



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

**CIVIL APPEAL NO. 90 OF 2016**

**PETER NDOHO KIMANI.....APPELLANT**

**VERSUS**

**ANJELINA WAIYIGO MWANGI.....RESPONDENT**

**RULING**

1. I am tasked with determining the Motion dated 9<sup>th</sup> September 2016, which seeks stay of execution of a ruling dated 1<sup>st</sup> August 2016 and orders dated 10<sup>th</sup> August 2016 made by the lower court in Nairobi CMCDC No. 18 of 2016. The grounds upon which it is founded are set out on its face and the facts are deposed in the affidavit in support sworn by the appellant on 9<sup>th</sup> September 2016. The appellant pleads that he is sickly and needs the money that accrues from the rental house he was ordered to move into for his medication and medical treatment. He has attached to his affidavit copies of the impugned order, lease agreement of the subject property and some documents from Nairobi Hospital. He swore a further affidavit on some unknown date in 2016, filed herein on 14<sup>th</sup> September 2016, to attach copy of a medical report by Prof. Joshua K. Kayima dated 13<sup>th</sup> April 2016.

2. The respondent has reacted to the application by filing grounds of opposition dated 14<sup>th</sup> September 2016. It is stated that the application abuses the court process, does not satisfy the minimum threshold set out in law for such applications, is misconceived and incompetent, is incurably defective and bad in law, and that it is meant to deviate from the issues at hand.

3. It was directed on 17<sup>th</sup> November 2016 that the said application would be disposed of by way of written submissions. There has been compliance, both sides have filed written submissions, which I have read and noted the arguments advanced therein.

4. The appellant filed a memorandum of appeal on 3<sup>rd</sup> August 2016, of even date. The lower court file has not been availed, probably because the file is still live, for the appeal is against an interlocutory order. The Motion seeks stay of execution of a ruling and of an order. It is imperative that copies of the ruling and order extracted therefrom be exhibited to the Motion, particularly in such a case as the instant one where the lower court file has not been availed.

5. The appellant is inviting me to stay execution of a ruling. That is a strange prayer for a ruling is incapable of execution. What is available for stay is the order made in the ruling. The ruling is nothing more than the outcome of a court's decision either on a point of law or on the case as a whole; while an order is a command, a direction or instruction of the court. A ruling usually says many things, and there is therefore no need to seek stay of its execution. Whatever the case, the appellant expresses himself in the Motion as seeking stay of execution of the ruling in question. A copy of that ruling is not exhibited in his affidavit. I cannot tell therefore whether such a ruling exists. Without copy thereof I would be unable to assess whether or not there is good ground for staying the same, for it is only upon perusal of the ruling that I should be able to decide whether the trial court had deviated from the correct path or misapplied the law, or generally that there was something seriously amiss about the court's handling of the matter.

6. The second limb of the Motion seeks stay of execution of an order. A copy of the impugned order has

been attached. An order is extracted from a ruling. Before making the order the court sets out the facts, analyses the same and applies the relevant law thereto. Crucially, to decide whether or not to stay an order the court needs to be satisfied that something had incredibly gone wrong. It should be apparent that the trial court perhaps applied the wrong principle or applied a principle wrongly or exercised discretion in some improper manner. Generally, it must be demonstrated that there was something remiss to warrant the court exercising its discretion to stay the order. So, without a copy of the ruling, it would difficult for the court asked to make the stay order exercise that discretion.

7. I do not have the pleadings before me, as copies thereof have not been exhibited and as the lower court file has not been availed. I therefore have no idea whatsoever about the crux of the matter as between the two parties before me. I am called upon to work only with a memorandum of appeal and the order impugned. I doubt whether that suffices for what the appellant is asking me to do.

8. The grounds upon which stay of execution pending appeal are made well known. There is abundant caselaw on the said stay, provided for under Order 42 rule 6 of the Civil Procedure Rules – that the application was brought without unreasonable delay, the applicant would suffer substantial loss if the order is not granted and security for costs should be provided. I doubt whether I can even begin to consider whether there would be substantial loss and whether security for costs would be necessary without having the benefit of knowing what the dispute between the parties is all about.]The appellant avers that he would suffer substantial damage to his health if the order is not made, for he claims that that house is where he gets money to fund his medical treatment. Yet, he has not given an indication of what he does for a living, and whether he has other sources of income apart from the rent from the said house. He has not demonstrated that his needs would be dire without rent from the house. On whether the application was brought without considerable delay, I am satisfied that there was no delay.

9. Overall, I am not satisfied that a case has been made out for the orders sought in the application. I shall accordingly dismiss the Motion dated 9<sup>th</sup> September 2016. Costs shall abide the outcome of the appeal.

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>TH</sup> DAY OF MAY, 2017.**

**W. MUSYOKA**

**JUDGE**