



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 279 OF 2015**

**ALOISE MARETE. .... APPELLANT**

**VERSUS**

**BONIFACE MUTETHIA KIAMBI. .... RESPONDENT**

**RULING**

On the 23<sup>rd</sup> March, 2016, the Appellant/Applicant filed a Notice of Motion dated the 22<sup>nd</sup> March, 2016 expressed to be brought under Sections 1, 1A, B, 3 and 3A of the Civil Procedure Act and Orders 42 Rules 6 (1) (2), 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law seeking the following orders: -

1. Spent
2. That, there be a stay of execution of the Judgment/Decree in Milimani CMCC No. 5913 of 2012 pending the hearing and determination of this application.
3. That, there be a stay of execution of Judgment delivered in Milimani CMCC No. 5913 of 2012 pending the hearing and final determination of the appeal filed herein.
4. That, costs of this application be in the cause.

The application is based on the grounds set out on the body of the same and it's supported by the affidavit of Carol Thiga sworn on the 22<sup>nd</sup> March, 2016. In the said affidavit, it is deponed that Civil Suit No. 5913 of 2012 was heard and determined in favour of the Plaintiff/Respondent and a Judgment delivered on the 8<sup>th</sup> day of May, 2015 following which the Appellant herein instructed his advocate on record to appeal against. An application for stay pending Appeal was made before the trial court which was dismissed with costs.

Following the dismissal of the application by the lower court, the Appellant has moved this court seeking orders of stay pending the hearing and determination of appeal as the main prayer in the application.

The Appellant/Applicant through the deponent has offered to deposit security in court and also to abide by any conditions that this honourable court may impose.

The Respondent has opposed the application vide a replying affidavit filed in court on 12<sup>th</sup> April, 2016 sworn by Boniface Mutethia Kiambi wherein he depones that the deponent to the Affidavit in support of the application is a stranger to the proceedings and for that reason, the same should be expunged from the record. The Respondent also takes issue with the averments contained in the supporting affidavit to the

effect that the Appellant is a company while indeed it is not.

The Respondent avers that the Appellant was at all material times aware of the proceedings in the lower court at the time the ruling was delivered and that failure by the Appellant's counsel to attend court on 1<sup>st</sup> February, 2016 to collect the ruling was an act of negligence on his part. He avers that there was delay in filing the present application and no good reason has been given for the delay.

It is further deponed that the Respondent is a man of means, he is an employee of Parliament of Kenya by the Parliamentary Service Commission working as a Clerk Assistant/Research Officer and that over and above his salary, he is a proud owner of a piece of land being Title No. Nkuene/Mitunguu/1724 which he purchased in the year 2015 for a sum of Ksh. 2 million. He therefore is capable of repaying the decretal sum should the appeal succeed, he has annexed a copy of his pay slip as annexure "BMK 1".

According to him, if the application herein is granted, he shall be prejudiced as he has already been (for the last one year) and continue to be deprived of the fruits and benefits of the judgment. He further depones that the appeal filed herein has no chances of success.

The Appellant also filed the Notice of Motion dated 10<sup>th</sup> May, 2016 brought under Sections 1A, 3A of the Civil Procedure Act, Order 45 Rules 1, 2, 5, Order 51 of the Civil Procedure Rules 2010, seeking the following orders: -

1. Spent
2. That there be a stay of execution of the judgment in CMCC No. 5913 of 2012 and Milimani CMCC 2982 of 2013 pending the hearing of this application and of the application dated 22<sup>nd</sup> March, 2016.
3. That the honourable court be pleased to review the Orders of Honourable Justice Aburili made on 14<sup>th</sup> April, 2016 to deposit the decretal sum in court as security and have the Appellant deposit an insurance bound as security for the appeal.
4. That this application be consolidated with the one dated 22<sup>nd</sup> March, 2016 for hearing.
5. That the cost of this application be in the cause.

The application is based on the grounds set out in the body of the same and it is supported by the affidavit of Carol Thiga sworn on the 10<sup>th</sup> May, 2016.

The summary of the Appellant's/Applicant's case as captured in the affidavit in support is that the application for stay of execution dated 22<sup>nd</sup> March, 2016 came up for hearing on the 14<sup>th</sup> April, 2016 when the court directed that the same proceed by way of written submissions and further directed that the Appellant do deposit the decretal sum within 21 days as a conditional stay. The Appellant now wishes to offer security in form of insurance bond and has sought to review the orders that were granted by Hon. Justice Aburili on the 4<sup>th</sup> April, 2016.

The application for review is premised on the fact that depositing an insurance bond is in facilitation of prudent management of finances of the insurer considering that the decretal amount is enormous and would be well secured via the depositing of an insurance bond which would secure the interest of both parties herein. It is also averred that the insurer has obligation to its insured and the general public to facilitate efficient and smooth running of the enterprise which is facilitated well by availability of a huge liquidity and that the respondent will not be prejudiced since security will have been offered for the whole decretal sum.

