



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CIVIL APPEAL NO. 37 OF 2016**

**OGADA ALPHONCE.....APPLICANT**

**VERSUS**

**JOSEPH MUTHENGI MUNYWE (Suing as the Administrator and the Legal**

**Representative of the Estate of DAIRUS KYALO MUTHENGI).....RESPONDENT**

**R U L I N G**

1. The Applicant herein approached this Court by way of Notice of Motion dated **10<sup>th</sup> October, 2016** seeking stay of execution of the judgment entered on the **30<sup>th</sup> August, 2016** in **Kitui Chief Magistrate's Court Civil Case No. 86** of **2014** (suit) and all consequential orders emanating therefrom pending hearing and disposal of the Appeal.
2. The application is premised on grounds that: The award made in favour of the Respondent in the suit is inordinately high so as to constitute an entirely erroneous estimate of the damages that ought to be awarded in the circumstances; The Applicant is threatened with the extraction and/or execution of the decree thereof; There is a real and probable likelihood that execution may issue at any time as to occasion substantial and irreparable loss and damage to the Applicant; The Respondent shall not suffer any prejudice and the Applicant is ready to furnish reasonable security.
3. An affidavit in support of the application was sworn by **Caroline Kimeto** a Legal Officer at **British American Insurance Company**, insurers of motor-vehicle registration number **KAZ 260E** and at whose instance the suit was defended. She deponed that judgment was entered in the sum of **Kshs. 3,781,390/=**; Damages awarded are inordinately high and not commensurate to quantum of damages reasonably expected to be awarded in such circumstances; The Appeal preferred against the judgment and in particular quantum of damages is merited, arguable and it raises pertinent points of law and has overwhelming chance of success. She concluded by reiterating what is stipulated in the grounds on the body of the application.
4. In reply, the Respondent swore a Replying Affidavit where he deposed that the award made by the Court in his favour was fair and commensurate with the awards made over years in similar cases; That he is a teacher and also a commercial farmer with 50 heads of cattle and 100 goats as well as a huge tract of land from which he makes reasonable returns of income; His ability to refund any part of the decretal sum is not disputed. He urged the Court to order release of **50%** or the money to him and the balance be deposited in an interest earning account for both Advocates on record should stay of execution be granted.
5. The application was canvassed by way of written submissions that I have taken into consideration.

6. The application is brought pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** that provide thus:

*“(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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

Granting orders sought or not is discretionary. In the case of **Butt vs. Rent Restriction Tribunal – Civil Application No. NAI 6 OF 1979, Madan JA** stated thus:

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal.....”*

7. Guided by the principles of granting stay set out in **Order 42(6)** of the **Civil Procedure Rules** I must consider if the Applicant will suffer substantial loss if the orders sought are granted. In the case of **Sewankambo Dickson vs. Ziwa Abby HCT – 00 – CC MA 0178 OF 2005** the **High Court (Uganda at Kampala)** stated:

*“.....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 or loss that is merely nominal.....”*

It is submitted by Counsel for the Applicant that in case the Appeal succeeds and the decision of the Lower Court overturned then the Applicant will suffer as the Respondent has not demonstrated that he is capable of restoring any part of the decretal sum. The Respondent on the other hand has argued that he is not a man of straw therefore is capable of refunding the decretal sum. In the case of **ABN AMRO BANK N. V. vs. Le Monde Foods Limited Civil Application No. NAI. 15 OF 2002**, the Court stated

that the duty is upon the Respondent to prove his ability to refund the money in case the Appeal succeeds.

The Court stated thus:

*“In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and that the pending appeal were to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”*

8. The Respondent herein has averred in the replying affidavit that he is a teacher and a serious farmer with livestock. He has given the figure he owns. Other than the averment he failed to demonstrate if indeed the assets exist or if he has any money of such a magnitude in any financial institution. In the premises he has not demonstrated the ability to refund the sum in case the Appeal succeeds.

9. The judgment in the Lower Court was entered on the **30<sup>th</sup> August, 2016**. The Appeal was filed on the **23<sup>rd</sup> September, 2016**. There was no unreasonable delay in filing the application of stay of execution.

10. From the foregoing I find this a case that calls for granting the Applicant the opportunity to be heard on Appeal. I therefore allow the application on condition that the Applicant deposits security in the sum of **Kshs. 3,781,390/=** being the decretal sum in Court within **21 days**. In default execution to proceed. Costs of the application shall abide the outcome of the Appeal.

11. It is so ordered.

**Dated, Signed and Delivered at Kitui this 4<sup>th</sup> day of May, 2017.**

**L. N. MUTENDE**

**JUDGE**