



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 6 OF 2018**

**K.B SANGHANI & SONS.....APPELLANT/APPLICANT**

**VERSUS**

**DOROTHY MUNINI MUTISYA & JACKLINE NDINDA (Suing as**

**the Legal Representatives of the estate of**

**JACKSON MUTUKU MUTISYA-Deceased.....RESPONDENT**

**RULING**

**The Application**

1. The Appellant filed a Notice of Motion dated 26<sup>th</sup> February, 2018, seeking orders to be granted stay of execution pending the hearing and determination of the appeal herein. The application is premised on the grounds that there is a judgment that was delivered in favour of the Respondent as against the Appellant on the 4<sup>th</sup> of December, 2017 wherein the appellant is aggrieved and who maintains that it has a merited appeal which will be rendered nugatory if the Respondent moves to execute as the appellant will be subjected to hardship, loss and damage.
2. The background to and reasons for the Application are given from the Defendant's perspective in the Supporting Affidavit sworn by Anthony Mwangi, the legal officer of the insurers of the defendant dated 26<sup>th</sup> February, 2018.
3. He averred that stay of 30 days that was granted in the lower court has expired and the plaintiffs may move to execute and that there is a meritorious appeal with high chances of success.
4. The Appellant stated that they are ready and willing to comply with the terms of security as ordered by court.
5. The appellant filed submissions dated 20<sup>th</sup> June, 2018 wherein reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, and the decision in **Johnson Mwiruti Mburu v Samuel Macharia Ngure (2004) eKLR**, for the arguments that they had met the threshold set by law as they have come to court without unreasonable delay in that they filed the memorandum of appeal swiftly. They further contended that that if orders of stay are not granted they will suffer irreparable loss, considering the colossal amount that was awarded by the trial court.
6. Lastly, the Appellant submitted that they are ready and willing to abide by the conditions that this court may give upon grant of stay and that they are ready to offer reasonable security as the court may order, and proposed to deposit the judgment award in a joint interest earning account in the names of both advocates.

**The Response**

7. Jackline Ndinda, the co-respondent, opposed the Applicant's application in a replying affidavit she swore on 26<sup>th</sup> April, 2018, and in written submissions dated 12<sup>th</sup> July 2018 filed in Court by the Respondent's learned Counsel, J A Makau & Company Advocates.
8. According to the Respondents, the Appellant has not deposited security as per the provisions of Order **42 Rule 6(2)(b)** of the Civil Procedure Rules. That the appellant has not demonstrated that execution is imminent and thus has filed this application to deny her the fruits of her judgment. That the decretal amount is necessary to meet the upkeep and education needs of the minors left behind by the deceased.
9. The averments in opposition to the application for stay were reiterated in the submissions filed by the Respondent, wherein it was argued that there is no demonstration that the appellant will be exposed to any substantial loss, and in any event the affidavit in support of the application is sworn by a person who is not competent to depone to that fact. Reliance was placed on the provisions of **Section 107(1) of the Evidence Act**.

## The Issues and Determination

10. I have read and carefully considered the pleadings and submissions filed. The two issues to be determined are whether the Court should exercise its discretion in favour of the Appellant and stay the execution of the decree of the Mavoko Principal Magistrates Court Case No. 545 of 2014 pending the hearing of the appeal and what amount of security should be ordered.

11. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

**“6.(1) 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.**

**(2) No order for stay of execution shall be made under subrule (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.”**

12. For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) The application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any decree that may become binding upon him.

13. The essence of an application for stay pending appeal is to preserve the subject matter of litigation and to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties especially the Respondent who already has judgement in their favour.

14. In the present application, this Court finds that there has been no delay in filing an application for stay pending appeal as judgment was entered on 4<sup>th</sup> December, 2017 and the application was made on 26<sup>th</sup> February, 2018 and thus the delay is not inordinate.

15. On the issue of substantial loss, the Respondents have not demonstrated that they have the means to refund the amount if the appeal succeeds. The decretal sum is a tidy amount by any standards and Respondent might not refund in the event of success of appeal since Respondent has not presented evidence of means on her part.

16. As the Appellant in its application has submitted itself to the conditions of security that may be ordered by court, I am inclined to accept their noble intention. The deposit of security will take care of the Respondent’s concerns as they already have a judgement in their favour.

17. Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Appellant’s Notice of Motion dated 26<sup>th</sup> February, 2018 has merit and is allowed on the following terms:

(1) There shall be a stay of execution of the judgment and decree in Mavoko Principal Magistrates Court Case No. 545 of 2014 pending the hearing and determination of the Appellant’s appeal, only on condition that the Applicant shall deposit the full decretal amount in **an interest earning account in the joint names of both Advocates** within 45 days of the date of this ruling failing which the stay orders herein shall lapse.

(2) The costs of the Notice of Motion shall abide in the Appeal.

**Signed, Dated and delivered at Machakos this 7<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**