



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NYR 167 OF 2018

BETWEEN

MICHAEL MWANGI GUCHURA.....APPLICANT

AND

MARTIN WAMBUA KITAVI Legal Representative of

KAMBUA KITAVI (DECEASED).....RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended

appeal against the ruling and order of the High Court of Kenya at Murang'a

(Kimondo, J.) dated 8th October 2019

in

HCCA No. 18 of 2019)

RULING OF THE COURT

The respondent, Martin Wambua Kitavi, suing on behalf of *Kambua Kitavi (deceased)*, obtained a judgment of *Kshs 536, 025* together with interest, against *the respondent, Michael Mwangi Guchura*, in the *Chief Magistrates Court at Murang'a*. The respondent's cause of action was based on a motor accident in which the deceased died.

The trial court granted the applicant stay of execution conditional upon deposit of the decretal amount in court. The respondent did not meet the condition and on 13th May 2019 the trial court extended the time to comply with 45 days, failing which the stay of execution would abate. The applicant was aggrieved and moved to the High Court on 26th June 2019 seeking an order for stay of execution of the judgment of the trial court. His main contention in the High Court was that he was a pensioner and unable to pay the decretal amount, the respondent was obliged to exhaust all other recovery avenues before seeking to commit the applicant to civil jail, and that the decree was time-barred under the Limitations of Actions Act.

Kimondo, J. dismissed the application on 8th October 2019 after finding that the applicant had not provided the details of his income and that he had in fact agreed before the trial court to deposit the decretal amount within 45 days.

After filing a notice of appeal on 18th October 2019, the applicant lodged the motion now before us in which he seeks stay of the ruling and order by the High Court dated 8th October 2019.

Other than the fact that the intended appeal is against exercise of discretion by the High Court which this Court will not readily interfere with, it is plainly obvious to us that the order which the applicant seeks to stay, and the subject of his notice of appeal, merely dismissed his application for stay of execution of the judgment and decree of the trial court. That order *per se* is a negative order that is incapable of being executed and therefore being stayed. This Court has stated severally that it cannot stay a negative order. (See *Western College of Arts & Applied Sciences v. Oranga & Others* [1976] KLR 6, *Executive Estates Ltd v. Kenya Posts & Another* [2005] 1 E.A. 53, *Co-operative Bank of Kenya Ltd v. Banking Insurance & Finance Union (Kenya)* [2015] eKLR, *Kenya Commercial Bank Ltd v. Tamarind Meadows*

Ltd & 7 Others [2016] eKLR, and Kaushik Panchamatia & 3 Others v. Prime Bank Ltd & Another [2020] eKLR).

We also cannot be asked to stay the decree of the trial court in the circumstances of this application, firstly, because as of now, we have no notice of appeal against that decree, and secondly, there is an appeal against that decree pending for hearing and determination before the High Court.

For the foregoing reasons, we find no merit in this application and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR