



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 611 OF 2017**

**DICKWAYS CONSTRUCTION CO.LIMITED.....APPELLANT**

**VERSUS**

**JOHN MACHIMBO KANGALA.....RESPONDENT**

**RULING**

The appellant was the defendant in the lower court in a suit filed by the respondent. Judgment was entered against it followed by this appeal. Although the appeal arises from CMCC No. 2481 of 2014, it has transpired that there was another suit by the respondent against the appellant in the same court, CMCC No. 1481 of 2012 wherein there is also a judgment in his favour.

The present application is for stay of execution of the Judgment in CMCC No. 2481 of 2014. It is brought under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules in addition to Sections 1A, 1B and 3A of the Civil Procedure Act. It seeks a stay of execution of the lower court judgment delivered on 17<sup>th</sup> October, 2017.

The record reveals an interesting set of facts. CMCC No. 1481 of 2012 was filed on 28<sup>th</sup> March, 2012 while CMCC No. 2481 of 2014 was filed on 7<sup>th</sup> May, 2014 and judgment delivered thereunder on 11<sup>th</sup> December, 2015. An application to set aside ex parte judgment was dismissed on 17<sup>th</sup> October, 2017.

There is also evidence that the respondent withdrew CMCC No. 1481 of 2012 on 15<sup>th</sup> September, 2016. That was after a judgment had been entered therein. It is not clear why the respondent filed two suits against the appellant relating to the same cause of action. Whatever the case, in CMCC No. 1481 of 2012 he was awarded Kshs. 504,050/= while in CMCC No. 2481 of 2014 he was awarded Kshs. 968,203/=.

The appellant has raised serious concerns about the conduct of the respondent but the respondent will not be judged upon his conduct, but the evidence on record. What is clear is that there are serious issues of apparent concealment of material facts and also a plea of *res judicata* under Sections 6 and 7 of the Civil Procedure Act.

I have looked at the Memorandum of Appeal and believe that the appellant has an arguable appeal and the right to be heard. The appellant has also demonstrated that it is likely to suffer substantial loss if an order of stay of execution is not allowed. The appellant has offered to deposit the sum of Kshs. 504,050/= as security and I believe that should be the case.

Accordingly, the application succeeds. There shall be a stay of execution of the lower court judgment on condition that the appellant deposits a sum of Kshs. 504,050/= in an interest earning account in the names of both advocates for the parties within 30 days from the date of this ruling. The costs shall be on appeal.

***Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of May, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**