



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL APPLICATION NO. E098 OF 2021**

**GODFREY KIRIMI.....APPELLANT/APPLICANT**

**VERSUS**

**CATHERINE MAKENA.....RESPONDENT**

**RULING**

***The Application***

1. Before the Court is an application dated 18<sup>th</sup> August 2021 seeking stay of execution of the Judgment delivered on 2<sup>nd</sup> July 2021 in Meru CMCC No. 323 of 2014. The subject matter of the suit at the trial Court was a claim for defamation in the form of slander brought by the Respondent against the Appellant. In the Judgment, the trial Court (Hon. T. M. Mwangi, SPM) found in favour of the Respondent and awarded her general damages of Ksh 450,000/= being damages for defamation together with interests and costs.
2. The Memorandum of Appeal dated 2<sup>nd</sup> August 2021 annexed to the Applicant's supporting affidavit reveals that the intended appeal seeks to challenge both quantum and liability.

***Applicant's Case***

3. The application is supported by the Applicant's supporting affidavit sworn on 18<sup>th</sup> August 2021. It is majorly premised on the grounds that the appeal has reasonable chances of success and that the Respondent has no known assets and will not be able to refund the decretal sum if paid to her, in the event of a successful appeal. The Applicant has indicated willingness to offer security as may be required by the Court and he urges that security may take various forms including financial, insurance, bank guarantees, title deeds or any other acceptable security. He claims that he is apprehensive that the Respondent will execute the Judgment issued by the trial Court and that he will suffer substantial loss and damage.
4. In his further affidavit sworn on 6<sup>th</sup> October 2021, he urges that despite the Respondent's allegation that she owns LR. No. Nyaki/Giaki/4739 and is thus capable of refunding the decretal sum in the event the appeal succeeds, the parcel has not been valued and it cannot, therefore, be a basis to assert capability to refund the decretal sum. He further urges that the suit filed in Nyeri was determined a long time ago and it has no bearing on the outcome of the instant matter.
5. He also filed submissions dated 1<sup>st</sup> October 2021. He relies on *Magnate Ventures vs Simon Mutua Muatha & Another* (2018) eKLR. He also cites *Butt vs Rent Restriction Tribunal* (1982) KLR 417 for the proposition that stay should be granted unless there is overwhelming reasons as to why it should not be granted. He further relies on *Housing Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Watta Enterprises Limited* (2015) eKLR for the proposition that an order of security should be such as not to stifle access to justice.

***Respondent's Case***

6. The Respondent has opposed the application by her replying affidavit sworn on 13<sup>th</sup> September 2021 and a supplementary affidavit sworn on 20<sup>th</sup> September 2021. She urges that she is entitled to the fruits of her Judgment and that the Applicant has not demonstrated how he stands to suffer substantial loss if the decree is executed. She urges that nothing has been placed before the Court to prove that she has no known assets and will thus not be able to refund the decretal amount. (She has annexed a copy of her title deed for her property). She urges that there has been inordinate delay in bringing the instant application i.e a month and 3 weeks after judgment was delivered. She urges that she has suffered for more than 6 years since the Applicant maliciously defamed her and brought her into hatred, ridicule and contempt and caused her dignity, reputation, character and esteem to be lowered in the eyes of the members of Naari Dairy Co-operative Society where she was working and the society at large and that the Applicant dismissed her from the Society.

7. She urges that the Applicant's appeal does not have a high chance of success considering that the Employment and Labour Relations Court in Nyeri ELRC Cause No. 131 of 2014 found that her dismissal from the Society was wrongful and unfair and she was awarded Ksh 295,500/= as compensation. She urges that most of the issues raised by the Applicant in his Memorandum of Appeal were raised at the Employment and Labour Relations Court and the Appellant did not appeal against the Judgment but he settled the decree.

8. She urges that the Applicant has not met the conditions for stay of execution and his application should be dismissed but in the unlikely event that the Court grants stay, he should be ordered to deposit security for the due performance of the decree of Ksh 1,000,000/=. He urges that the Applicant extensively delayed the suit at the trial Court and the trial Court once closed the defence case for non-attendance thereby causing the Applicant to make an application to re-open the defence case.

9. The Respondent also filed submissions dated 15<sup>th</sup> October 2021. She urges that the application is incurably defective because it is founded on the wrong provisions of law i.e Order 22 Rule 6 of the Civil Procedure Rules on application for execution and Order 10 Rule 11 of the Civil Procedure Rules on setting aside and/or varying of Judgments and yet the application is one for stay of execution, which ought to have been brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

10. On the merits, she urges that the Court should not concern itself with the question of whether there is an arguable appeal as that is a test under Rule 5 of the Court of Appeal Rules. Citing *Kenya Shell Ltd vs Benjamin Karuga Kigitu & Ruth Wareson Karuga* (1982-1988) IKAR 1018, she urges that the Applicant has not demonstrated the likelihood of suffering substantial loss. She urges that the likelihood of execution is not proof of substantial loss. She cites *Naiposha Lilituu vs Robert Kamau Gikonyo* (2020) eKLR

