



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CIVIL APPEAL NO 238 OF 2013**

NELSON NJUGUNA KIIRU

JULIUS MWANGI KIIRU.....APPELLANTS

VERSUS

JESSE MUTHIGA ALBERT.....RESPONDENT

**R U L I N G**

1. This ruling is in regard to the **notice of motion dated 30/03/2015** filed by the Appellants in which they seek the main order of stay of execution of decree pending disposal of the appeal. The application is supported by their joint affidavit annexed to the application. There are various grounds for the application appearing on the face thereof.

2. The Respondent opposes the application by **grounds of opposition dated 20<sup>th</sup> and filed on 21<sup>st</sup> April 2015**. Those grounds include –

- i. That the Appellants have not fulfilled the conditions set out in **Order 42, Rule 6(2)** of the **Civil Procedure Rules** (the **Rules**) regarding furnishing of security.
- ii. That the application was brought after inordinate delay.
- iii. That the Appellants have not shown what substantial loss they will suffer if stay is not granted.

3. I have considered the submissions of the learned counsels appearing. I have also perused the court record.

4. The Respondent has a money decree against the Appellants. Judgment was passed by the lower court on 28/09/2012 for KShs 50,500/00 plus costs and interest after an *ex parte* hearing on 25/07/2012. Apparently the trial court found that the Appellants had been duly served with hearing notice. An application to set aside the judgment was dismissed with costs in a ruling delivered on 06/09/2013.

5. The Appellants lodged their memorandum of appeal (against that order of dismissal) on 12/09/2013, well within time. However, they did not apply for stay of execution of the decree until 01/04/2015 (by the present application) (nearly one year and seven months after lodging their appeal) – and then only after they had been committed to civil jail in execution of decree. But I note that the Appellants had sought stay of execution before the trial court, which stay was refused on 06/09/2013.

6. Rule 6(2) of Order 42 of the Rules provides –

**“(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.”**

**Delay**

7. As already noted, the Appellants applied after one year and nearly seven months after refusal of their application for stay by the trial court and after they lodged their appeal. No explanation at all has been offered for this long delay, either in their supporting affidavit or in their submissions made in person or by their learned counsel instructed after hearing of the application had commenced. The Appellants applied only after they were committed to civil jail in execution. They no doubt would have been content to sit and wait – without even taking steps to prosecute their appeal.

8. In the circumstances of this case I find the delay in applying to be unreasonable and unexplained.

**Substantial Loss**

9. In money decrees the common way of demonstrating substantial loss is to show that the appellant, should he succeed in his appeal, shall not be able to recover any decretal sum paid, or that he will have considerable difficulties in such recovery. In the present case there is not any such allegation, let alone proof on a balance of probabilities.

10. In the event I find no merit in the main prayer of stay of execution of decree pending disposal of the appeal in the notice of motion dated 30/03/2015. The same is dismissed with costs to the Respondent. Any interim stay of execution in place is hereby vacated. It is so ordered.

**DATED AND SIGNED AT MURANG’A THIS 12<sup>TH</sup> DAY OF MAY 2016**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG’A THIS 13<sup>TH</sup> DAY OF MAY 2016**