



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

**CIVIL APPEAL NO.79 OF 2012**

**(CORAM: F. GIKONYO J)**

**ERIC MURIUNGI.....1<sup>ST</sup> APPELLANT**

**TARTEX CONTRACTORS..... 2<sup>ND</sup> APPELLANT**

**Versus**

**JACKSON MURIUKI.....RESPONDENT**

***Appeal from the judgment of Hon. P.M.Mulwa Senior Principal Magistrate in Nkubu in Pmcc. No. 25 of 2009 delivered on 20<sup>th</sup> July 2012)***

**RULING**

Stay of execution pending appeal

[1] The Motion dated 19<sup>th</sup> December 2012 which is expressed to be brought under Order 42 rules 6(1) (2) of the Civil Procedure Rules and sections 1A and 1B of the Civil Procedure Act is essentially asking this court to:-

- (1) Order a stay of execution of; the judgment and decree in; and also of sale of goods proclaimed on 6<sup>th</sup> December, 2013 pursuant to the warrants of attachment issued in NKUBU SPMCC NO 25 of 2009 pending determination of this appeal.***
- (2) Order for costs of the application.***

[2] The application is supported by two affidavits; the Supporting affidavit and Further Affidavit of KARERE GITONGA, the Managing Director of the 2<sup>nd</sup> Appellant sworn on 19<sup>th</sup> December, 2012 and 11<sup>th</sup> March 2013, respectively. The Applicants also filed written submission pursuant to the order of the court made on 13<sup>th</sup> March 2013. From the application and the pleadings, the Applicants argued that they merit a stay of execution. The reasons given are; that their appeal has overwhelming chances of success; the execution has already taken place and proclamation of goods made; that substantial loss may be suffered by the Applicants; and that they are ready to deposit half of the decretal sum in court at earliest opportunity. The Appellants saw substantial loss occurring if the goods proclaimed are sold as they are of a very high value compared to the decretal sum. The Applicants gave the example of M/V registration Number KAM 679 which they said was worth more than Kshs. 600,000 whereas the decretal sum is Kshs. 277,855.

[3] In answer to the anomalies pointed out by the Respondent, the Applicants in the further affidavit averred that the correct case to which this appeal relates is CMCC NO 25 OF 2009 and not 26 of 2009. They also blamed the impleading of the wrong respondent to this error which they termed as typographical and one capable of being corrected through amendment and it should not, therefore, deprive them remedy.

### **Respondent opposed application**

[4] The Respondent opposed the application; he filed a replying affidavit as well as grounds of opposition. The core of their objection is that the application is an afterthought and incompetent: an afterthought because the Applicants paid a sum of Kshs. 400,000 leaving a balance of only Kshs. 66,000 in respect of case number 26 of 2009 to which this appeal relates. They filed the application in question so that they will not pay up as had been ordered by the court. According to the Respondent it is incompetent for two reasons; (1) it relates to suit number 25 of 2009 which was settled completely; and (2) yet it has been filed in the wrong file which relates to suit number 26 of 2009.

### **DETERMINATION**

[5] I have considered the rival submissions of the parties and I take the following view of the matter. I find that there is one matter of preliminary significance; that is, the error on the court file number for the primary suit. From the record and the information that CMCC NO 26 OF 2009 is fully settled, it is clear that this appeal relates to CMCC NO 25 OF 2009 and not CMCC NO 26 OF 2009. The confusion was caused by the fact that there existed two suits on similar circumstances. But, the error arising out of that unsatisfactory state of affairs is mere technicality which can be corrected through amendment. Such error is not of a substantial or decisive characteristic which would deny the Appellants remedy herein. Accordingly, I will proceed to determine the application herein on its merits.

[6] I go back to the merits of the application. The application before me is for stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. This is a subject without a dearth of judicial authorities. Therefore, I do not wish to re-invent the wheel on the subject. For a stay of execution to issue, the applicant must show sufficient cause. But, there are traditional prescriptions which the court will consider in an application for stay pending appeal, namely;

- (a) ***Whether the application was made without unreasonable delay;***
- (2) ***Whether substantial loss will occur unless stay of execution is granted; and***
- (3) ***What kind of security is sufficient for the due performance of the decree which might ultimately be binding on the applicant?***

But, courts have said time and again that the cornerstone of granting stay of execution pending appeal before the High Court is whether substantial loss will occur if stay of execution is not issued. Ordinarily, in money decree, substantial loss lies in the inability of the respondent to make a refund of the decretal sum if the appeal is successful. Invariably, such eventuality reduces a successful appellant to a mere holder of a barren result which he cannot realize. That is the substantial loss which must be avoided. Accordingly, where substantial loss is unlikely to occur ***it would be a rare case that an appeal would be rendered nugatory by some other event.*** On this, see the decision of the Court of Appeal in the case of **KENYA SHELL LIMITED vs. BENJAMIN KARUGA KIGIBU & RUTH WAIRIMU KARUGA (1982-1988) 1 KAR 1018**, that:-

***“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case that an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”***

[7] It bears repeating that the possibility of substantial loss occurring is the primary consideration in

an application for stay of execution pending appeal. And I should think that the need for security will only arise after the requirement for substantial loss occurring has been established. Despite these propositions, however, each case should be decided on its own merits. Strictly speaking, in this case there is really no proof of substantial loss occurring. The fact that attachment of goods belonging to the Appellants is already on course; and that the attached vehicle was of a value which is much higher than the amount of the decretal sum are not in themselves sufficient proof of substantial loss occurring in the sense of order 42 rule 6 of the CPR. First, attachment of attachable goods belonging to the Appellants was levied pursuant to lawful process of the court. Second, goods attached in execution of a decree should also be able to pay off the entire decretal sum and all attendant costs including but not limited to auctioneers charges. Again, there is no prohibition that a property of higher value than the decretal sum should not be attached in execution of the decree thereto. That notwithstanding, each case should be decided on its own peculiar circumstances. In this case, there some important considerations I should take into account. I note that the court ordered a temporary stay of execution on condition that the Appellants deposited Kshs. 150,000 within 45 day from 21<sup>st</sup> December 2012. Nonetheless, albeit in violation thereof, the Appellants deposited the money on 1<sup>st</sup> February 2013. In view of these circumstances, I may still be inclined to order a stay of execution but on terms which must be adhered to strictly. I am aware that both parties have rights; the appellants have right to appeal and their appeal should not be rendered nugatory; the respondent has right to immediate realization of his judgment. Therefore, in order to hold these competing rights of parties in an almost symmetrical bound, I should be guided by sound and best practices in this field of the law. Accordingly, I order that, pending the determination of this appeal, there shall be a stay of execution of the judgment and decree in CMCC NO 25 of 2009 on condition that the Appellants shall: -(1) deposit the entire decretal sum in an interest earning account in the joint names of counsels for the parties herein within 90 days from today; and (2) shall pay auctioneer's charges to be taxed or agreed between the parties. Once the account herein is opened, the sum deposited in court shall be paid into the said account immediately and the Deputy Registrar, High Court at Meru shall facilitate this. If the Appellants fail to comply with these orders within the time allowed, the stay order will lapse automatically. It is so ordered.

**Dated, signed and delivered in open court at Meru this 11<sup>th</sup> day of**

**July 2016**

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Ondari advocate for appellant

Mr. B.G. Kariuki advocate for respondent.

**F. GIKONYO**

**JUDGE**