



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 165 OF 2014**

**1. JOSEPH KINARA NYARIGITA**

**2. JOSHUA MWANGANGI MUTETI.....APPELLANTS**

**V E R S U S**

**PETER KAMAU CHEGE.....RESPONDENT**

*(Being an Appeal from the whole Ruling delivered by the Hon. S. Atambo (Ms) Principal Magistrate on 4<sup>th</sup> April 2014 in Nairobi CMCC No. 954 of 2007)*

**RULING**

This is an application (amended Notice of Motion dated 11<sup>th</sup> November 2014) for stay of execution pending appeal. It is opposed by the Respondent. The decree is for the modest sum of KShs 192,000/00 plus costs and interest.

The court has read and considered the affidavit sworn in support of the application, the replying affidavit as well as the submissions of the learned counsel appearing, including the cases cited.

Under Order 42 rule 6 (2) of the Civil Procedure Rules 2010 (the Rules) the Appellants must demonstrate that they have applied without unreasonable delay, and that they stand to suffer substantial loss if the order sought is not granted. They must also be prepared to give such security for the due performance of the decree should their appeal fail.

As for delay, there is none. The lower court dismissed a similar application for stay on 26<sup>th</sup> September 2014. The Appellant then filed the present application on 6<sup>th</sup> October 2014, only ten days later.

As for substantial loss, it is not usual for an Appellant to suffer such loss merely by paying the decretal sum. But the Appellants may suffer such loss in the event that, should they succeed in their appeal, they are unable to recover the decretal sum from the Respondent, or that they cannot make such recovery without undue difficulty or expense.

In the supporting affidavit annexed to the application it is deponed at paragraph 12 that the Appellants stand to suffer irreparably if execution takes place, as they are apprehensive that they would be unable to recover the same from the Respondent. There is however no evidence that the Respondent will be unable to refund the decretal sum in the event the appeal succeeds. As already pointed out, the judgment sum was very modest. In any event, an obligation to pay a decretal sum can never amount to substantial loss. Apart from the allegation in the supporting affidavit that the Appellants will be unable to recover the decretal sum from the Respondent, no evidence has been presented to bolster such assertion.

The Appellants have however offered to have the security of Kshs. 120,000/- already deposited in an interest-earning account be deemed as security. That will be acceptable security. The application is accordingly allowed. There shall be stay of execution of the decree of the lower court pending disposal of the appeal herein.

Costs shall be on appeal.

**Dated and delivered at Nairobi this 19<sup>th</sup> Day of March, 2015.**

**A. MBOGHOLI MSAGHA**

**JUDGE**