



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 320 OF 2013**

**BENSON MUIGAI & 4 OTHERS.....PLAINTIFFS**

**-VERSUS-**

**PHILOMENA NDANGA KARANJA.....DEFENDANT**

**KARANGI COFTEA LIMITED.....GARNISHEE**

**RULING**

**[1] The Notice of Motion dated 26 January 2017** was filed herein pursuant to **Section 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 42 Rule 6** and **Order 22 Rule 1** of the **Civil Procedure Rules, 2010** for stay of execution of the orders issued herein on **18 January 2017** pending the hearing and final determination of an intended appeal to the Court of Appeal; and that the costs of the application do abide the outcome of the intended appeal. The grounds set out in support of the application are:

[a] That the Defendant intends to lodge an appeal against the ruling delivered herein on **18 January 2017** and has since filed a Notice of Appeal and letter requesting for typed proceedings.

[b] That the Defendant's advocates were not notified that this matter was scheduled for ruling on **18 January 2017** and as such was unable to apply for a stay of execution and or any other orders.

[c] That it is unclear as to how the ruling date of **18 January 2017** was fixed as there is no indication of the same on the court file after the court attendance of **15 November 2016** when this matter was initially slated for ruling on **20 December 2016**.

[d] That the Plaintiffs already obtained warrants of arrest on **19 January 2017** and as such the Defendant is bound to be arrested and committed to civil jail any time.

[e] That unless an order of stay of execution of the warrant of arrest is granted the Defendant applicant stands to suffer irreparably and the pending appeal will be rendered nugatory.

[f] That the instant application has been brought without unreasonable delay as the Defendant only got to know of the orders in issue on **24 January 2017**.

[g] That it is in the interests of justice that the orders sought be granted.

[2] These grounds were expounded on in the Supporting Affidavit sworn by the Defendant, in which she also deposed that she is an 86 year-old widow and that she is suffering from various old age ailments including diabetes and blood pressure. She averred that she stands to suffer irreparably if the warrants of arrest and committal to civil are executed. She is convinced that she has a meritorious appeal, which may be rendered nugatory should her prayer for stay not be granted. The Defendant further deposed that the Plaintiffs already have a Garnishee Order in their favour and therefore the issuance of a warrant or arrest against her amounts to subjecting her to double jeopardy. In support of her averments, the Defendant annexed to her affidavit copies of her Notice of Appeal, her affidavit filed on **26 July 2016** in response to the Notice to Show Cause that was issued herein and which culminated in the orders of **18 January 2017** and the Garnishee order.

[3] The application was opposed by the Plaintiffs, vide the Grounds of Opposition filed herein on **30 January 2017**. It was their contention that the application is incompetent, misconceived, and fatally defective. They also posited that the application is *res judicata*, on account of the Defendants previous multiple applications for stay herein, which applicants had been dismissed with costs. It was further the contention of the Plaintiffs that the Defendant has not come to court with clean hands, because she has neither paid the decretal amount nor made concrete proposals on how to pay; and therefore that the order of the Deputy Registrar sanctioning her arrest and committal to civil jail, was made in the interest of justice. The Plaintiffs thus urged for the dismissal of the Defendant's application with costs.

[4] The Application has been brought under **Order 42 Rule 6** of the **Civil Procedure Rules**, which provides that:

**"(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..."**

**(2) 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."**

Accordingly, the Defendant was under obligation to demonstrate that:

**[a] she stands to suffer substantial loss unless the stay order is made;**

**[b] that the application has been made without unreasonable delay.**

**[c] that she has provided security or is ready to provide such security as the court may order.**

[5] As to whether the application has been made **without unreasonable delay**, it is now well settled that what amounts to **unreasonable delay** for purposes of **Order 42 Rule 6, Civil Procedure Rules**, is dependent on the facts and circumstances of each case. For instance, in **Jaber Mohsen Ali & Another Vs. PricillahBoit& Another [2014] eKLR** the court held thus:

