



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**MISC. APPLICATION NO. 92 OF 2013**

**JOHN MUREITHI & ANOTHER ..... APPLICANTS**

**VERSUS**

**JOSEPH KIMENCHU..... RESPONDENTS**

**RULING**

The applicants through an application dated 5<sup>th</sup> December, 2013 brought pursuant to provisions of Order 42 Rule 6(1), Order 52(1) of the Civil Procedures sought the following orders:-

1. *That the application herein be certified as urgent and be heard exparte in the first instance for reasons of urgency.*
2. *That there be a stay of execution pending hearing of this application inter parties.*
3. *That an order for stay of execution of judgment and decision made on 29<sup>th</sup> October, 2013 be granted pending the hearing and determination of the intended appeal.*

The application is based on the grounds on the face of the application being as follows:-

- a. **That the judgment was entered in this matter for a large amount of Kshs.500,00/- on 29<sup>th</sup> October, 2013.**
- b. **That the Defendants/applicants are not content by the judgment delivered in PMCC NO.36 of 2012 on 29<sup>th</sup> October, 2013 and intend to appeal to the High Court of Kenya against the whole of the said judgment.**
- c. **That substantial loss will result and the intended appeal will be rendered futile unless an order of stay of execution is granted pending the hearing and determination of the appeal.**
- d. **That the defendants/applicants are willing to abide by any conditions which may be set by this Honourable court for the grant for the grant of the orders of stay of execution.**

The application is further supported by an affidavit deponed upon by Ringera Stephen, 2<sup>nd</sup> applicant. It is deponed that judgment was in PMCC 36 of 2012 delivered on 29<sup>th</sup> October, 2013 for Kshs.500,000/- for general damages and that the applicants were aggrieved by the said judgment. He further depones that he is duly advised an appeal ought to be filed within 30 days from the date of judgment of the lower court to the High Court but in this case 30 days lapsed without filing of the appeal which the applicant contribute to delay in obtaining a copy of the judgment. That the advocate got copies of the judgment on 3<sup>rd</sup> December, 2013. The applicants depones further that he does not know of any assets of the plaintiff/respondent and that they are apprehensive that in the event they are successful in the Appeal it will prove futile for them to recover any money paid to the plaintiff as the plaintiff's assets are not known

to them.

The applicants depone that they are ready and willing to abide by any terms and conditions which may be imposed by the court for the grant of order of stay of execution.

The plaintiff/respondent is opposed to the application and relies on his Replying Affidavit dated 9<sup>th</sup> December, 2013. The respondent contend the applicants won't be prejudiced if the stay is not granted as he is able to refund the decretal sum if the applicants' intended appeal succeeds as he runs a lucrative cereals and grocery business in Isiolo town under the name and style of JOSKAM which earns monthly profit at a rate of Kshs.70,000/- and that he has a 4 acre farm which is P/NO.517 in Kiwanja-Ndege area in Isiolo and that he has one acre LR No.Nyambene/Kitheo/991 from which he earns Kshs.200,000 from coffee and bananas. The respondent further deponed that the conditions for granting of stay of execution has not been satisfied. He also contended appeal cannot see the right of day. He contended that he is entitled to enjoy the paltry awarded by the trial court as fruits of his litigation. He further deponed that the proceedings and judgment was typed in time and it is the applicants who delayed in paying for the same and collecting the same in time.

Initially this matter had been brought under certificate of urgency but when the same came up for hearing on 9<sup>th</sup> December, 2013, the court considered the application and refused to certify the same as urgent and directed that the application be served and hearing date be taken at the registry.

The application was argued by both counsel for the applicants and the respondent. The respondent filed list of authorities in support of his oral submissions.

I have carefully considered the pleadings relied upon by the parties. I have similarly considered submissions by counsel on behalf of their respective clients and authorities relied upon by the respondent and the provisions of the Civil Procedure Rules relied upon by the applicants.

The issue for consideration is whether the applicants have filed an appeal and whether they have met the conditions set out under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules to justify granting of stay of execution as sought?

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 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 sub rule***

***(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.”***

It is of great importance to point out that in the instant application no appeal has been filed and no prayer for filing of an Appeal out of time is sought in the present application. Order 42 of Civil Procedure Rules can only be invoked where a party has filed an appeal or where in the application of stay of execution a party has also sought leave to appeal out of time. It is unfortunate in the current application leave to appeal out of time is not sought and it is my finding that the provisions of Order 42 Rule 6(1) of Civil Procedure Rules are inapplicable, but be as it may, I will proceed to consider the application on its merits.

The applicants filed notice of Motion on 18<sup>th</sup> February, 2014 and had some passed over to my Court Clerk when this matter was going on. The application was seeking to amend application dated 5<sup>th</sup> December, 2013 and filed on 6/12/2013. That instead of adjourning the matter to deal with the application dated 18<sup>th</sup> February, 2014, the applicants opted to proceed with the application dated 6<sup>th</sup> December, 2012 as drawn. The application therefore did not have a prayer for leave to appeal out of time. Consequently the draft Memorandum of Appeal hangs in the air and serves no purpose in the application as it is a purported annexure supporting an un-existing prayer. The respondent has on his part shown that he has business and several properties from which he makes good earnings. That has not been challenged or controverted by way of affidavits.

In the case of **KENYA SHELL LTD V BENJAMIN KARUYA KIBIRU & ANOTHER(1982-1988) 1KAR 1018 Hon. Platt J.A** as he then was, stated that where there is no evidence of substantial loss in an application for stay of execution of the decree, the application should not be granted. Further the burden lies with the applicants to show substantial loss (see **Philomen Oyugi V Bamburi Portland Cement Co.Ltd HCCC 337/1989 as per Ringera J.**

In view of the special facts of this application and there being no proof of existence of an appeal or a prayer in the application to file appeal out of time and the applicants having failed to meet the conditions for granting stay as set out under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, and having failed to satisfy court that they will suffer substantial loss if stay is not granted, and the respondent having satisfied this court that he is a businessman and a man of means, which assertion has not been controverted and therefore able to refund the amount in case the applicant's end up filing an appeal and succeeding thereafter. I am satisfied that the applicants' application is not merited at all.

I therefore dismiss the application dated 5<sup>th</sup> December, 2013 with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF MARCH, 2014.

**J. A. MAKAU**

**JUDGE**

**Delivered in Open court in the presence of:**

1. Mr.Muthomi B h/b for M/S Gitonga Kamiti & Kiariaria & Co. Advocates for applicants.
2. Mr. C. Mbaabu for respondent

**J. A. MAKAU**

**JUDGE**