



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. 48 OF 2017**

*(Being an appeal from a Judgment of the CM'S Court Naivasha in Civil Case No. 899 of 2012, R. M. Kitagwa - RM)*

**MUSIC COPYRIGHT SOCIETY OF KENYA.....1<sup>ST</sup> APPELLANT/APPLICANT**

**DANIEL ANJWANG.....2<sup>ND</sup> APPELLANT/APPLICANT**

**MILKA CHEPTOO.....3<sup>RD</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**RICHARD CHERUIYOT TANUI.....1<sup>ST</sup> RESPONDENT**

**NYAMIRA LUXURY EXPRESS.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....INTERESTED PARTY**

**R U L I N G**

1. The Appellants herein, aggrieved by the judgment in Naivasha CMCC No. 899 of 2012 filed an appeal to this court on 27<sup>th</sup> October, 2017. A Notice of Motion under Order 42 Rule 6 and 9 of the Civil Procedure Rules, *inter alia*, seeking stay of execution was subsequently filed on 23<sup>rd</sup> November, 2017. For purposes of this ruling the relevant prayer is number 3, which seeks:

**“3. THAT this Honourable court be pleased to stay execution of the judgment and decree in Chief Magistrate’s Court Civil Suit 899 of 2012 pending the hearing and determination of this intended appeal.”**

2. In support of the Motion, the Appellants relied on the Supporting affidavit sworn by **Merit Simiyu** the Chief Executive Officer of the Appellant. The gist of the said affidavit is that execution against the Appellants will be carried out unless stayed by this court. That the Appellants stand to suffer substantial loss and the appeal thereby rendered nugatory, if the decretal sum is paid over. This he says is because, the Respondents have no means to repay the same should the Appellants’ appeal succeed. Moreover, that the 1<sup>st</sup> Appellant is a non-profit organization whose role is to collect and distribute members’ royalties.

3. The Respondents for their part swore a Replying Affidavit through the 2<sup>nd</sup> Respondent’s manager, contending that the Appellant’s application has no merit, as there is no evidence of imminent execution. The Respondents appeal to the court to compel the payment of the entire decretal sum into court should the application be allowed. They depone that they have not been shown to be in pecunious.

4. The application was argued through written submissions. Emphasising the conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules, the Appellants' advocate argued that the Respondents have not demonstrated ability to refund the decretal sum, should the appeal be successful. Thus, the Appellants will suffer substantial loss, and the results of the appeal rendered nugatory, should the decretal sum be paid over. The Appellant argues that they have acted with dispatch this matter.

5. The Appellants further that argued substantial loss is what is to be prevented an applicant has there is an undoubted right of appeal. It is the Appellants' position that the present application was brought timeously and further, the Appellants pledge to comply with any conditions that the court may impose in respect of depositing security for the future performance of the decree.

6. The Respondents once more pointed to the laches by the Appellant and assert that they have not attempted to execute the judgment in their favour. That the Appellants have not demonstrated that the Respondents are impecunious, and demand that security be given by the Appellants.

7. For the purposes of the present application, the court needs to satisfy itself that the Applicant has brought this case within the consideration set out under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules to the following effect that:-

**“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. There is no dispute that application was filed timeously even though after an extension of time for filing of appeal by this court. The Applicant expresses willingness to furnish security for the performance of the decree, as may be ordered by this court.

9. It seems to me therefore that, the sole question to be answered is whether the Applicants have demonstrated that there is a likelihood of suffering substantial loss if the stay sought is denied. The Applicants' asserts, that the Respondents may not be able to refund the decretal sum. Thus the Applicants argue that if any monies are paid out, the same may not be recoverable if the appeal outcome is in the Applicant's favour. And therefore, the appeal would have been rendered nugatory.

10. The Court of Appeal in **East African Portland Company Limited –Vs- Superior Homes (Kenya) Limited [2014] eKLR** observed that:-

**“.....it has been said that the Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory.....when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.....”** See also **Mukoma -Vs- Abuoga [1988] KLR 645.**

11. The Court of Appeal had earlier observed (**Platt, Ag. J.A.**) in **Kenya Shell Ltd -Vs- Benjamin Karuga Kibiru and Another (1986) eKLR** that:-

**“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms; is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”**

12. A challenge having been raised as to the decree holders' ability to refund the decretal sum, it is an

invitation for the Respondents to rebut the same. As **Kasango, J** noted in **Kenya Orient Co. Ltd -Vs- Paul Mathenge Gichuki & Others [2014] eKLR**:

**“.....the burden of proof that the Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment the Appellant states that it is unaware of [the] Respondent’s resources”**

13. The Respondents have not rebutted the depositions of the Appellant in this regard. In view of the foregoing, it appears that the Respondents may not be capable of refunding the decretal sum if paid out. And subsequently, the Applicants’ appeal would be rendered nugatory in the event that it succeeds.

14. The words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

**“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff.....**

**It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....”**

That too is the import of part of the court’s observations in **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR**.

15. In the circumstances of this case, I will allow the application for stay of execution pending appeal, on condition that within 20 days of today’s date, the Applicants deposit a sum of Shs. 150,000/=. This sum is to be deposited into an interest earning account in a financial institution to be agreed upon by the parties’ advocates and in their joint names. In default, execution shall proceed. The costs of the application will abide the outcome of the appeal.

**Delivered and signed at Naivasha on this 16<sup>th</sup> day of March, 2018.**

In the presence of:-

Mr. Owuor holding brief for Mr. Andolo for the Applicants

Mr. Gichuki holding brief for Mr. Gachiengo Gitau for the Respondents

N/A for the Interested Party

Court Clerk - Quinter

**C. MEOLI**

**JUDGE**