

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL CASE NO. 28 OF 2014

JACINTA NJOKI IRERI

MICHAEL KANIARU KARIBAPLAINTIFFS

VERSUS

NYAGA NJIRU

LEAH NJOKI NYAGADEFENDANTS

RULING

This is an application for stay of execution of a monetary judgement in the sum of over Kshs 745,300/- entered against the appellants by the court of the Chief Magistrate on 2nd December, 2013 at Embu

The appellants have filed an appeal in this court and it is on that basis that they seek stay of the magisterial judgement. In support of the application, their counsel have annexed a supporting affidavit. According to their counsel, the appellants are dissatisfied with the judgement and for that reason, they have filed an appeal. He also adds that if the decretal amount is paid to the respondents, the appellants may suffer substantial loss in the event their appeal succeeds on both issues of liability and quantum. Their counsel further states in the supporting affidavit that they are ready to comply with any order that this court may impose in respect of security for costs. Finally, their counsel states that there has not been any delay in the filling of this application and that it is only fair and just that the stay of execution be granted pending the hearing and determination of this appeal.

The appellants' application is opposed by the respondents through their counsel in her replying affidavit. Their counsel has stated that an applicant for stay of execution must meet the conditions set out in Order 42 Rule 6 (2) of the 2010 Civil Procedure Rules. According to the provisions of that Order, a court may grant stay if it is satisfied that substantial loss may result to the applicant unless stay is ordered. Additionally, she also states that an application for stay of execution must be made without unreasonable delay. It is her contention that the application was filed within 10 months which in her view constitutes unreasonable delay and for that reason it should be dismissed. She also states that the respondents are entitled to the fruits of their judgement. It is also her submission that this application is designed to deny and/or delay the payment of the decretal amount to the respondents.

Furthermore, she has also stated that the appellants have not admitted that they are ready and willing to deposit the entire decretal amount in court. Finally, she states that the application as drawn and filed is fatally defective and an abuse of the court process because it offends the mandatory provisions of Order 51 Rule 13 (2) and should therefore be dismissed with costs to the respondents.

Both counsel have filed rival submissions to which they have annexed authorities.

I have considered the affidavit evidence of both parties, the submissions of both counsel and the authorities cited in their submissions.

I find that this is a case in which a stay should be granted. If it is not granted, it may render the appeal nugatory. The only issue to be determined is what sum of money the appellants are to deposit in court as security in favour of the respondents. Taking into account all the circumstances of the case, I hereby

direct that the appellants deposit in court a sum of Kshs 745,300/- less 20% which represents the contribution negligence on the part of the respondents. They have to deposit this sum of money within a month failing which their application and the consequential orders will stand dismissed.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** day of **OCTOBER, 2015**

In the absence of both counsel

Court clerk Mr Njue

J.M. BWONWONGA

JUDGE

21.10.15