



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

**CIVIL APPEAL NO. 22 OF 2015**

**DAVID K. ROTICH.....1<sup>ST</sup> APPELLANT**

**SIMEON KIPROTICH KATAM.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**THOMAS KIPCHOGE KOLWA.....RESPONDENT**

**RULING**

1. The 1<sup>st</sup> appellant is aggrieved by the ruling of the lower court delivered on 13<sup>th</sup> January 2015. He has presented a notice of motion praying for stay of execution until his appeal is heard and determined. In the alternative, the 1<sup>st</sup> appellant prays that he be released from civil jail; and that the warrants of arrest be lifted.

2. The impugned ruling was delivered on 13<sup>th</sup> January 2015. The learned trial magistrate dismissed the appellants' application dated 8<sup>th</sup> July 2014. The latter motion sought to set aside the proceedings and judgment of the lower court. The appellants have lodged a memorandum of appeal dated 13<sup>th</sup> February 2015 challenging the decision on ten grounds. The appeal has not been admitted. As a matter of fact, the record of appeal has not been filed.

3. From the supporting affidavit of the 1<sup>st</sup> appellant sworn on 20<sup>th</sup> May 2015, I gather that the decretal sum payable by the appellants now amounts to Kshs 2,524, 728. A firm of auctioneers issued a proclamation on 25<sup>th</sup> February 2015. Curiously, on 9<sup>th</sup> April 2015, the decree holder's advocates authored a letter to the lower court to "*change the mode of execution from warrants of attachment to warrants of arrest*". On 18<sup>th</sup> May 2015, the 1<sup>st</sup> appellant was arrested and placed in civil jail. That is the genesis of the present application.

4. The gravamen of the motion is that the 1<sup>st</sup> appellant was not served with any notice to show cause; that the warrants were undated; and that unless the reliefs sought are granted, the appeal will be rendered nugatory.

5. The motion is contested. The respondent has filed a replying affidavit filed on 26<sup>th</sup> May 2015. The *jurat* is not dated by the Commissioner for Oaths; and for all purposes, the affidavit is a *nullity*. Learned counsel for the respondent submitted that the decree has not been annexed; that the applicants have should furnish security for due performance of the decree; that the appellants are justly and truly indebted to the respondent; and, that since this is a money decree, the appeal will not be rendered nugatory.

6. I have considered the application, depositions, and the rival submissions. The court may grant a stay pending appeal under Order 42 of the Civil Procedure Rules 2010. The present motion is predicated upon Order 42 rule 6 (1) of the Rules which provides-

*“6.(1) 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.*

*(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.”*

7. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417, the learned Judge, Madan JA (as he then was) quoted with approval the views of Brett L.J. in Wilson v Church (No 2) 12 Ch D [1879] 454 at 459.

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”*

8. Justice Madan delivered himself thus in the Butt case (Supra) at page 419,

*“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”*

9. Again the court will grant a stay if special circumstances of the case dictate so. See Attorney General v Emerson and others 24 QBD [1889] 56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. Those general principles were restated in Madhupaper International Limited v Kerr [1985] KLR 840 at page 846.

10. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate Vs Shamas Charania [2010] eKLR (Civil Application No 68 of 2008).

11. The present motion also relies on article 159 of the Constitution and sections 1A and 3A of the Civil Procedure Act. I am satisfied that the application was brought *within a reasonable time*. I am also satisfied that a *memorandum of appeal* has been lodged in this court.

12. The decree is for a *substantial* sum. Instead of proceeding to execute the decree by attachment of goods, the respondent chose to arrest the 1<sup>st</sup> appellant. He was entitled to do so. But I think the entire scheme was to bring maximum pressure to bear upon the 1<sup>st</sup> appellant to meet the decree. The fate of the 2<sup>nd</sup> appellant is unclear. I am satisfied that owing to the large decree in dispute between the parties there is a *special circumstance* that gives the applicants an undoubted right of appeal. Butt v Rent Restriction Tribunal [1982] KLR 417.

13. The other key consideration is whether the appellants will suffer *substantial loss*. I am alive that as a

general proposition, the mere execution of a *money decree* does *not* constitute substantial loss. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR. In this case, the 1<sup>st</sup> appellant has been incarcerated in civil jail. If the appeal is successful, the loss of liberty may not be easily quantified or compensated. It would also render the appeal nugatory. I am thus satisfied that the 1<sup>st</sup> appellant stands to suffer substantial loss. In a synopsis, *sufficient* basis has been laid to exercise my *discretion* to grant stay pending appeal.

14. I order that the 1<sup>st</sup> appellant be released *forthwith* from civil jail. But the appellants cannot have their cake and eat it. Order 42 rule 6 still calls for furnishing of security for the due performance of the decree. In order to ensure equality of arms; and, to further the overriding objective, I order a that there shall be a *stay of execution* of the decree pending appeal but on the condition that the appellants *deposit* the principal sum of Kshs 450,000 and Kshs 1,070,000 in court; or, in a joint interest earning account of both counsel in a reputable bank. The sums shall be deposited within *twenty one* days, in default of which the decree holder will be at liberty to *execute*. The appellants shall also take immediate steps to prepare the record of appeal; have the appeal admitted; and, list it for directions within the next *ninety* days.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 2<sup>nd</sup> day of July 2015

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kibii for the appellants instructed by Terer & Company Advocates.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.