



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL CASE NO. 9 OF 2012**

**PATRICK KIGORO.....1ST APPLICANT**

**TELCOM (KENYA) LIMITED.....2ND APPLICANT**

**VERSUS**

**SABINA NYAKENYA MWANGA.....RESPONDENT**

**RULING**

1. This is the application dated 15/2/2016 seeking stay of execution of judgment pending hearing and determination of the appeal at the Nyeri Court of Appeal. The application is supported by the affidavit of the legal officer of the 2<sup>nd</sup> applicant Lawrence Karanja.
2. In the supporting affidavit, it is stated that judgment was delivered on 22/10/2015 in favour of the plaintiff for a sum of Kshs.4,215,683/= plus costs and interests. The defendants/applicant's advocates filed a notice of appeal on 30/10/2015 in Nyeri Court of Appeal. The plaintiff/ respondent's advocates filed a bill of costs for taxation and a ruling for the same was delivered at a sum of Kshs.242,518/=. The total sum payable to the respondent is Kshs.4,458,201/=.
3. The applicant is apprehensive that the plaintiff will commence execution for recovery of the decretal sum which is substantial and valuable assets of the 2<sup>nd</sup> applicant/appellant may be sold. If the appeal is successful, the respondent will not be able to refund the decretal amount. The applicants state that they will suffer irreparable loss. The applicants are willing to pay KShs.800,000/= pending the hearing of the appeal.
4. In the replying affidavit the respondent stated that her advocate has never been served with the notice of appeal to the Court of Appeal or any other appeal documents. The annexed notice of appeal dated 29/10/2015 and lodged on 27/1/2016 was clearly out of time. The respondent argues that she is not a woman of straw and is therefore capable of refunding the money in the event that the appeal is successful. She further states that the applicants are denying her the fruits of her judgment.
5. It is in the public domain that the applicant's business is not upbeat and that the organization might go under any time before the appeal is heard and determined. The respondent proposes that if the application is allowed the applicants should pay the respondent half the decretal amount and the other half should be deposited in a joint interest-earning account
6. In a further supporting affidavit by the applicant Lawrence Karanja, it was stated that 30 stay of execution was granted when the bill of costs was taxed and that the period has since lapsed. The notice of appeal was served upon the respondent's advocate and was lodged on 30/10/2015 but it was signed by the

DR on 27/1/2016. The delay in signing the notice of appeal cannot be visited upon the applicants. It was further stated that it is not true that the 2<sup>nd</sup> applicant is experiencing financial difficulties in its operations.

7. Both parties filed written submissions through their respective advocates Messrs P.N. Mugo and Messrs Mithega & Kariuki.

8. The respondent in her submissions stated that there is no appeal pending before the Court of Appeal as the notice of appeal annexed in the application was filed out of time as provided for under Rule 75 and 76 of the Court of Appeal, Rules 2010. The said notice of appeal has never been served upon the respondent's advocates. There is no explanation as to why no appeal has been filed since October 2015 when the judgment was delivered. The applicants have not demonstrated the substantial loss likely to be suffered if the application is not allowed.

9. It is further argued that the applicants have a duty to prove that the respondent is not in a position to refund the money if the appeal is successful. The burden should not be shifted to the respondent as she has already stated in her affidavit that she is in a position to refund the money. During the trial, the applicants consented to 85 % liability.

10. As such, the applicants ought to have sought extension of the stay orders before they lapsed. The KShs.800,000/= that the applicants are willing to pay as security out of Kshs.4,215,683/= is not acceptable. As stated in the replying affidavit, the applicants should pay the respondent half the decretal amount and the other half should be deposited in a joint interest-earning account.

