

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 251 OF 2017

UNIGLOBE NORTHLINE TRAVEL LIMITED.....APPLICANT

VERSUS

AGNES KAGURE KARIUKI.....RESPONDENT

RULING

1. The application dated 24th May, 2017 seeks orders that pending the hearing and determination of the appeal herein, this Hon. Court do issue an order of stay of execution of the judgment and decree in **Milimani CMCC 4298 of 2014 : Ages Kagure Kariuki v Michael Kamau & 2 others by Hon. P Muholi on 26th April, 2017.**

2. The judgment of the Lower Court was delivered on 26th April, 2017. The Applicant is dissatisfied with the said judgment and has appealed. It is stated in the affidavit in support and the supplementary affidavit that 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. It is further stated that the Applicant will therefore suffer substantial loss as the Respondent is a person of straw. That the Appeal has high chances of success and should be given a chance.

3. The application is opposed. It is stated in the replying affidavit that the application lacks merits and is a delaying tactic intended to deny the Respondent of the immediate access to the fruits of the judgment. That the Applicant has not proved the allegation that the Respondent is impecunious nor satisfied the requirements of Order 42 rule 6 (2) Civil Procedure Rules. That the Applicant has not demonstrated any special circumstances to warrant the grant of stay of the money decree herein. It is further stated that the appeal is unarguable with no chances of success and the application should be dismissed.

4. 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.”

5. The appeal was filed without unreasonable delay. The Applicant has expressed it’s apprehension that the Respondent is impecunious and that it stands to suffer substantial loss. The Respondent has not demonstrated that she is capable of refunding the decretal sum in the event that the appeal is successful. As stated by the Court of Appeal in the case of **Nairobi 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 respondent or the lack of them. One 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.”

6. On whether the appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the Subordinate Court to the High Court. The Applicant is not required to prove that he has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

7. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 30th day of Jan., 2018

B. THURANIRA JADEN

JUDGE