



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.142 OF 2014

(Appeal from the judgment of Hon. ATEYA (RM) dated and

delivered on 17^H November , 2014, in the original OGEMBO SRM Civil Case no. No.243 of 2012)

JULIUS NYABARO OGWANGI.....APPELLANT

VERSUS

ZIPPORAH KEMUNTO NYABARO

T/A GETONTO JUNIOR SELF HELP GROUP.....RESPONDENT

RULING

1. This ruling relates to an application dated 24th August 2015 brought by way of **Notice of Motion under Order 22 Rule 22 of the Civil Procedure Rules** in which the applicant seeks for an order of stay of execution of decree in **Ogembo SRMCC No. 243 of 2012** pending the hearing and determination of this appeal being **Civil Appeal NO. 142 of 2014**.
2. The application is premised on the grounds stated on the body of the notice of motion and the applicant's affidavit sworn on 24th August, 2015.
3. The applicant states that he has already filed an appeal against the judgment of **Ogembo SRM Court** which appeal could be rendered nugatory if the stay sought is not granted as he had already been arrested and put in Civil Jail before he obtained a temporary stay before this court on 25th August, 2015. The appellant contends that his property had also been attached and therefore, he stands to suffer double loss if the stay is not granted.
4. The applicant also contends that the respondent will not be able to refund the decretal sum should he win the appeal and thus rendering the said appeal nugatory.
5. The application is opposed by the respondent through her replying affidavit sworn on 16th October, 2015 in which she depones that the instant application is only meant to delay the finalization of her case as the appeal has no merit since the applicant had admitted owing her the decretal sum
6. The respondent added that the applicant should be granted a conditional stay through an order for the depositing of the decretal sum in a joint interest earning account held by the advocates of both parties.

7. When the application came up before me for hearing, parties agreed to canvass their arguments by way of written submissions.
8. I have perused the written submission filed by the parties' respective counsels together with the pleadings filed and I note that the only issue that I need to determine is whether the applicant has made out a proper case for the grant of stay orders of execution pending appeal.
9. The relevant law on stay of execution pending appeal can be found in order 42 Rule 6 of the Civil Procedure Rules. The applicant has however cited order 22 Rule 22 of the Civil Procedure Rules which provides as follows:

“(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court

having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

10. In the instant case, it is not in dispute that the applicant has already lodged his appeal before this court. The applicant has further demonstrated that he stands to suffer substantial loss if the execution, by way of his committal to Civil Jail, is allowed to continue as such an eventuality would render his appeal nugatory.
11. From the submissions of the applicant, it is clear to me that he is not averse to providing security in court for the due performance of the decree by way of depositing a title deed in court as security.
12. The Respondent has, on her part also submitted that the applicant should deposit the entire decretal sum of Kshs. 86,710/= in court or in a joint interest earning account in the names of both the advocates for the parties.
13. In view of the above, I find that the applicant's application dated 24th August, 2015 has merit and make orders as follows:
 - a. **That there be a stay of execution of the decree in Ogembo Senior Principal Magistrates Court Civil Suit NO. 243 of 2012 pending the hearing and determination of the appeal herein, but on condition that:**
 - i. **The applicant deposits the full decretal sum together with costs in a joint interest earning account to be held by the advocate for the applicant and the respondent within 30 days from the date of this order.**
 - ii. **In the event of failure to comply with the order contained in (a) (i) hereinabove, the stay order shall stand vacated and the respondent shall be at liberty to proceed with the execution of the decree.**

b. The costs of the Notice of Motion dated 24th August, 2015 shall abide the outcome of the appeal.

Dated, signed and delivered in open court this 7th day of June 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- N/A for Sagwe for the Appellant
- Mr. Ogari for the Respondent
- Omwoyo: court clerk