



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL CASE NO. 614 OF 2007**

**DALMAS OTIENO.....APPLICANT**

**VERSUS**

**REV.DR. STEPHEN KANYARU M'IPWII.....RESPONDENT**

**RULING**

1. The application dated 31<sup>st</sup> October, 2016 seeks orders that there be a stay of execution of the judgment delivered herein on 29<sup>th</sup> July, 2016 pending the lodging, hearing and determination of the intended appeal to the court of Appeal.
2. It is stated in the affidavit in support that the Applicant has filed a Notice of Appeal and applied for the proceedings to enable him lodge the appeal. It is further stated that the appeal has high chances of success and that the appeal will be rendered nugatory if the application is not allowed. The applicant is willing to furnish security for the due performance of the decree.
3. The application is opposed. It is stated in the replying affidavit that the application has been made after unreasonable delay which has not been explained. That the decree herein being a monetary decree the same can be refunded if the appeal is successful. It is further contended that the Applicant has not demonstrated what loss he stands to suffer if the orders sought are not granted. The Applicant has deponed that he is gainfully employed and is capable of raising the decretal sum in the event that he is required to refund the same. According to the Respondent, there is no just cause for depriving him of the fruits of his judgment.
4. I have considered the application, the reply to the same and the submissions made. I have also considered the authorities relied on by the parties.
5. 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 –**

**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**

**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.”**

6. The judgment herein was delivered on 29<sup>th</sup> July, 2016. The Respondent was awarded the sum of Ksh.1,500,000/=in total as damages for defamation plus costs and interest. The application at hand was filed three months later. The delay in filing the application has not been explained.

7. On the issue of substantial loss, the Applicant has expressed his fear that the Respondent may not be able to refund the decretal sum and thereby render the appeal nugatory. As stated by the Court of Appeal **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.”**

8. The Applicant has not stated in his affidavit in support what substantial loss he stands to suffer if the orders sought are not granted. The Applicant has however averred that there is nothing to stop the Respondent from executing the judgment. This may render the appeal nugatory. There are no assertions made that the Respondent is not capable of refunding the decretal sum. On the other hand, the Respondent has stated that he is not a man of straw and that he is capable of refunding the decretal sum. The Respondent has deponed that he is employed as an administration police officer and has exhibited his certificate of appointment which shows that he holds the rank of a senior superintendent. However, taking into account the imponderables of life, there could be delays or hardships in recovering the decretal sum (See for example the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**).

9. The Applicant is willing to deposit security for the due performance of the decree. He left it to the court to exercise its discretion on the same and referred the court to the case of **Africa Safari Club v Safe Rentals Ltd [2010]eKLR**.

10. This court has to balance the competing interests of both parties. The Applicant has the undoubted right of appeal while the Respondent is entitled to the enjoyment of the fruits of his judgment. My view is that the parties can be placed on equal footing by the deposit of security. Consequently I allow the application on condition that the Applicant do deposit the sum of Ksh. 750,000/= in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof and deposit security for the balance within the same period of 30 days.

Date, signed and delivered at Nairobi this 21<sup>st</sup> day of Sept., 2017

**B. THURANIRA JADEN**

**JUDGE**