



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 77 OF 2013

EMRAY ENTERPRISES LIMITED.....APPELLANT/APPLICANT

VERSUS

PATRICK MAITHYA MBITHUKA RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate's Court at Machakos of Civil Case No. 530 of 2011 dated 5th April 2013)

(Before B. Thurania Jaden J)

RULING

1. The application dated 30/4/13 seeks an order of stay of execution in **CMCC No. 530 of 2011** pending hearing and determination of the appeal against the judgment made by the **Hon. P. Ngare Gesora SPM** on the 5th April 2013.
2. According to the affidavit in support, the Respondent has a judgment of Kshs.403,000/= in his favour. The Applicant has appealed against the entire judgment and is apprehensive that the Respondent will move to execute if a stay is not granted.
3. The application is opposed. It is stated in the replying affidavit that the application is calculated to delay the enjoyment of the fruits of the judgment. The Respondent has implored the court to order the Applicant to pay half of the decretal sum and to deposit the balance in court as a condition for the stay.
4. The appeal was canvassed by way of written submissions which I have considered.
5. Under **Order 42 rule 6 (2)** are 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.”***
6. The appeal is on both liability and quantum. 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.”

7. The Applicant has expressed the fear that the Respondent may not be in a position to refund the decretal sum in the event that the decree is successful. The Respondent has not shown whether she is capable of refunding the decretal sum. 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.”

8. The interests of both parties will be served by depositing the decretal sum in court or in a joint interest earning account of both counsels for the parties herein.
9. Consequently, I allow the application on condition that the Applicant do deposit the decretal sum within 30 days from date hereof. In default the Respondent at liberty to execute.

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B. THURANIRA JADEN

JUDGE

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

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B. THURANIRA JADEN

JUDGE