



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 1 OF 2017

KAMENE MWENGA.....APPLICANT

VERSUS

MUTHAKYE MUSYIMI.....RESPONDENT

RULING

1. By way of Notice of Motion, the Applicant seeks Stay of Execution of the Decree and Exparte Judgment entered in **Civil Case No. 82 of 2016** on the **26th January, 2017** pending hearing and determination of the Appeal filed.
2. The application is premised on grounds that the appeal is arguable and has a high chance of succeeding; If stay of execution is not granted the Appeal will be rendered nugatory and the Applicant will suffer irreparable damages; substantial loss will result to the Applicant and the application was made without unreasonable delay.
3. The Applicant swore an affidavit in support of the application where she deponed that the Respondent filed a suit claiming for refund of **Kshs. 17,300/=** plus costs incurred as a result of a dispute before elders and the Chief. The suit was heard without notice to the Applicant. If the amount is paid to the Respondent and the Appeal succeeds she will suffer irreparable loss.
4. In a response thereto the Respondent filed a replying affidavit where she stated that the Applicant was aware of the hearing date but failed to turn up therefore the case proceeded in her absence. The Judgment having been pronounced, she is required to pay **Kshs. 17,300/=**. It is in the interest of justice that the Applicant satisfies the Court Decree. No substantial loss will be suffered by the Applicant; the Applicant has not demonstrated that she filed the applications without undue delay and has not provided any security for satisfaction or performance of the sum ordered by the Lower Court in event of the Appeal failing.
5. At the hearing the Applicant reiterated that the Judgment was entered in her absence and she was not aware of the kind of compensation she was required to make.
6. In response, the Respondent asked to be paid what was due to her. Further, she stated that she was forced to close down the canteen she was operating because of this case.
7. I have considered the oral submissions by both the Applicant and Respondent. The law applicable in the premises is **Order 42 Rule 6(1) and (2)** which provides thus:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

The rule was considered in the case of **Peter Ondande T/A Spreawatt Chemis vs. Josephine Wangari Karanja (2006) eKLR** where the Court stated:

“The issue for determination by this court is whether the applicant has established a case to enable the court to grant him the order of stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted; Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally the applicant must provide such security as may ultimately be binding upon him.”

8. Both the Applicant and Respondent are elderly ladies of meager means who do not even understand the Court process. It was averred that the Applicant will suffer substantial loss if the order sought is not granted. In the case of **Sewakambo Dickson vs. Ziwa Abby HCT-00 CA MA 178 OF 2005** it was stated that”

“.....Substantial loss is a qualitative concept, it refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value that is merely nominal.....”

9. The Respondent stated that she used to operate a Canteen that she has since closed. Currently she is not in employment therefore in case the Appeal succeeds if paid the money she may not be in a position to refund the sum. Consequently substantial loss would be suffered by the Applicant if execution proceeds.

10. Judgment in the matter was delivered on the **26th** day of **January, 2017**. The application was filed on the **8th** **February, 2017** some twelve (12) days later. This was done without unreasonable delay.

11. Having looked at the status of parties herein, it will be in the interest of justice for this court not to impose any terms in regard to security.

12. Consequently I grant unconditional stay of execution pending hearing and determination of the Appeal. Costs of the application shall abide the outcome of the Appeal.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of February, 2017.

L. N. MUTENDE

JUDGE

