



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

**CIVIL APPEAL NO 134 OF 2015**

**JEREMIAH MWANZA..... APPLICANT**

**VERSUS**

**JOHN NGUMBA.....RESPONDENT**

**RULING**

**The Application**

The Appellant filed a Notice of Motion in this Court dated 25th May 2016, seeking orders of a temporary stay of execution and sale of his moveable property proclaimed on 23rd June 2016 and scheduled for sale on 6th June 2016 until further orders. Further, that he be granted unconditional leave to pursue his appeal filed on 13th August 2015. The application is premised on the grounds that intended and imminent sale of the applicants' moveable property will cause him irreparable loss and render him and his family destitute .

The Appellant filed a supporting affidavit sworn on 25th May 2016 wherein he averred that his business and household goods were proclaimed by Falcon Recovery Auctioneers on 23rd May 2016, pursuant to a decree issued upon taxation of a bill of costs on 12th April 2016 at Makueni law courts in PMCC No. 204 of 2013. Further that the said Bill of Costs that was filed in court on 22nd September 2015 was never served upon him. The Appellant stated that by that time he had already filed this appeal in Machakos High Court out of a defamation case he had lost in Makueni law courts. He annexed a copy of the said Bill of Costs and his Memorandum of Appeal

The Appellant also filed submissions dated 23rd June 2016 wherein reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, and the decision in **Aggrey Maula Malungu v Joseph Sanya Mwakavi [2015]**, for the arguments that he had met the threshold set by law as he has come to court without unreasonable delay in that he filed his application on 23rd May 2016 , which was two days after knowing of the existence of the bill of costs proceedings. He further contended that that if orders of stay are not granted he is not granted an opportunity to canvass his appeal , the Respondent may dispose of his property rendering the entire appeal nugatory .

Lastly, the Appellant submitted that he is ready and able to abide by the conditions that this court may give upon grant of stay and that he is ready to offer reasonable security as the court may order should need arise.

**The Response**

Justus Mutisya Mutia, the Respondent's Advocate, opposed the Applicant's application in a replying affidavit he swore on 8th June 2016 , and in written submissions dated 3rd August 2016 filed in Court by the Respondent's learned counsel, Mulwa, Isika and Mutia Company Advocates. According to the

Respondent, the Appellant was properly served with the defendant's bill for assessment of costs which he received and signed on 22.9.2015 and was also properly served with a mention notice. The copies of the affidavit of service, mention notice and the Defendant's bill for assessment of costs were attached. It was argued that the filing of an appeal to this court does not entitle the Appellant to automatic stay of execution, and the process of execution was in order. Further, that the subordinate court upon assessing the costs issued the defendant with a certificate of costs which was annexed, and that the Appellant never sought any stay of execution before the subordinate court. Therefore, that the assessed costs amount to a money decree that he should settle immediately.

These averments were reiterated in the submissions filed by the Respondent, wherein it was argued that paying the costs at the lower court will not expose the Appellant to any substantial loss, as the costs can be refunded in the event his appeal succeeds. Further, that he has not shown that he would not be able to recover the costs from the Respondent if the appeal succeeds. Reliance was placed on various judicial authorities in this regard, including the decision in **Kenya Shell Limited v Benjamin Karuga Kabiru & Another [1986] eKLR**,

Further, that if the court agrees that there will be substantial loss, the Appellant should provide security by immediately depositing Kshs.93, 900/= as per the warrants of attachment, and a further amount as the court deems fit to cater as security of Respondent's costs for the appeal, in an interest earning account in the joint names of the Appellant and the Respondent's firm of advocates within a reasonable time, failure to which the order be vacated.

### **The Issues and Determination**

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 Makeni Principal Magistrates Court Case No . 204 of 2013 and sale of his proclaimed moveable property pending the hearing of the appeal.

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.”**

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 ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time balancing the rights of the parties.

In the present application, this Court finds that there has been delay in filing an application for stay pending appeal as judgment was entered in the trial Court on 21<sup>st</sup> July 2015. However, since the Appellant in his application sought to stay proclamation and sale of the of his moveable property, and the said proclamation was served on the Appellant on 23<sup>rd</sup> May 2016, there was no delay in bringing the instant application. In addition the Appellant can be excused for the delay in filling the application for execution of stay as he is unrepresented.

On the fulfillment of the second condition, the Applicant has argued that he will be rendered destitute if the stay is not granted as his business and personal goods will be sold. The Respondent countered this argument by stating that he is able to refund the said sum if the appeal succeeds. Lastly, on the third condition, the Appellant did affirm that he is willing to furnish security for satisfaction of the decree, to which the Respondent appears to have no opposition.

Accordingly, the orders that commend themselves to me arising from the foregoing, is that the Appellant's Notice of Motion dated 25<sup>th</sup> May 2016 is allowed on the following terms:

1. There shall be a stay of execution of the judgment and decree in Makueni Principal Magistrates Court Case No. 204 of 2013 and the sale of the Appellant's proclaimed moveable property pending the hearing and determination of the Appellant's appeal, only on condition that the Applicant shall deposit the sum of Kshs.93, 900/= in an interest earning account in the joint names of the Appellant and Respondent's Advocate on record within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The Appellant shall meet the costs of the Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 6<sup>th</sup> day of February 2017.

**P. NYAMWEYA**

**JUDGE**