



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 97 OF 2013

(Being an appeal against the Judgment of the Senior Principal Magistrate Hon. A. G. Kibiru in Kitui SPMC No. 149 of 2012 dated 23rd April, 2013)

AUTOSOL K. LIMITED.....1ST APPELLANT

CYLUS THIGA.....2ND APPELLANT

VERSUS

SHADRACK MULWA WAMBUA.....RESPONDENT

RULING

1. The application dated 26th June, 2013 seeks orders for stay of execution of the judgment made on 23rd April, 2013 pending the hearing and determination of this appeal.
2. According to the affidavit in support, judgment was delivered in the Lower Court on 23rd September 2013 for the sum of Ksh 754,830/= plus costs. The Appellants being dissatisfied with the judgment appealed to this court. It is stated that the Applicants goods have been proclaimed. It is further averred that the Appellants stand to suffer irreparable loss and damages since it would be impossible to recover the decretal sum from the Respondent in the event that the appeal is successful. The Applicants are ready to deposit an insurance bond as security.
3. The application is opposed. According to the replying affidavit, the Respondent is a man of means who is employed at the National Defence College and is capable of refunding the decretal sum. That no substantial loss will therefore be suffered by the Applicants. It is further stated that the appeal has no chances of success.
4. The above application was heard simultaneously with the application dated 8th July, 2013. The application seeks to have the interim orders made on 27th June 2013 set aside. It is deposed that the Respondents filed a similar application for stay in the lower court and that the said application is at an advanced stage of hearing.
5. In opposition to the application dated 8th July, 2013 it is stated that the 30 days stay of execution issued by the trial court has since expired. That no interim orders of stay were granted pending hearing *interpartes* thereby leaving the Respondents goods exposed to execution. That the Respondents intention to withdraw the application for stay that was pending before the trial

court was overtaken by events since the execution proceedings have commenced.

6. The applications were canvassed by way of written submissions which I have duly considered.

7. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules 2010** –

“(2) 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.”***

8. On the issue of a similar application being filed in the lower court, it is noted that it is not denied that the Appellants goods have been proclaimed and no orders were issued by the lower court staying the execution proceedings. This would clearly render their undoubted right of appeal nugatory. The applicable law is set out by **Order 42(6)(1)** which states as follows:

“..... and whether the application for stay shall have been granted or refused by the court appealed from, the Court to which such appeal is preferred shall be at liberty, an application being made, to consider such application and to make such order thereon as it may seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the Appellate Court to have such orders set aside.”

The application dated 8th July 2013 had no merits and is dismissed with costs.

9. There is no complaint that the application for stay was filed with undue delay.

10. On whether the Respondent is a man of straw, the Court of Appeal held in the case of **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.”

11. On the issue need to balance, the court needs 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 propositions, 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.”

12. The appeal herein is both on liability and quantum. To balance the competing interests of the parties herein, I allow the application dated 26th June, 2013 on condition that the appellant do deposit the sum of Ksh 500,000/= in court or in a joint interest earning account of counsels for both parties within 30 days from the date hereof. In default execution to issue.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 20th day of May, **2015**

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B. THURANIRA JADEN

JUDGE