**"Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."**

[6] The Ruling in question was delivered on **18 January 2017** and the Notice of Appeal was filed on **27 January 2017**. The Applicant has explained that she was unaware of the date for the ruling and would have promptly moved the Deputy Registrar for stay. Thus, it is clear that, in the circumstances hereof, the application was promptly made. Hence, the key issue for determination is whether there has been a clear demonstration that the Defendant runs the risk of suffering substantial loss unless the stay order is made. The Defendant's case is that if the warrants for her arrest are not stayed, she will suffer irreparable loss,

given her age and health status. She is also worried that her appeal, which in her view has good chances of success, may be rendered nugatory.

**[8] Mr. Kurauka**, Counsel for the Plaintiffs was however of the view that the law allows for committal to civil jail as a mode of execution notwithstanding the age of a defendant; and that the intended committal is for the purpose of compelling the Defendant, who appears in his view to be a person of means, to pay the amount due to the Plaintiffs from their Judgment. He also took issue with the fact that the Defendant has not only failed to pay the decretal sum, but has also not made any proposal to pay. With regard to the Garnishee Order, Counsel argued that the Plaintiffs have employed and exhausted other modes of execution available, to no avail, and moved for arrest and committal of the Defendant to civil jail as a last resort.

**[9]** The test of whether a matter is *res judicata* was well explicated in the case of **DSV Silo –Vs- The Owners of Sennar [1985] 2 All ER104** as applied in the Kenyan case of **Bernard Mugo Ndegwa –Vs- James Nderitu Githae and 2 others [2010]eKLR**. The applicant, alleging *res judicata*, must show that:

- (a) The matter in issue is identical in both suits;
- (b) That the parties in the suit are substantially the same;
- (c) There is a concurrence of jurisdiction of the court;
- (d) That the subject matter is the same; and finally.
- (e) That there is a final determination as far as the previous decision is concerned.

Since the order in issue was only made on **18 January 2017** and this being the first application for stay in respect thereof, it cannot be validly argued that the application is *res judicata*. The previous applications for stay were in respect of specific orders of the court; for instance the application dated **23 December 2013** was specific to stay of sale of the applicants goods by **Siuma Auctioneers**, and turned on its own merits. Accordingly, it cannot be said that, with reference to the order of **18 January 2017**, there has been a consideration on the merits and a final decision made thereon. I would thus find and hold that the argument that the instant application is *res judicata* to be untenable.

**[10]** The foregoing notwithstanding, it is trite that a successful party is entitled to employ the civil processes available for the realization of the fruits of his/her litigation, one of which being arrest and committal of the Defendant/Judgment Debtor to civil jail. The Notice to Show Cause dated **8 June 2016**, which culminated in the Orders of **18 January 2017**, shows that the decretal sum then stood at **Kshs. 23,861,219**. There is no proposal by the Defendant as to how that huge amount will be paid. In **Machira t/a Machira & Co. Advocates vs East Africa Standard No. 2 [2002] KLR 63**, it was held thus:

**"...the ordinary principle is that a successful party is entitled to the to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings, or execution, pending appeal...in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

**[11]** However, where sufficient cause is shown for going against the aforementioned grain, courts do not hesitate to do so. The Defendant herein contends that she is old and sickly; and that prison conditions would exacerbate her situation. The Defendant may be a senior citizen, but there appears to be no evidence in support of her contention that she is suffering complications or ailments related to old age. Nevertheless, it cannot be gainsaid that there exists the likelihood that she may serve the entire term before the intended appeal is heard and disposed of. Accordingly, I would allow the application dated **26**

**January 2017** and grant the orders sought therein in terms of Prayers (2) and (3) thereof on condition that the Defendant deposits an amount of **Kshs. 5 million** as security within 30 days from the date hereof, failing which the Plaintiff will be at liberty to have her arrested and committed to civil jail in accordance with the Deputy Registrar's Order dated **18 January 2017**.

Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2017**

**OLGA SEWE**

**JUDGE**