



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 133 OF 2013

JOSEPH WAMBURU TUMBU APPLICANT

VERSUS

BENARD MUTISO MUTISYA RESPONDENT

RULING

1. The application dated 22/7/13 seeks orders for stay of execution of the judgment delivered on 29th November 2012 pending the hearing and determination of the application.
2. The thrust of the application according to the affidavit in support sworn on 22/7/2013, by **Lilian Munyiri**, the Legal Officer of the Applicant's insurer is that judgment has been entered by the lower court in **PMCC, Yatta 39/2011**. That the Applicant was dissatisfied with the said judgment and has appealed to this court, after his application to appeal out of time was allowed on 27/6/2013. That the Applicants have deposited security for the due performance of the decree. The Appellants are apprehensive that if there is no stay of execution, the Respondent may move the court to execute and the Applicants will suffer substantial loss as their appeal will be rendered nugatory. It is averred that the appeal has arguable issues and the chances of success are high.
3. The application is opposed as per the replying affidavit sworn on 12/9/2013 by the Respondent. The Respondent has deponed that there was consent on liability and the court only proceeded to assess General Damages. That the Applicant has not informed the court the amount of General Damages he considers fair and just but that the Applicant had offered to pay Kshs.280,000/= as General Damages and Kshs.59,164/= as Special Damages plus costs and interest, which amount the Respondent was willing to receive. The Respondent further stated that there was inordinate delay in the filing of the application. He further stated that the appeal would not be rendered nugatory as he was capable of refunding the decretal sum in the event the appeal succeeds.
4. The application was canvassed by way of written submissions which I have duly 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 application to appeal out of time was allowed on 27/6/2013, after the court was satisfied that sufficient explanation for the delay was given. Thereafter the application for stay was filed timeously.
 7. The threat of execution is real. There is no doubt the execution would lead to substantive loss as

the appeal will be rendered nugatory. The decretal sum is over Kshs.600,000/=.

- 8. It is not in dispute that judgment on liability was by consent of the parties. The Applicant therefore has no chances of success on a 100% basis. To balance the interest of the 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.”

- 9. The Respondent has not shown that he 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.”

- 10. I am of the view that the interests of justice would be served in this case by the payment of 50% of the decretal sum to the Respondent less the apportioned liability pending the hearing of the appeal. The security already deposited is sufficient for the balance.

- 11. Consequently I allow the application on the following conditions:-

- a. **The Applicant to pay 50% of the decretal sum to the Respondent within 30 days from the date hereof.**
- b. **In default execution to issue.**
- c. **Costs in cause.**

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **28th** day of **March** 2014.

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B. THURANIRA JADEN

JUDGE