



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

**CIVIL APPEAL NO. 179 OF 2015**

**MULTIPLE HAULIERS (E.A)**

**LIMITED.....APP  
ELLANT**

**VERSUS**

**JULIUS NZIOKA KYULWA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE  
LATE WELLINGTON MUTUKU)..... RESPONDENT**

**RULING**

**The Application**

The application before the court for determination is a Notice of Motion dated 23<sup>rd</sup> November 2015 filed by the Appellant under the provisions of sections 1A, 1B, 3A and 65 of the Civil Procedure Act, and Orders 42 Rule 6(1) and 51 of the Civil Procedure Rules. The Appellant is seeking orders that there be a stay of execution of the judgment and/or decree in Machakos PMC No. 735 of 2009 and any consequential orders arising therefrom, pending the hearing and determination of the appeal filed herein

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit sworn on 23<sup>rd</sup> November 2015 by John Diro, the Appellant's legal counsel. The main ground is that the Appellant is dissatisfied with the lower court's judgment delivered on 30<sup>th</sup> October 2015 and has filed an appeal in this Court which has a high chance of success, and stands to suffer irreparable loss and prejudice if the application is not allowed. Further, that the Appellant is able and willing to abide by any terms as to security as may be ordered by this Court.

The Appellant gave a chronology of the events arising from the judgment of the lower Court, and attached a copy of the said judgment and of the Memorandum of Appeal. The Appellant averred that in the event that the aforesaid execution is permitted to proceed, its appeal shall be rendered nugatory, and that if the decretal sum is paid out before the determination of the appeal, the Respondent will not be in a position to refund the same if he appeal is successful as he has no means of restitution.

**The Response**

The Respondent opposed the Appellant's application in Grounds of Opposition dated 28<sup>th</sup> November 2015, wherein it was urged that the Appellant's application does not meet the legal threshold required for granting a stay of execution, that the decretal sum is a liquidated sum therefore the Appellant would not suffer substantial loss as the amount is known, and the Respondent would refund the same in the unlikely event of success of the Appellant's appeal; and lastly that the Appellant's appeal has no likelihood of success and the application has not been made in good faith.

## **The Submissions**

The parties made oral submissions at the hearing of the Appellant's application on 8th December 2015. The Appellant through its learned counsel Ms. Gakuya reiterated its grounds of appeal, and submitted that the Respondent had not shown that he was a person of means and how he would pay the decretal sum if the appeal is successful. Reliance was placed on the decision in **Corporate Insurance Company vs Emmy Cheptoo** in this regard. It was also submitted that the Appellant moved with speed to file the appeal and application on 23<sup>rd</sup> November 2015 after judgment was delivered by the lower court on 30<sup>th</sup> October 2015, therefore there had been no undue delay.

Mr. Gichure, learned counsel for the Respondent submitted that the Appellant had not met the legal threshold of proving substantial loss, and that the Respondent is not able to pay the decretal sum. Further, that it is only after discharging this burden of proof that the burden shifts to the Respondent to show that he can pay. Reliance was placed on the decision in **Antoine Ndiaye vs African Virtual University** for this position, and also for the position that security can also be given after substantial loss has been proved. It was also submitted by the Respondent that the application is not brought in good faith as it had taken nine years to determine the suit in the lower court since 2006, and is meant to deny the Respondent the fruit of his judgment.

## **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. Stay of execution pending appeal is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

**“6.(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 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.”**

For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:

(a) the application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;

(b) the applicant must show that he will suffer substantial loss if the orders of stay is not granted, and

(c) the applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.

The essence of an application for stay pending appeal is to preserve the subject matter of litigation, to avoid a situation where a successful appellant only gets a paper judgment, while at the same time

balancing the rights of the parties.

In the present application, the Respondent conceded that the first condition for stay had been met, and that the application was brought timeously. On the fulfillment of the second condition, I agree with the Respondent that the Appellant has not demonstrated what substantial loss it will suffer save for stating that its appeal will be rendered nugatory and that the Respondent will not be able to refund the decretal sum.

The Applicant in addition did not demonstrate the inability of the Respondent to refund the decretal sum in the event that this appeal succeeds. I am in this regard also mindful of the fact that the Respondents have been waiting for a long time for the resolution of the dispute with the Appellant, and should in the circumstances be allowed some measure of enjoyment of the fruits of their judgment. Lastly, on the third condition, the Appellant has stated that it is willing to provide security on terms set by the Court.

Accordingly, the orders that commend themselves to me arising from the foregoing is that the Appellant's Notice of Motion dated 23<sup>rd</sup> November 2015 is allowed on the following terms:

1. There shall be a stay of execution of the judgment and/or decree in Machakos PMC No. 736 of 2009 and any consequential orders arising therefrom pending the hearing and determination of this appeal, only on condition that the Appellant shall pay to the Respondent one half of the decretal sum and deposit in court the remaining half of the decretal sum within 30 days of the date of this ruling, failing which the stay orders herein shall stand vacated.
2. The costs of the Appellant's Notice of Motion shall follow the appeal.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 3<sup>rd</sup> day of February, 2016.**

**P. NYAMWEYA**

**JUDGE**