



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

**CIVIL APPEAL NO. 113 OF 2014**

*(Appeal against the Ruling and orders of the Ag. SRM Kithimani dated 19<sup>th</sup> June, 2014 in Kithimani SRMCC No. 187 of 2007)*

DENIS KISELI KATIA.....APPELLANT

**VERSUS**

LUCIA NGII SILA.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The application dated 27<sup>th</sup> February, 2015 seeks orders that there be an interim stay of execution of the subordinate court's decree dated 17<sup>th</sup> May 2013 pending the hearing and determination of the appeal herein.
2. According to the affidavit in support, the lower court delivered a judgment in this matter on 4<sup>th</sup> April, 2013 awarding the 1<sup>st</sup> Respondent a sum of Ksh 354,000/= general damages against the Applicant and the 2<sup>nd</sup> Respondent. The Applicant subsequently appealed against the judgment. It is stated that the 1<sup>st</sup> Respondent thereafter instructed auctioneers to proclaim the Applicant's goods. It is further averred that the appeal has overwhelming chances of success and that the appeal may be rendered nugatory if the Applicant's goods are auctioned. The Applicant is apprehensive that that 1<sup>st</sup> Respondent's financial status is unknown. The Applicant's application for stay before the lower court was dismissed with costs.
3. The application is opposed. It is stated in the replying affidavit that there is no appeal against the judgment of the lower court and that the Applicant's application seeking review and/or the setting aside of the judgment was dismissed. It is further stated that the 1<sup>st</sup> Respondent is a person of means who is capable of refunding the decretal sum in the unlikely event of the appeal succeeding. That the decree herein being a monetary decree, the appeal cannot be rendered nugatory. That the Applicant has not shown that he will suffer any substantial loss and that no security has been offered for the due performance of the decree.
4. **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.”*

5. The appeal herein was filed timorously.

6. The Applicant has pointed out that the 1<sup>st</sup> Respondent may not be able to refund the decretal sum in the event that the appeal is successful. The 1<sup>st</sup> Respondent has not disclosed her means. There is therefore the likelihood that the Respondent may not be capable of refunding the decretal sum, thereby occasioning the Applicant substantial loss.

7. As stated by the Court of Appeal 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.”*

8. With the foregoing, I allow the application. The Applicant to deposit security for the decretal sum within 21 days from the date hereof. Costs in cause.

.....

**B. THURANIRA JADEN**

**Dated and delivered at Machakos this 30<sup>th</sup> day of July, 2015**

.....

**B. THURANIRA JADEN**

**JUDGE**