



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 15 OF 2015**

**JACKSON KAIO KIVUVA.....APPELLANT**

**-VERSUS-**

**PENINA WANJIRU MUCHENE...RESPONDENT**

**RULING**

This is an application for stay of execution of a decree issued on 9.2.2015 pending the hearing and determination of an appeal there from the judgement of Hon. E. Mbicha delivered on 9.1.2015.

The application is brought under Order 51 Rule 1 of the Civil Procedure Act and all the enabling provisions. The defendant/appellant contentions are that there be a stay of judgement dated 9.1.2015 in Kajiado and Case No. PMCC 9 of 2011 pending the hearing and full determination of the Civil Appeal No. 13 of 2015 formerly filed at Machakos. The said appeal has been transferred to Kajiado High Court referred as Civil Appeal No. 15 of 2015.

The basis of the contention that the appellant civil appeal has high chances of success and hence a stay is necessary to preserve the status quo. That unless stay is granted the issues to be ventilated in an appeal No. 15 of 2015 shall be overtaken by events and shall be rendered nugatory. That the stay granted by the trial court on 31.7.2015 was conditional with a requirement of depositing the entire decretal amount in a joint interest earning account of both the plaintiff and defendant.

The application was disposed off by way of written submissions. Mr. Osoro Advocates for the appellant submitted and gave a chronology of events leading to the current notice of motion before this court. He acknowledged that judgement in the lower court before Hon. E. Mbicha dated and delivered on 9.1.2015 was in favour of the plaintiff.

The terms of the judgement of the claim was that, ***“judgement is entered for the sum of Ksh.335,000 with costs in favour of the plaintiff as against the defendant.”***

He further acknowledges that a substantive notice of motion dated 26.3.2015 was filed and heard by the trial court interpartes. The learned trial magistrate issued a ruling in the following terms:

***“There shall be a stay of execution of the judgement delivered on 9.1.2015 in this matter pending hearing and full determination of Machakos Civil Appeal No. 13 of 2015 High Court on condition that the defendant/appellant shall deposit the decretal amount herein and the respective costs awarded herein in a joint interest account in the name of joint names of the plaintiff and the***

***defendant's account within a period of forty five days (45) from the date of delivery of this ruling failure to which execution may/issue. There shall be no orders as to costs."***

Mr. Osoro further submitted that the defendant/appellant was unable to comply with the order of the trial court of depositing the entire decretal amount with interest in a joint interest earning account within the 45 days period. To buttress his arguments counsel for the appellant cited the case of **Kalonde Mbusya vs. Martin Kimwele Kikoi & Others in Civil Appeal No. 35 of 2005**. The court of appeal held inter alia;

***"Although as we have stated, we are not sitting on an appeal against the learned judges' ruling, we need to state that any condition ordered by the court for doing or not doing anything should not in itself create an impediment for a litigant to access justice. Such a condition must be fair and must not amount to a refusal to grant the order....."***

Mr. Wanyonyi for the respondent submitted that the application lacks merit and only aimed at denying a successful peaceful access to the fruits of his judgement. He asked the court to take cognizance of the time the plaintiff took in court which lasted for 5 years before he got judgement in his favour.

Secondly counsel Mr. Wanyonyi urged that the applicants application has not met the test envisaged under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. The criteria set out in for stay of execution to be granted being:

- a. Substantial loss may result to the applicant unless the order is made.***
- b. The application has been made without unreasonable delay; and***
- c. The applicant has furnished security for due performance of the decree being appealed from***

In his arguments on objecting to the orders of stay of execution, counsel urged this court to take notice that applicant disobeyed an Order by Hon. E. Mbicha to deposit the decretal amount in a joint interest earning account within 45 days. He dismissed the contention by the applicant that the amount was colossal and had difficulties to raise in order to comply.

The cases of **JAMILA ADURWALLA & ANO. Vs. HUSSEIN ABDULAZIZ & ANO. HIGH COURT CIVIL CASE 231 OF 2000**, **MACHIRA T/A MACHIRA & CO. ADVOCATES Vs. EAST AFRICAN STANDARD 2002 KLR 63**, **AHMEDNASIR ABDIKADIR & CO. ADVOCATE Vs. NATIONAL BAK OF KENYA LTD HIGH COURT CIVIL CASE NO. 532 OF 2004**. The legal principles, the authorities referred to by the respondent is that;

***"A successful party is entitled to the fruits of his judgement or any decision of the court giving him success at any stage"***.

On my part I agree with all the submissions that have made by both counsels. The conditions for the grant of stay of execution under Order 46 Rule 6(2) are that the application has been made without unreasonable delay, that court is satisfied that substantial loss may result to the applicant unless the order is made, and such security as the court orders for the due performance of the decree has been given by the applicant in this notice of motion and from the record judgement in PMCC 9 of 2011 was delivered on 9.1.2015.

The application was filed on 26.10.2015. It manifest that the application was made without expedition. The reasons for unreasonable delay of ten months has not been explained. It is also clear from the record a stay application was made before the trial court and a ruling delivered on 31.7.2015. In the

circumstances of this case a period of three months delay cannot be said to be reasonable.

There is humble evidence that applicant did not comply with the order of depositing the decretal amount within 45 days from delivery of ruling on 31.7.2015. In default of compliance, the record shows that the decree-holder applied and was issued with warrants of attachment. In my view the applicant is guilty of laches as he did not even seek enlargement of time to comply or seek review orders on the ruling by the trial court.

The second act is in respect of an order for security as the court may order. This court has carefully considered the affidavit sworn by the applicant. The applicant has not made any such offer to provide security for due performance of the decree. In this second attempt seeking stay of execution pending determination of intended appeal, it would have been prudent for evidence to the effect that applicant is a pauper. There was no such evidence placed before this court to consider. It is worthy noting that this requirement may be imposed by the court taking into account circumstances of each case. This lost has not been fulfilled by the applicant.

The third rest for the court to consider concerns issue of substantial loss. Under this test the applicant has to satisfy the court that the decree-holder is a man of straw. This implies that it will be highly impossible or at least difficult to obtain back the decretal amount in the event of intended appeal succeeding. The burden to adduce evidence is to show that the decree-holder will be incapable of refunding the decretal amount if paid out is on the applicant. From the affidavit and documents filed in support of this application no such evidence was presented.

I therefore respectfully agree with the argument and submissions by the respondent in opposing the orders sought. In a nutshell I would rule that this application ought to fail and costs awarded to the respondent. In the alternative I note that the applicant has taken issue with the deposit earlier ordered of the entire decretal amount as a condition likely to stifle his right to approach the appellant court.

In the interest of justice this court tapers and varies the practice that mandates security for the entire decretal amount to that of security deposit of the principal amount of Ksh.335,000 to the court within 30 days from today's order. The amount be held till the final determination of the appeal or any further orders from this court. In default to comply with the order of deposit within the stipulated time the respondent be at liberty to commence execution. The costs of and remedial to this application shall abide the result of the appeal.

***Dated and delivered at Kajjido this 18<sup>th</sup> day of December, 2015.***

**R. NYAKUNDI**

**JUDGE**

Representation

Mr. Simon Romo holding brief for Mr. Osoro Advocate for the applicant

Mr. Mateli Court Assistant



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