



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL NO. E450 OF 2020**

**WESTERN MICRO FINANCE LIMITED.....APPELLANT**

**VERSUS**

**DESTERIO KHADUDU NYABOLA.....RESPONDENT**

**RULING**

1. The application dated 29<sup>th</sup> October, 2020 seeks orders **that this honourable court be pleased to stay the execution and Decree of the judgment of Hon. Chief Magistrate L.L. Gicheha dated 13<sup>th</sup> October, 2020 pending the hearing and determination of the Appeal filed herein.**

2. The application is predicated on the grounds set out on its face and is supported by the affidavit sworn by the Applicant. It is deponed that the judgment of the lower court was delivered on 13<sup>th</sup> October, 2020. The Applicant is apprehensive that if the decree is executed, it may not be able to recover the sum in the event that the Appeal succeeds as the Respondent means are unknown. It is further averred that the Appeal has high chances of success and that the Applicant stands to suffer substantial loss. The Applicant is willing to abide by the conditions that the court may set for the due performance of the decree.

3. The application is opposed. It is stated in the replying affidavit that the application has not met the threshold for stay of execution orders. That no substantial loss has been demonstrated and that the application is meant to delay the execution process.

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

5. In an application for stay of execution, Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“No order for stay of execution shall be made under sub-rule (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. It is not in dispute that the Judgment of the lower court was delivered on 13<sup>th</sup> October, 2020. The instant application was filed on 3<sup>rd</sup> November, 2020. There was no unreasonable delay.

7. The Respondent has not disclosed his capability to refund the decretal sum if the Appeal turns out to be successful. 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.”**

8. The Applicant is willing to give security for the decretal sum.

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

**DATE, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021**

**B. THURANIRA JADEN**

**JUDGE**