The Applicant has not demonstrated his willingness to furnish security. In other words, there was no averment pointing to the fact that he was willing to furnish security. It is my considered view that this court may set the amount of security, should the application be successful.

21. In the case of Ujagar Singh v 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...”*

22. In the case of Siegfried Busch vs MCSK [2013] eKLR, it was held;

*“A superior court to which an application has been made must recognize 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...”*

23. Accordingly, having considered the parties’ pleadings, affidavits, submissions and case law, it is my considered view that the applicant is entitled to exercise to his right of appeal. It is in the interests of justice that orders for stay of execution pending the hearing and determination of the appeal of this appeal be granted so as not to render the appeal nugatory.

24. Accordingly, the upshot of this court’s ruling is that the applicant’s notice of motion application dated 6<sup>th</sup> April 2019 and filed on 8<sup>th</sup>

April 2019 is merited and the same is hereby allowed in the following terms:-

- a) *That there shall be a stay of execution of Judgment of Hon. M.N. Gicheru in Embu CMCC No. 77 of 2017 pending the hearing and determination of the intended appeal on condition that the appellant shall deposit into an interest earning account in the joint names of the advocates on record for the parties half of the decretal amount within thirty (30) days from the date hereof.*
- b) *That in the event of default on deposit of the said sum within the time stipulated herein, the conditional stay of execution shall automatically lapse.*
- c) *That if the appeal has not been filed, the same be filed within seven (7) days.*
- d) *The applicant shall meet the costs of this application for mitigation of the delay in filing this application.*

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Kathungu for Applicants**