

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 540 OF 1999

WINFRED NJOKI CLARKE.....PLAINTIFF

VERSUS

HOTEL INTERCONTINENTAL NAIROBI.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

R U L I N G

There is a judgment in favour of the plaintiff against the defendants herein. The 1st Defendant on becoming aware of the judgment against it delivered on 31st May, 2018 lodged an application dated 20th June 2018 for stay of execution, and setting aside the said judgment to allow the suit to be reinstated and then call its witnesses to testify.

That application which was brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules was heard and dismissed in a ruling delivered on 11th December, 2018.

The present application dated 5th February, 2019 seeks an order for stay of execution of the decree herein pending the determination of an appeal filed following the ruling delivered on 11th December, 2018 aforesaid. The application is brought under Order 42 Rule 6(1), (2) and Order 51 Rule 1 of the Civil Procedure Rules. The same is opposed and there are grounds of opposition filed on behalf of the plaintiff the thrust of which is that, this court is *functus officio* and that the application is *res judicata*. Both counsel have filed submissions which I have on record and cited several authorities.

The plaintiff has a judgment in her favour which she desires to execute while at the same time the 1st defendant has the right of appeal. The order sought by the 1st defendant is discretionary. The application was filed within reasonable time.

The 1st defendant has raised concern if the decree is executed the plaintiff may not be in a position to refund the decretal sum if the appeal succeeds. It is generally accepted that once an applicant raises any doubt about the inability of the respondent to refund the decretal sum, then the burden shifts to the respondent to prove her financial capability – See **Nancy Wanjiku Kariithi & Another Vs Fontana Limited (2018) eKLR and Nairobi Civil Application 238 of 2005 – National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another**. The plaintiff has not made a rejoinder to that submission by the 1st defendant.

On the subject of whether this court is *functus officio*, I observe the first application dated 20th June 2018 sought orders different from the present. The court is therefore not *functus officio*. For the same reason, the subject of *res judicata* cannot be invoked at this stage because the issue for determination in the present application is whether or not there should be a stay of execution pending the determination of the appeal. That issue was not determined in the first application.

The 1st defendant has offered to post security. The order sought being discretionary, I am persuaded that the 1st defendant should be given an opportunity to pursue the appeal and therefore, to avoid any substantial loss, I grant the order for stay of execution on condition that the 1st defendant deposits the decretal sum in an interest earning account in the names of both advocates for the parties, within 30 days of this ruling. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 20th day of June 2019.

A. MBOGHOLI MSAGHA

JUDGE