11. The conditions for granting stay pending appeal were explained in the Court of Appeal case of **BUTT VS RENT RESTRICTION TRIBUNAL [1982] KLR 417** where the court held that:-

(a) *The power of the court to grant or refuse an application for stay of execution is a discretionary one.*

(b) *The discretion should not be exercised in such a way as not to prevent an appeal.*

(c) *The general principle in granting or refusing stay is that if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should the appeal be successful.*

(d) *A court in exercising discretion whether or not to grant or refuse an application for stay will consider the special circumstances of the case and the unique requirements.*

(e) *The court can order security upon application by either party failure by which the order for stay will lapse.*

12. The case of **HALAL & ANOTHER VS THORNTON & TURPIN [1990] KLR 365** set out further principles when it held that:-

- *the applicant must demonstrate a sufficient cause,*
- *the applicant must demonstrate that substantial loss will ensue from a refusal to grant stay*
- *The applicant must furnish security*
- *The application must be made without delay*

13. The applicable law in this application is Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides:-

*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.*

14. It is not always the case that he who alleges must prove. When an applicant alleges that the respondent is a man of straw, the burden of proof shifts to the respondent. In the case of **ILRAD VS KINYUA [1990] KLR 403** the court held that:-

*the onus was upon the respondent to rebut by evidence that the intended appeal if successful would be rendered nugatory on account of his alleged impecunity*

15. In the case of **KENYA PIPELINE COMPANY LTD V DUNCAN NDERITU NDEGWA & ANOTHER [2015] eKLR** the court held that the onus is on the 1<sup>st</sup> respondent to show that is a man of means.

16. The respondent herein stated in paragraph 6 of the replying affidavit that she is not a woman of straw. She did not go ahead to demonstrate that she is a lady of means. She did not even state what she does for a living or what her source of income is. In absence of this, she did not discharge the burden as expected.

17. In the case of **KENYA SHELL LTD V KIBIRU [1986] KLR 410** , Platt Ag JA stated:-

*Substantial loss in its various forms is the corner stone for of both jurisdiction for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondent should be kept out of their money.*

18. Gachuhi AG JA stated:-

*It is not sufficient by merely stating that the sum of ksh 20,380 is a lot of money and the applicant would suffer loss if paid. What sort of loss would this be .In an application of this nature, the applicant must show the damages it would suffer if the order for stay is not granted....”*

19. In paragraph 7 & 8 of the supporting affidavit, it is argued that the decretal sum is quite substantial and that if the appeal succeeds the respondent will not be able to refund the decretal sum. Since the respondent did not prove that she is a lady of means, this may be construed to mean that the applicant's apprehension that the respondent will not be able to refund the decretal amount is justified.

20. The other issues for consideration is whether the application was made without delay. Judgment was delivered on 22/10/2015. The application was filed on 15/2/2016. There was a period of less than three months between the delivery of judgment and the filing of the application. The applicants cannot be said to have delayed.

21. The respondent argue that the applicant must furnish security for the decretal amount. The applicants have offered to furnish security of KShs.800,000/=. The respondent on the other hand has dismissed this amount as being too little and is proposing that the applicants be ordered to deposit half of the decretal amount in a joint interest earning account and the other half be paid to her. In my opinion since the respondent has not proved that she is a lady of means any amount for security should be deposited in a joint interest earning account.

22. The respondent argued that the notice of appeal was not filed within time. The issue that arises is whether of whether there is a valid notice of appeal. This issue was discussed in the case of **KAUSHUMU WAMBUI VS HAMISI OMARI & ANOTHER [2015] eKLR** the Court of Appeal held that even though the notice of appeal was filed out of time it was a non issue in an application for injunction pending appeal as the deficiencies in the notice of appeal could be corrected as the rules of the court provided parties with remedies that can be exercised to their advantage.

23. Similarly, I am of the considered opinion that the issue of the applicants filing the notice of appeal out of time cannot bar the court from determining the application for stay pending appeal.

24. The court has discretion to grant stay pending appeal. I have considered all the foregoing issues and hereby allow the application on the following terms:-

*(a) That the applicants deposit half of the decretal amount as security in an interest earning account in the names of the advocates for the parties within 30 days in default of which the orders herein will be automatically vacated.*

*(b) That the applicant fast-tracks the appeal and should serve the respondent with the memorandum of appeal and any other relevant documents within 30 days in default of which the orders herein stand vacated.*

*(c) That the applicants meet the costs of this application.*

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF APRIL, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Kathungu for plaintiff/respondent**

**Ms. Muriuki for Kariuki for defendant/applicant**