



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 330 OF 2012**

**PATRICK NYOIKE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**LINUS GITAHU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATION MEDIA GROUP LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application dated 2<sup>nd</sup> July, 2020 seeks orders that **there be a stay of execution of the judgment delivered by this Honourable Court on 29<sup>th</sup> May, 2020 pending the hearing and determination of the Appeal filed.**

2. The application is premised on the grounds stated therein and the affidavit in support of the application. Judgment was entered herein on 29<sup>th</sup> May, 2020. The Applicants are aggrieved by the said judgment and have filed a Notice of Appeal. The Applicants are apprehensive that if execution proceeds the Appeal will be rendered nugatory and thereby suffer substantial loss. It is further stated that the Applicants will be unable to recover the decretal sum in the event that the Appeal succeeds. The Applicants are ready to provide security for the due performance of the decree.

3. The application is opposed. It is stated in the replying affidavit that the Application herein is calculated to delay the satisfaction of the award herein. That there has been inordinate delay in filing the application and no explanation has been given. That the application is premature as the execution process has not commenced. That in any event the Applicants will not suffer any prejudice as the Respondent is capable of refunding the decretal sum. That no Memorandum of Appeal is exhibited herein and therefore there is no way of knowing whether the Appeal is arguable.

4. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

5. Order 42 rule 6 (2) provides for the following conditions to be met in an application for stay of execution.

**“6. (2) No order for stay of execution shall be made under subrule**

**(1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

6. The judgment herein was delivered on 29<sup>th</sup> May, 2020. The Notice of Appeal was filed on 8<sup>th</sup> June, 2020. The application at hand was filed on 3<sup>rd</sup> July, 2020. The delay is not unreasonable.

7. Once the judgment has been delivered the right to execution is available to the Respondent. Although the Respondent has stated that he is not a man of straw and owns properties both in Nairobi and Thika, the transfer of property exhibited by the Respondent reflects that the property is owned jointly with the Respondent’s wife. There are no documents in support of the Respondent’s other means.

8. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

9. This court’s view is that there could be difficulties in recovering the decretal sum. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009.**

**“It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”**

10. The Applicant is willing to furnish security for the decretal sum.

11. To balance the competing interests of both parties herein, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the parties herein or in court within 30 days from the date hereof.

Date, signed and delivered at Nairobi this 11<sup>th</sup> day of Feb., 2021

**B. THURANIRA JADEN**

**JUDGE**