



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 725 OF 2016**  
**DUNCAN CHAINA MALUKI.....APPLICANT**  
**VERSUS**  
**CHARLES NGUSYA NGUNA.....RESPONDENT**

**RULING**

1. The application dated 9<sup>th</sup> December, 2016 seeks orders that this Honourable Court be pleased to grant a stay of execution pending the hearing and determination of the Appeal herein.
2. The Applicant's case as stated in his affidavit in support of the application is that judgment has been entered by the lower court against the Applicant for the sum of Ksh.6,000,000/= plus interest at court rates from the date of the filing of the primary suit. The Applicant is aggrieved by the said judgment and has appealed herein. It is further stated that the Respondent is in the process of executing the decree. It is stated that the appeal has high chances of success and that the application has been made without unreasonable delay. The Applicant is willing to deposit such security as the court may order.
3. The application is opposed. It is stated in the replying affidavit that the appeal has no merits and is unlikely to succeed. That the decree being a monetary decree, the Respondent who is a man of means can refund the same in the event that the appeal is successful. That the Applicant will not suffer any substantial loss and that there is no risk that the appeal will be rendered nugatory.
4. The application was canvassed by way of written submissions. I have considered the said submissions and the authorities cited.
5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“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.”**

6. The appeal herein was filed on 2<sup>nd</sup> December, 2016. The judgment of the lower court was passed on 14<sup>th</sup> November, 2016. The application at hand was filed on 14<sup>th</sup> December, 2016. The application was

filed without unreasonable delay. The Applicant is also willing to deposit security for the due performance of the decree.

7. The decree is a monetary decree. The Applicant has not stated what substantial loss he is likely to suffer if execution proceeds. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR**:

**“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”**

8. On the other hand the Respondent has demonstrated that he is capable of refunding the decretal sum in the event that the appeal is successful. The Respondent has exhibited a Title Deed for a parcel of land in Thika and a sale agreement for an apartment in Thika. The Respondent has also averred that he is a landlord with a rent income of about Ksh.1,000,000/= per month. However, recovering the decretal sum may also turn out to be an arduous task.

9. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

**“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”**

10. On whether the appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High court. The Applicant is not required to prove that he has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

11. The change of Advocates after judgment is provide for by Order 9 rule 9 Civil Procedure Rules which stipulates as follows:

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

12. Any advocate who has come into the case after judgment should comply with this rule. An advocate is deemed to be on record for a party until the final conclusion of the case which includes any review or appeal (See Order 9 rule 5 Civil Procedure Rules). The issue of the Applicant’s counsel not being properly on the record was raised rather late in the day. However, the Applicant’s counsel should regularize his position before taking any other step in this matter.

13. In the instant case, the Respondent who is the successful litigant so far wishes to enjoy the fruits of his

litigation. His claim against the Applicant is now seven (7) years old. On the other hand, the Applicant wishes to exercise his undoubted right of appeal. The court has to exercise discretion in a manner that will protect the interests of both parties.

14. With the foregoing, to balance the interests of both parties herein, I allow the application on condition that the Applicant deposits the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. In default the application stands dismissed. Costs in cause.

Date, signed and delivered at Nairobi this 13<sup>th</sup> day of July, 2017

**B. THURANIRA JADEN**

**JUDGE**