

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 272 OF 2018

AFRICA APPARELS LIMITED.....APPELLANT

VERSUS

JOHN NAMISI KIVEU.....RESPONDENT

(Being an appeal from the judgment of Hon. D.O. Mbeja at Chief Magistrate's Court

in Nairobi on 30th May, 2018 in CMCC 8637 OF 2016)

RULING

There is a judgment of the lower court which was delivered on 30th May, 2018 in favour of the respondent against the appellant. On 20th June, 2018 the appellant filed a Memorandum of Appeal to contest that judgment. This was followed by an application dated 28th and filed on 29th June, 2018 by way of Notice of Motion under Order 42 Rule 6, Order 22 Rule 22 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, seeking a stay of execution pending the determination of the appeal.

The application is supported by an affidavit sworn by the legal officer of APA Insurance Company Limited which had insured the appellant, alongside grounds set out on the face of the application. The application is opposed and there is a replying affidavit sworn by the respondent herein.

The appellant is supposed to satisfy the conditions set out under Order 42 Rule aforesaid. Having considered the material before me, the application was filed timeously. As to whether there is substantial loss, it has been contended that the appellant's goods are likely to be attached if stay is not granted and further that, if the decretal sum is paid to the respondent, he is unlikely to refund the same if the appeal is successful.

The respondent has not disclosed his financial status which he was duty bound to do, after the appellant raised doubts about his inability to repay the decretal sum if the appeal succeeds.

In applications of this nature, the court has to balance the interests of both parties. Whereas the appellant has a right of appeal, the respondent has a judgment in his favour which he desires to execute. The appellant has offered to deposit the entire decretal sum in an interest earning account in the names of both advocates on record. This appears in the submissions filed herein. I believe that is sufficient security for due performance of any decree that may be found against the appellant.

This application therefore succeeds, and there shall be a stay of execution provided that the decretal sum herein shall be deposited in an interest earning account in the names of both advocates on record for the parties. This shall be done within 30 days from the date of this ruling.

The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 28th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE