



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 450 OF 2019

ISUZU EAST AFRICA LIMITED (FORMERLY GENERAL EAST AFRICA LIMITED).....APPELLANT/APPLICANT

VERSUS

RAA (Minor suing thro” Her father and next friend .....1<sup>ST</sup> RESPONDENT

MOSES NDIRANGU.....2<sup>ND</sup> RESPONDENT

NGAYWA NGIGI & KIBET ADVOCATES.....3<sup>RD</sup> RESPONDENT

RULING

1. The application dated 18<sup>th</sup> December, 2019 seeks orders **that this honourable court be pleased to grant an order for stay of execution of the Decree dated 1<sup>st</sup> February, 2018 and issued on 15<sup>th</sup> February, 2019 pending the Hearing and determination of the Appellant’s intended Appeal evidenced upon the grounds raised in the annexed Memorandum of Appeal filed on 2<sup>nd</sup> August, 2019.**
2. The application is predicated on the grounds stated therein and the supporting affidavit. It is averred that the judgment of the lower court was delivered on 1<sup>st</sup> February, 2018 following *ex-parte* proceedings. That the Applicant became aware of the judgment following service of warrants of Attachment of Moveable Property in execution of the Decree. That the Applicant applied for orders for stay of execution and the setting aside of the judgment but the application was dismissed on 5<sup>th</sup> July, 2018 and thereby triggered the filing of the application at hand.
3. It is further deponed that the Appeal is arguable with good chances of success but stands to be rendered nugatory if the application is not allowed. That the decretal sum is a colossal amount and may be difficult to be recovered. It is further stated that the Applicant applied for the typed proceedings of the lower court vide letter dated 8<sup>th</sup> July, 2019 but the same were supplied on 13<sup>th</sup> December, 2019.
4. The application is opposed by the 1<sup>st</sup> Respondent. It is stated in the replying affidavit that the judgment delivered is regular and that the Appeal has no chances of success. That the conditions for stay of execution have not been met and that the application is meant to delay the 1<sup>st</sup> Respondent from enjoying the fruits of the judgment.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not reply to the application though served.
6. The application was canvassed by way of written submissions. I have considered the application, the response to the same and the submissions filed.
7. 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.”**

8. The ruling of the lower court was delivered on 5<sup>th</sup> July, 2019 in the presence of both parties. The instant application was filed on 18<sup>th</sup> December, 2019. It has been explained that the proceedings of the lower court were supplied on 13<sup>th</sup> December, 2019. This is not disputed. The letter dated 8<sup>th</sup> July, 2019 requesting for the proceedings and judgment was stamped as received in court on 22<sup>nd</sup> July, 2019. This court accepts the explanation for the delay.

9. The Applicant is apprehensive that the decretal sum may not be recoverable in the event that the Appeal is successful. The Respondent has remained silent about his capability to refund the decretal sum. The same is reflected in the warrants of Attachment as Ksh.563,859.52. 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.”**

10. To balance the competing interests of the parties herein, the application is allowed on condition that the decretal sum is deposited in a joint interest earning bank account of the advocates for the Applicant and the 1<sup>st</sup> Respondent herein or in court within 30 days from the date hereof.

**DATE, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY, 2021**

**B. THURANIRA JADEN**

**JUDGE**