



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 550 OF 2019**

**SMATTKAR ENTERPRISES LIMITED.....1<sup>ST</sup> APPELLANT/1<sup>ST</sup> APPLICANT**

**PETER GITUTU MBUGUA .....2<sup>ND</sup> APPELLANT/2<sup>ND</sup> APPLICANT**

**VERSUS**

**PATRICK MUIRURI WANYOIKE.....RESPONDENT**

**RULING**

1. The application dated 7<sup>th</sup> May, 2020 principally seeks orders **that an order of stay of execution of the judgment and the resultant decree given in Milimani CMCC No.9971/2018 be issued pending the hearing and determination of the Appeal.**
2. Secondly, **that in the alternative, this Honourable Court be pleased to vary or alter the stay conditions issued by the Lower Court and grant a stay on the condition that the Appellants provide a bank guarantee for performance of the decree or deposit part of the decretal amount in a joint interest earning account in the name of both advocates until the determination of this Appeal.**
3. The application is premised on the grounds stated therein and the supporting affidavit. The Applicants are dissatisfied with the Lower Court judgment and have appealed herein. The Applicants were granted orders of stay of execution on condition that half of the decretal sum be released to the Respondent and the other half be deposited in a joint interest earning bank account in the names of the parties Advocates. The Applicants are dissatisfied with the condition imposed in respect of the release of half of the decretal sum to the Respondent. It is averred that half the decretal sum is approximately Ksh.500,000/= and that the Respondent may not be able to refund the same in the event that the Appeal is successful. It is further stated that the Respondent's source of income is unknown. The Applicants are willing to give a bank guarantee as security for the due performance of the decree.
4. In a replying affidavit filed in opposition to the application, it is stated that the decretal sum is yet to be settled. That the Applicants made a similar application before the trial court which made orders that are yet to be complied with.
5. The application was canvassed by way of written submissions which I have considered.
6. Under Order 42 rule 6 (1) of the Civil Procedure Rules, the court to which such appeal is preferred has the liberty, on application being made, to consider an application for stay of execution and to make such order thereon as may to it seem just. The application for stay of execution made before the trial court does not therefore bar the Applicant from filing a similar application before this court.
7. 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 judgment of the trial court was delivered on 16<sup>th</sup> September, 2019. The application at hand was filed on 4<sup>th</sup> October, 2019. There was no unreasonable delay.

9. The Respondent has not said anything about his ability to refund the decretal sum. 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, I allow the application on condition that the Applicants do deposit the decretal sum in a joint interest earning bank account of the Advocates for parties or in court within 30 days from the date hereof.

**Date, signed and delivered at Nairobi this 16<sup>th</sup> day of Dec., 2020**

**B. THURANIRA JADEN**

**JUDGE**