11. She urges that the application is calculated to delay the justice. She urges that she is entitled to enjoy the fruits of her judgment and that the application has not met the threshold for stay. She urges that she has known assets in accordance with her title deed for LR. No. Nyaki/Giaki/4739. Citing the case of *Winfred Nyawira Miana vs Peterson Onyiego Gichana* (2015) eKLR, she urges that the Applicant has not discharged the legal burden of proving her inability to pay. She cites *Charles Ondiek Awuor & Another vs Jacob Odhiambo Otieno* (2021) eKLR in urging that the unexplained delay of one month and 3 weeks on the part of the Applicant in bringing this application is inordinate. She urges that even a delay of 14 days as represented by the Applicant is inordinate. She further urges that the Applicant's conduct at the hearing of the suit where he delayed the hearing, is reason to deny him stay of execution. She cites *Evangeline Kanyua Mwiandi vs Gilbert Kinyua* (2020) eKLR. She urges that there is no reason for the Court to exercise its discretion in the Applicant's favour. Citing *John Mwangi Ndiritu vs Joseph Ndiritu Wamathai* (2016) eKLR, she urges that the Applicant failed to offer security, despite indicating his willingness to do so.

### **Determination**

#### **Wrong provisions of the law**

12. The Respondent urged that the Applicant brought his application under the wrong provisions of the law and this renders the entire application incurably defective. The Court has confirmed that the application is posited to have been brought under Order 22 Rule 6 of the Civil Procedure Rules and Order 10 Rule 11 of the Civil Procedure Rules which are provide for application for execution and setting aside and/or varying of Judgments respectively.

13. The correct provision of law to have brought his application under is Order 42 Rule 6 of the Civil Procedure Rules which provides for stay of execution pending appeal. It is therefore true that the Applicant's application has been brought under the wrong provision of the law. This Court has however previously held that in the spirit of Article 159 (2) of the Constitution and Section 1 A

and B of the Civil Procedure Act, failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of the application. See *Meru Misc Civil Application No. E007 of 2021 Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another*. See also *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR*. The Court will therefore go into the merits of the application.

### ***Stay of Execution***

14. The test for applications for stay of execution in the High Court is set out in Order 42 Rule 6 of the Civil Procedure Rules. The conditions that an Applicant has to meet and/or demonstrate for the court to grant a stay of execution are as follows: -

- a) *substantial loss will result to applicant if stay is not granted; and*
- b) *security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and*
- c) *the application has been brought without unreasonable delay.*

### ***Substantial Loss***

15. To urge his claim for substantial loss, the Applicant claims that the Respondent has no known assets and if paid the decretal sum, he may not recover the same, should his appeal be successful. The Respondent in her response annexed a title deed with respect to property namely L.R No. Nyaki/Giaki/4739 being a 0.10 Ha registered in her name.

16. The Court disagrees with the Respondent's assertion that the onus of proving that a Respondent in such applications for stay may be unable to settle the decretal sum lies on the Applicant. Once an Applicant expresses fears that the Respondent may not be in a position to settle the decretal amount, the burden of proof shifts to the Respondent to show that she has the means to pay since that is a matter which is peculiarly within her knowledge as per Section 112 of the Evidence Act. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* and *Equity Bank Limited v Japhet Kubai Ikiamba & Another Meru HCCA No. E007A of 2020*. The Court however considers that despite her misguided submission on this issue, the Respondent in fact discharged this burden by annexing her title deed. The Court does not agree that the property ought to be valued at this stage. The Court considers that it has the liberty to take judicial notice of the value of a 0.1 Ha property around the area of Nyaki/Giaki. The Court does not find it unreasonable that the property, if sold would be able to offset the decretal amount of Ksh 450,000/=.

17. This Court thus finds that the Applicant has not demonstrated the likelihood of suffering substantial loss.

### ***Security***

18. The Applicant has indicated his willingness to offer security for the due performance of the decree, only that the same should be reasonable so as not to stifle access to justice. The Respondent has urged that the Applicant ought to have gone a step further to indicate what he is offering. The Court finds that there is no strict requirement that an Applicant has to indicate how much he is offering as security, as the Court has ultimate discretion to make appropriate orders and require payment.

19. This Court considers that despite the failure to demonstrate the likelihood of suffering substantial loss, it would be fair to grant stay on condition that security is deposited and some reasonable amount is paid to the Respondent.

### ***Undue Delay***

20. Judgment in the trial Court was delivered on 2<sup>nd</sup> July 2021 and the instant application was brought on 18<sup>th</sup> August 2021, approximately one and a half months later. This Court does not find that there was any undue delay on the part of the Applicant. The Court has considered the Respondent's claim that the Applicant deliberately delayed the hearing of the suit at the trial Court, but this Court considers that the justice of the case calls for grant of stay pending the hearing and determination of the appeal.

### ***ORDERS***

21. Accordingly, for the reasons set out above, this Court makes the following orders: -

*i) The court grants an order for stay of execution of the Judgment and/or Decree delivered on 2<sup>nd</sup> July 2021 by Hon. T. M. Mwangi (SPM) in Meru CMCC No. 323 of 2014 pending the hearing and determination of the appeal.*

*ii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 150,600/= being 1/3 of the decretal sum.*

*iii) Within the said thirty (30) days in ii) above, the Applicant shall deposit the balance of the decretal sum being Ksh 300,000/= in Court.*

*iv) In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.*

*v) The costs of this application shall abide the outcome of the appeal.*

*Order accordingly*

**DATED AND DELIVERED ON THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S KIAUTHA ARITHI & CO. ADVOCATES FOR THE APPLICANT**

**M/S MURANGO MWENDA & CO. ADVOCATES FOR THE RESPONDENT**



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