

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 231 OF 2019

GATHUA ELIZABETH.....APPLICANT

VERSUS

CYRUS OMBUNA MACHINI.....1ST RESPONDENT

STEPHENE MAINA THEURI.....2ND RESPONDENT

RULING

1. The application dated 25th April, 2019 seeks orders that there be a stay of execution, proceedings and consequential orders in Milimani CMCC No. 9420 of 2017 Cyrus Ombuna Machini v Gathua Elizabeth & Stephene Maina Theuri pending the hearing and determination of the Appellant's instant Appeal.

2. The Applicant's complaint is that her application seeking to set aside default judgment and leave to file Defence out of time was dismissed in the lower court. The Applicant is aggrieved by the said dismissal and has appealed herein. The Applicant is apprehensive that execution proceedings may be commenced and will thereby suffer irreparable loss and damage.

3. The application is opposed. According to the grounds of opposition and the replying affidavit, the application is incompetent and unmeritorious. It is contended that the deponent of the affidavit in support, Caroline Kimeto and the insurer of the accidental motor vehicle, General Insurance Co. (Kenya) Ltd lack the requisite *locus* and capacity to bring the appeal and the application at hand as they are not parties herein. The Respondent supported the decision of the trial court and urged the court to make orders for the deposit of security for the due performance of the decree should the application be allowed.

4. I have considered the application, the response to the same and the submissions filed.

5. In an execution 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. The application herein was filed on 25th April, 2019. The ruling of the lower court was delivered on 2nd April, 2019. There was no unreasonable delay.

7. The Applicant's appeal stands to be rendered nugatory if the application is not allowed. On the other hand the 1st Respondent is entitled to the fruits of his judgment. To balance the competing interests of the 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 or in court within 30 days from the date hereof. Costs to abide the outcome of the appeal.

Date, signed and delivered at Nairobi this 21st day of Nov., 2019

B. THURANIRA JADEN

JUDGE