



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 448 OF 2005**

**SALIM MOHAMED SALIM BAKHRESA.....APPLICANT**

**VERSUS**

**SHAROK KHER MOHAMED ALI (HIRJI).....RESPONDENT**

**RULING**

1. The application dated 5<sup>th</sup> December, 2017 seeks order that:

**1. Spent**

**2. That this honourable court be pleased to order the immediate release to the Applicant/Appellant of Ksh.200,000/= that he had deposited by as cash bail.**

**3. That this honourable court be pleased to order the immediate release to the Applicant/Appellant of the original title deed being title number E. Bukusu/S.Kanduyi/1210 that had he had deposited with the court as a condition for stay of execution of the warrants or arrest.**

**4. Spent**

**5. That this honourable court be pleased to grant a stay of execution of the decree and all consequential orders issued herein by the Deputy Registrar (Hon F. Rashid), specifically the order committing the Appellant to civil jail pending the hearing and determination of this appeal.**

**6. That costs of this application be provided for.**

2. The application is based on the grounds therein and is support by the affidavits sworn by the Applicant. The Applicant is aggrieved by the ruling delivered by the Deputy Registrar on 15<sup>th</sup> February, 2017 in respect of a Notice to Show Cause allowing issuance of warrant of Arrest against the Applicant on account of failure to settle the decretal sum herein fully. According to the Applicant, the decretal sum was fully settled. A subsequent application for a review of the ruling failed and the Respondent was given the go ahead to execute the decree by any other method other than by way of committal to civil jail.

3. It is contended that as a condition for stay of execution of the warrant of Arrest, the Applicant had deposited the sum of Ksh.200,000/= and the original title deed of land parcel No. E Bukusu/S. Kanduyi.1210. It is stated that the Applicant has filed an Appeal which has high chances of success and that he stands to suffer substantial loss and the Appeal rendered nugatory. The Applicant further stated that in view of his age and poor health, he is not in any gainful employment and relied on his children for upkeep. The Applicant is willing to comply with the conditions that the court may impose.

4. The application is opposed. It is stated in the replying affidavit that the decretal sum has not been fully paid and that the security deposited herein by the Applicant should not be released as the Applicant has been spared civil jail by the court. It is denied that an Appeal has been filed. The Respondent supported the ruling by the Deputy Registrar and stated that the Applicant has substantial wealth which he has transferred to his children in order to defeat the ends of justice.

5. The Respondent's position is that just like the Applicant, he is also not in good health. The Respondent saw this application as an abuse of court and urged that the same be dismissed with costs.

6. Order 42 rule 6 (1) of the Civil Procedure Rules provides as follows:-

**“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”**

7. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“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.”**

8. The ruling by the Deputy Registrar which is the subject of the Appeal was delivered on 23<sup>rd</sup> November, 2017. The Memorandum of Appeal was filed on 24<sup>th</sup> November, 2017. The instant application was filed on 5<sup>th</sup> December, 2017. There was no unreasonable delay.

9. On substantial loss, the gist of the Applicant’s case is that he has fully settled the decretal sum. The Applicant’s contention is that he will lose his property and his appeal rendered nugatory. The threat of execution is real and the Applicant has appeared in court severally in a bid to stay the execution. However, in the ruling dated 23<sup>rd</sup> November, 2017, the Deputy Registrar observed that the Applicant is sickly and allowed execution in any other form other than committal to civil jail. There is therefore no threat of committal to civil jail.

10. On 13<sup>th</sup> September, 2017 the Applicant was brought to court under a warrant of Arrest which was in force at the time. The Applicant was then released on a Ksh.500,000/= bond with one surety of a like sum and a cash bail of Ksh.200,000/=. Since then the Applicant has been enjoying his freedom. The deposit of the title deed in question is as per the orders of the Deputy Registrar given on 5<sup>th</sup> October, 2017 pursuant to an application for substitution of the order for the deposit of half the decretal sum in court. This court will therefore continue holding the same security pending the hearing and determination of the Appeal.

11. With the foregoing, the application by and large has no merits save for the prayer for the execution of the decree. The application therefore succeeds to that extent only. Costs in cause.

**Date, signed and delivered at Nairobi this 11<sup>th</sup> day of Oct., 2018**

**B. THURANIRA JADEN**

**JUDGE**