The Respondent has opposed the application by way of a replying affidavit sworn by himself. In the said affidavit he avers that one Carol Thiga is a stranger to the proceedings herein and for that reason, the

affidavit should be expunged from the record. He also avers that the Appellant herein is not a company as deponed in the supporting affidavit to the application dated 10<sup>th</sup> May, 2016.

He further avers that the Appellant has failed to comply with the order of the court made on 14<sup>th</sup> April 2016 to deposit the decretal sum in court within 21 days from the date thereof yet in an application dated 10<sup>th</sup> June, 2015 filed in the Chief Magistrate's court, the Appellant swore an affidavit indicating his willingness to deposit at least half of the decretal sum in a joint interest earning account or as the court may direct. That the court having ordered the Appellant to deposit the money in court, he should not come back to the court in an attempt to chose the nature of security to give to court.

According to him, the Appellant has not given good grounds why the Honourable court should review the orders made on the 14<sup>th</sup> April, 2016.

Parties agreed that the two applications be heard together and that they be disposed off by way of written submissions which they filed and which I have duly considered.

The application dated 22<sup>nd</sup> March, 2016 seeks for orders of stay of execution of the decree issued in Milimani CMCC No. 5913 of 2012 pending the hearing and determination of the Appeal. Order 42 Rule 6 of the Civil Procedure Act is the relevant order in cases of stay pending Appeal and it provides as hereunder: -

***“(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.***

The application herein dated 22<sup>nd</sup> March, 2016 was filed on the 23<sup>rd</sup> March, 2016 following the dismissal of an application for stay of execution by the lower court on 1<sup>st</sup> February, 2016. Order 42 Rule (6) allows a party to file an application for stay in the lower court before coming to the High Court and that is the option the Applicant herein chose. The Application before this court was filed two months after the ruling dismissing the application for stay by the lower court. In my view, the delay though long, has been explained and this court shall give the Applicant the benefit of doubt.

The Applicant is also required to satisfy the court that substantial loss may result if a stay of execution is not granted. The applicant in this case has not illustrated how he will suffer substantial loss. That fact is not even deponed to, in the supporting affidavit. As the court held in the case of **Kenya Shell Limited Vs Kibiru & another (1986) KLR 410,**

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented and without this evidence, it is difficult to see why the Respondents should be kept out of their money.”***

On the issue of security, it is noted that the Applicant has offered to deposit security in court and to abide by any conditions set by the court.

Where execution of a money decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal is doubtful. The court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In this case, the Respondent has deponed that he is employed at

Parliament of Kenya by Parliamentary Service Commission as a Clerk Assistant. Looking at his payslip, the net salary is Ksh.73,394/- left to carter for himself and his family. In my view, if the decretal sum is paid to him, he may have difficulties refunding the same in the event that the appeal succeeds. As for the plot, it is noted that no valuation report has been annexed to show the current market value of the plot and save for the agreement, there is no evidence to show at how much the applicant acquired it. In the premises aforesaid, the Respondent has failed to satisfy this court that he is in a position to refund the decretal sum in the event that the appeal succeeds.

The Respondent has also argued that the deponent to the affidavits in support of the applications under consideration is a stranger to the proceedings and therefore the affidavits should be expunged from the record. The deponent describes herself as the legal officer of the Appellant but looking at the pleadings, the Appellant is a person and not a company. In the supporting affidavit sworn on the 19<sup>th</sup> May, 2016, the deponent in paragraph 1 states that she is a legal officer with the Defendant's insuring company and that she is duly conversant with this matter. Under the doctrine of subrogation, an insurance company is allowed to defend a suit on behalf of its insured and by virtue of that principle, it is in order for a legal officer of an Insurance company to swear an affidavit in proceedings relating to claims arising out of accidents involving their insured.

The application dated 10<sup>th</sup> May, 2016 seeks a review of the orders made on 14<sup>th</sup> April, 2016. The remedy of review and the principles governing it, are provided for under Order 45 Rule (1) of the Civil Procedure Rules. An Applicant seeking review must prove that there is discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons. From the evidence on record, the reasons given by the Applicant for review are that depositing of an insurance bond is for facilitation of prudent management of finances of the insurer, that the amount involved is enormous and would be well secured via depositing an insurance bond which secures the interests of both parties and that the insurer has obligation to insure the general public and to facilitate an efficient and smooth running of the enterprise it is facilitated well by availability of a huge liquidity.

In my view, none of these is a sufficient reason to warrant review of the orders made on 14<sup>th</sup> April, 2016. It has not been shown that the insurer has financial difficulties and it's not in a position to deposit the money in court as security.

In the premises aforesaid and in the interest of justice, the application dated 22<sup>nd</sup> March, 2016 is hereby allowed in terms of prayer 2 on condition that the decretal sums in CMCC Nos. 5913 of 2012 and 2982 of 2013 are deposited in court within 30 days from today failing which the order for stay shall automatically lapse.

The application dated 10<sup>th</sup> May, 2016 is hereby dismissed with costs to the Respondent. The orders herein shall also apply to Civil Appeal Number 280 of 2015.

Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of September, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence of**

..... *for the applicant.*

..... *for the respondent.*