



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 368 OF 2018**

**KEITHLINK ENTERPRISES .....APPLICANT**

**VERSUS**

**CHRISTOPHER GARO OMBEVA.....RESPONDENT**

**RULING**

1. The application dated 26<sup>th</sup> June, 2018 seeks orders that pending the hearing and determination of this application and the intended appeal, there be a stay of the ruling and orders of the court in Civil Cause No. 7187 of 2018 Christopher Garo Ombeva v Keith Link Enterprises Ltd & Keith Link Enterprises delivered on 20<sup>th</sup> June, 2018. Keithlink Enterprises Ltd was however struck out of the proceedings herein on 28<sup>th</sup> March, 2019.

2. It is stated in the grounds and the affidavit in support of the application that the Applicant is aggrieved by the ruling of the lower court and intends to appeal against the same. The Applicant is apprehensive that if the decretal sum is paid the Respondent may not be in a position to refund the same in the event that the appeal is successful, and thereby render the appeal nugatory. It is further stated that the appeal has high chances of success.

3. The application is opposed as per the grounds of opposition dated 19<sup>th</sup> July, 2018. It is stated in the grounds that the application is defective, an abuse of the court process and meant to deny the Respondent the fruits of the judgment.

4. The application was canvassed by way of written submissions which I have considered.

5. 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. The ruling of the lower court was delivered on 20<sup>th</sup> June, 2018. The application at hand was filed on 26<sup>th</sup> June, 2018. There was no unreasonable.

7. The Applicant has alleged that the Respondent may not be capable of refunding the decretal sum. The Respondent has not said anything to allay these fears. 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. 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 of the counsels for the parties herein or in court within 30 days from the date hereof.

**Dated, signed and delivered in Nairobi this 30<sup>th</sup> day of May, 2019**

**B. THURANIRA JADEN**

**JUDGE**