



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISC. APPLICATION CASE NO. 29 OF 2013**

**ADIEL MURITHI PHILIP ..... APPLICANT**

**VERSUS**

**DOMIZIANO GITONGA ..... RESPONDENT**

**RULING**

The applicant has approached this court by way of a Notice of Motion brought under Section 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. He seeks two orders.

**1. That this Honourable court be pleased to grant an order for stay of execution of the ruling dated 28<sup>th</sup> March, 2013 in Chief Magistrate's Court case No. 225 of 2007 pending the hearing of this application.**

**2. That the costs of this application be perused.**

**The application is premised on four grounds on the face of the application namely:-**

**1. That the applicant is a sick person and unemployed.**

**2. That being a lame person is unable to meet his daily needs and depends on handouts.**

**3. That due to ruling issued on 28<sup>th</sup> March, 2013 the applicant can afford to pay Kshs.500/= only per month and not ordered Kshs.7000/-.**

**4. That being ordered to be kept in jail will not value any matter and only to shorten my life which is not allowed in our present constitution.**

The application is premised on an affidavit sworn by the applicant. The gist of the affidavit is that applicant is disabled and that sending him to civil jail would shorten his life. It is also averred that the applicant could only afford to pay Kshs.500/- a month and not Kshs.7000/= ordered by the lower court. He avers he does not understand how decree of Kshs.23,220/- could have risen to Kshs.78,897/-.

There is a replying affidavit sworn by the respondent dated 10<sup>th</sup> June, 2013. The gist of the affidavit is that the respondent got judgment in his favour against the applicant on 14<sup>th</sup> November, 2008, in which the decretal sum was kshs.79,897/- in chief magistrate's civil Case No. 225 of 2007. He averred that the applicant has not paid a single coin since the decree. He avers further that the applicants offer to pay kshs.500/- per month was absurd, unreasonable, mischievous and feebly late in the day. He avers that the

applicant was a man of means with a farm and business which were established.

I have considered the application, replying affidavit and submission by the application and by Mr. Muthomi for the Respondent. The applicant seeks a stay of execution pending the determination of the appeal. It has been brought under O.42 R 6 (b) of the Civil Procedure Rules the court has power to grant stay of execution pending appeal. That power is fettered by five conditions clearly set out under O.42 R6(1) and (2) of the CPR. These are one that the Applicant must establish a sufficient cause; two the court must be satisfied that substantial loss would ensue from a refusal to grant a stay three the applicant must furnish security; four the applicant must have brought the application without unreasonable delay and, fifth there must be a pending appeal.

Has the Applicant satisfied the basic conditions in this application?

The first issue raised by Mr. Muthomi was that the Applicant had not filed an appeal before filing this application. Counsel urged that the application was incompetent. The Applicant replied that he had filed an appeal No. 2476 of 2013 but admitted it was so filed after this application.

The Applicant admitted he filed the application before his appeal in which the order of the lower court, which is in issue in this application, is challenged. Whether filing the appeal after the application for stay is fatal or not is arguable. However, the application sought stay but did not peg the order of stay to the pending appeal. The application seeks **“for stay of execution of the ruling dated 28<sup>th</sup> March, 2013 in Chief Magistrate’s Court Case No. 225 of 2007 pending the hearing of the application.”**

The application is clearly incompetent since, upon hearing the application, the matter will be concluded as there would be nothing else pending to be heard or resolved. Clearly the Applicant had not pegged the application on any appeal.

The Applicant did not offer any security for the due performance of the decree or order that would ultimately be finding on him.

The Applicant instead urged this court to reduce the sum of money he was ordered to pay as instalments by the lower court from 7000/- per month ordered to 500/-. That prayer is what the Applicant should urge in his substantive appeal and not in this application. That prayer was pre mature. At this stage he should have offered security for the due performance of the order or judgment of the lower court. He offered none.

The applicant needed to show what loss he stood to suffer if the application were denied. He did not show or establish any.

For the above reasons the applicants motion dated 26<sup>th</sup> April, 2011 is incompetent first and foremost, and is accordingly struck out with costs.

DATED SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF JULY, 2013

**J. LESIIT**

**JUDGE**