



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 300 OF 2013

GATEWAY INSURANCE CO. LTD. APPLICANT

VERSUS

FRANCIS MAUNDU MAKAI RESPONDENT

RULING

1. This is an application for stay pending appeal. Judgment was entered in the sum of Kshs. 491,920/= by the lower court on 21/11/2013. The Applicant is apprehensive that there being no order of stay, his property is open to execution. According to the affidavit in support of the application, the Applicant will suffer substantial loss as it will not be easy to recover the decretal sum. The Applicant is ready to deposit security bond pending the determination of the application.
2. The application is opposed. The Respondent has filed a replying affidavit which contends that summary judgment was entered on the basis of clear admissions made by the Defendant. That no orders of stay were sought before the lower court. The Respondent further asserted that he is a businessman in the **Petroleum Industry** with a monthly income of over Kshs.100,000/= and he is therefore capable of refunding the decretal sum in the unlikely event that the appeal is allowed.
3. The appeal was canvassed by way of written submissions which I have considered.
4. **Order 42 rule 6** provides as follows:-

“No order for stay of execution shall be made under subrule (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. The appeal herein was filed without delay.
6. Although the Respondent has argued that the summary judgment was based on admissions made, **section 67 (2)** which the Respondent has relied on does not come in. The said provision deals with decrees passed by the court with the consent of the parties. I do not understand the judgment that is the subject of this application to have been entered into by consent.
7. The court has to balance the interests of both parties. As stated by the Court of Appeal in **Kenya Shell Ltd. Vs Kibiri & Another (1986) KLR:-**

“In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his

favour without just cause and secondly that execution would render the proposed appeal nugatory.”

8. On the issue that the appeal may be rendered nugatory, I observe that the Respondent has not given any details relating to his income save for the general statement about his earnings. As stated by Court of Appeal in **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

“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.”

9. To balance the interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in court or in an interest earning account of the counsels for both parties within 30 days from date hereof. In default execution to issue.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 12th day of **March** 2015.

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B. THURANIRA JADEN

JUDGE