



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

**CIVIL DIVISION**

**CIVIL APPEAL CASE NO. 475 OF 2016**

**EAST & CENTRAL AFRICA**

**ENTERPRISES LIMITED .....1<sup>ST</sup> APPLICANT**

**SAMUEL MUHUNU KIMANI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DORCAS WAIRIMU NDIRANGU .....1<sup>ST</sup> RESPONDENT**

**EAST AFRICA STAR BAKERIES .....2<sup>ND</sup> RESPONDENT**

**WILLIAM OWITI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 15<sup>th</sup> July, 2016 seeks orders that the Honourable Court be pleased to grant an order of stay of execution of the Ruling/Order issued in Milimani CMCC 6996 of 2012 pending the hearing and determination of this application.

2. It is stated in the affidavit in support that *ex parte* judgment was entered against the Applicants on 16<sup>th</sup> December, 2013 in CMCC 6996 of 2012. That the Applicants application for stay of execution was dismissed by the Lower Court on 9<sup>th</sup> June, 2016, hence the appeal herein. The Applicants are apprehensive that if there is no order of stay of execution, the appeal will be rendered nugatory as the Applicants may not be able to recover the value of the attached goods. It's further averred that the Respondents will not suffer any prejudice if stay is granted. The Applicants are willing to furnish security for the due performance of the decree.

3. The Respondents filed a replying affidavit in opposition to the application. It is contended that the Applicants are forum shopping after two of their applications were dismissed by the Lower Court and a third one withdrawn. That the Applicants are undeserving of the orders sought as they have come to court with unclean hands. That the application for stay of execution was determined by the Lower Court. It is the Respondents' contention that the Applicants' application has no merits and is meant to frustrate the Respondents from enjoying the fruits of their judgment. That it's not been demonstrated to the court that the Respondents are not capable of refunding the decretal sum in the event that the appeal is successful. It is further argued that the Applicants are not willing to deposit the decretal sum in court.

4. The counsels for the respective parties gave oral submissions which essentially highlighted the contents of the affidavit evidence.

5. Order 42 rule 6(1) provides *inter alia* as follows:

**“whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just.....”**

The applicants are therefore properly before this court.

6. 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.”**

7. It is common ground that the application herein was filed timeously .

8. The Applicants have established that they stand to suffer substantial loss if stay of execution orders are not granted. The Applicants goods have been proclaimed and stay stand to lose the same. 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.”**

9. The Applicants have offered to furnish security for the due performance of the decree. On the other hand, the Respondents have not shown that they are able to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UIR 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.”**

10. To balance the interest of both parties, I allow the application on condition that the Applicants do deposit the decretal sum in a joint interest earning account of the counsel for both parties or in court within 30 days from the date hereof. Costs in cause.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of Oct., 2016

**B. THURANIRA JADEN**

**JUDGE**

