



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

**CIVIL DIVISION**

**CIVIL APPEAL CASE NO 38 OF 2016**

**FOUNDATION INSTITUTE OF PROFESSIONALS LIMITED.....APPLICANT**

**VERSUS**

**KINYUA KOECH LIMITED.....RESPONDENT**

**RULING**

1. The application dated 20<sup>th</sup> June, 2016 seeks orders that an order of stay of execution be and is hereby issued pending the hearing and determination of this appeal.
2. It is stated in the affidavit in support that a ruling was delivered in Milimani CMCC 5166 of 2014 on 29<sup>th</sup> January, 2016 where summary judgment was entered against the Applicant for the sum of kshs.946,580/=. The Applicant was dissatisfied with the said ruling, hence the appeal herein. It is the Applicant's case that it operates an institution of higher learning within Nairobi and that the execution of the decree will lead to a closure of the institution, thereby affecting the future of many young people and the students who are booked for examinations. That the application for stay was dismissed by the Lower Court. According to the Applicant, the appeal herein raises substantial questions of facts and the law.
3. The Application is opposed. It is stated in the replying affidavit that the Applicant is just buying time with the intention of denying the Respondent the fruits of the judgment. That the decree is a declaratory one and the Applicant will not suffer any irreparable loss. It is further stated that the Applicant defaulted in paying rent and the Respondent levied for distress for rent. That the parties entered into a consent but the Applicant defaulted in the payments and vacated the premises. The Respondent further stated that the Applicant was not made any offer for the due performance of the decree.
4. The application was canvassed by way of written submission which I have considered.
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 –**

- (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.”**

6. 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. In the case at hand, the Applicant has stated that the execution of the decree would lead to the closure of the institution and affect the students who have been booked for examinations. While this may be substantial loss, the Applicant has not given any reasons why it cannot pay the decretal sum. It is not disclosed whether they are not able to pay or whether the Respondent cannot be able to refund the same in the event that the appeal is successful. Although the appeal involves a money decree, where an appeal is likely to be rendered nugatory, a stay of execution can issue: (See for example **Nation Newspapers Ltd v Peter Baraza Rabando (2007) eKLR.**

8. The application was filed timeously. Although the Applicant has made no offer for the due performance of the decree the court can impose conditions.

9. 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 account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of Sept, 2016

**B THURANIRA JADEN**

**JUDGE**