



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 517 OF 2015**

**CANNON ASSURANCE COMPANY LTD.....APPLICANT**

**VERSUS**

**ISAIAH MAKUTWA KUBONDO.....RESPONDENT**

**RULING**

1. The application dated 18<sup>th</sup> October, 2016 principally seeks orders that this honourable court be pleased to order stay of any further execution pending the hearing of the appeal.

2. The application is predicated on the grounds stated in the application and is supported by the affidavit sworn by Hellen Kisaka. The background to the application is that the Respondent filed a declaratory suit in the lower court against the Applicant. Following an application made by the Respondent, summary judgment was entered against the Applicant. The Applicant made an application for stay of execution pending appeal. It is stated that the ruling was delivered without notice to the Applicant and that the Applicant became aware of the ruling when it's goods were proclaimed by auctioneers. According to the Applicant Company, it had not insured the motor vehicle belonging to the Defendant in the primary suit and nor was the Applicant served with a statutory notice. It is the Applicant's contention that it stands to suffer substantial loss as the auctioneers have attached it's motor vehicle and other vital office equipment. That the appeal has high chances of success and the appeal will be rendered nugatory if stay of execution is not allowed.

3. The application was canvassed by way of written submissions which I have considered.

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 ruling the subject of the application was delivered on 23<sup>rd</sup> March, 2016. The application at hand was filed on 19<sup>th</sup> October, 2016, about seven (7) months later. This is inordinate delay. However, the delay has been explained as due to lack of notice for the delivery of the ruling on the Applicant. This

evidence is not controverted by any other evidence. This court is therefore prepared to accept that the ruling was delivered without notice.

6. The Applicant's goods have been proclaimed. The Applicant is apprehensive that he will suffer substantial loss and the appeal rendered nugatory. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR**:

**“Substantial loss in its various forms, is the cornerstone of the 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.”**

7. The Respondent has not demonstrated that he is capable of refunding the decretal sum in the event that the appeal is rendered nugatory. The Respondent's means are not known. As stated by the Court of Appeal in the case of **Nrb 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 a respondent or the lack of them. Once 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.”**

8. 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 it 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 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**).

9. The Applicant is ready to furnish security for the due performance of the decree.

10. To balance the interests of both parties herein, I allow the application on condition that the Applicant deposits 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 21<sup>st</sup> day of June, 2017

**B. THURANIRA JADEN**

**JUDGE**