



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ELC. CASE NO. 30 OF 2012.**

**TIMOTHY NYONGESA MASINDE.....1<sup>ST</sup> PLAINTIFF**

**ASTON WAMALWA MASINDE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS.**

**HUMPHREY WACHIYE MACHASIO.....DEFENDANT**

**R U L I N G**

[1] This application is brought under article 159, Section 1A, 1B, 3 3A and 63(e) of the Civil Procedure Act order 10 rule 11 of the Civil Procedure Rules and order 51 rule 1 of the Civil Procedure Rules. The applicant prays for a stay of proceedings and further proceedings herein pending the determination of this application inter partes. He prays that there be a stay of execution pending the hearing and determination of a filed appeal to the Court of Appeal.

The only reason given for asking for a stay is that the appeal has overwhelming chances of success and that the attachment of the applicants property is irregular.

[2] The application is opposed by the respondent who have filed a Replying Affidavit and have said that the application lacks merit and should be dismissed with costs. Further that a similar application dated 1<sup>st</sup> December, 2017 was filed and more time was granted till February 2018. It is also stated that the applicant should seek a stay of the execution of the decree in the court of Appeal. Further that it is also contended that the applicant has not met the principles under order 42 rule (1) (6) of the Civil Procedure Rules.

[3] I have considered the Submission of the applicant and those of the respondent. This is a money decree. When the first application was made herein the parties agreed on a conditional stay against the attachment slated for 1<sup>st</sup> December, 2017 and the interim orders of 4<sup>th</sup> December 2017 were extended. The matter was to be mentioned in February, 2008 for further orders and that the auctioneers were to file their bill of costs by then. The applicant instead of pursuing the earlier application filed another application on 19/2/2018 asking for the same thing and that the decree of 3<sup>rd</sup> October, 2017 be stayed.

[4] Under order 42 rule 6(1) No appeal or second appeal shall operate as stay of execution. I personally have found no sufficient reason why a money decree should be stayed. But since this debt of Kshs.537,682/70 to the 1<sup>st</sup> respondent and Kshs.1,200,812/60 to the 2<sup>nd</sup> respondent arose out of a partnership that all parties herein were involved, and further that all the buildings that were constructed with that money of the 1<sup>st</sup> and 2<sup>nd</sup> respondents are on the applicants land and now form part of his land previously intended for all the parties, the applicant shall deposit the respective amounts in an interest earning account with each respondent pending the hearing of the alleged appeal within the next 30 days from today date.

He will pay the Auctioneers charges in the next 14 days if taxed, or 14 days after taxation. If he fails to open the accounts as aforesaid, or pay the auctioneers charges as aforesaid the execution will be carried out without further reference to court. I say so because he has had 6 months since 3<sup>rd</sup> October 2017 to do so and has not done so. The costs of this application shall be to the respondents.

Judgment read in open Court.

**Dated at Bungoma this 28<sup>th</sup> day of March, 2018.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Joy: Court Assistant

Mr. Murunga: For Mr. Khakula for Plaintiff respondent