



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 215 OF 2017

ABSOLUTE STOCKS LIMITED1ST APPLICANT

ANDREW NGURE2ND APPLICANT

ROSELYN KAMAU.....3RD APPLICANT

JOSEPH GOGO.....4TH APPLICANT

VERSUS

ANNE WAMBUI MWENJE.....RESPONDENT

RULING

1. The application dated 11th May 2017 seeks orders that a stay of execution of the judgment delivered on 7th April, 2017 in this suit be granted pending the hearing and determination of the Appeal filed against the said judgment.

2. It is stated in the affidavit in support that the judgment of the lower court was delivered on 7th April, 2017 for the sum of Ksh.3,079,710/=. The Applicants are aggrieved by the said judgment and have appealed herein. The Applicants are apprehensive that they will suffer substantial loss if execution proceeds as they may not be able to recover the decretal sum from the Respondent in the event that the appeal is successful. It is further stated that the Respondent's sources of income are unknown. It is averred that the appeal has high chances of success and was filed without unreasonable delay. The Applicants are willing to deposit security.

3. The Application is opposed. It is stated in the replying affidavit that the Respondent is a person of means and is capable of reimbursing the decretal sum. According to the Respondent, the application herein is a delaying tactic. The Respondent further stated that if the application is allowed the Applicants should deposit the decretal sum in court.

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. On substantial loss, the Applicants have contended that the Respondent is not able to refund the decretal sum and the Applicants will therefore suffer substantial loss. 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.”

6. The Respondent has not availed any documents in court to support the assertion that she is able to reimburse the decretal sum. As stated by the Court of Appeal in the case of **Nairobi 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 respondent or the lack of them. One 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.”

7. The Applicants have offered to deposit security

8. To balance the interests of both parties herein, I allow the application on condition that the Applicants do deposit 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 22nd day of Nov., 2017

B. THURANIRA JADEN

JUDGE