



230/2014

**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 173 OF 2012**

**KANJI VAGJIANI.....1<sup>ST</sup> APPELLANT/APPLICANT**

**AFRICAN BANK CORPORATION.....2<sup>ND</sup> APPELLANT/APPLICANT**

**KESHIRA & SONS LIMITED .....3<sup>RD</sup> APPELLANT/APPLICANT**

**VERSUS**

**FRANCIS MWANZA MULWA .....RESPONDENT**

**RULING**

1. The Application dated **24<sup>th</sup> October, 2012** is brought pursuant to the provisions of **Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules, 2010; Section 1A, 1B** and **3A** of the **Civil Procedure Act** and all enabling provisions of the law.
2. The Applicants/Appellants seek this court's order staying execution of the judgment, decree and all consequential orders in **Machakos CMCC No. 1089 of 2010** pending hearing and determination of the appeal.
3. The application is premised on grounds that the applicants being dissatisfied by the judgment aforesaid has appealed against the whole judgment; the memorandum of appeal as well as the application have been filed timeously and are merited; the appellants who stand to suffer irreparable pecuniary loss have already applied for certified copies of judgment, decree and proceedings; the applicants are ready and willing to furnish such security as the court may deem reasonable for the due performance of any such decretal obligation as may be ultimately binding against them.
4. The first applicant/appellant swore an affidavit in support of the application having been authorised by his co-applicants. He deposed that they are obligated to pay **Kshs. 1,142,502/=** plus costs following the decree issued; the judgment sum being substantial, they stand to suffer substantial loss and prejudice; being aggrieved by the judgment of execution proceeds they will suffer loss.
5. In his replying affidavit the respondent states that he is a man of means being an advocate of the High Court of Kenya having practised law from 1973; he owns several properties therefore capable of refunding the decretal amount in case the appeal is successful.
6. It was the submission of counsel for the applicants that the applicants insurers **Ms Corporate**

- Insurance Company** being underwriters were able to pay the decretal sum should they be compelled. However, since the respondent had not demonstrated that he could refund the money in event the appeal is successful the applicants' insurers would suffer substantial loss. Secondly, the application having been filed timeously there was no delay in filing it and they were willing to furnish security as may be ordered.
7. The respondent's counsel on the other hand submitted that the applicant had a duty of demonstrating that the intended appeal would be rendered nugatory and provide security for the appeal. It was stated that the respondent is a man of means being an advocate of the High Court of Kenya therefore was capable of refunding the decretal sum if in case the appeal succeeds.
  8. It is the law that the court in exercising its discretion to grant stay of execution the question to be decided is whether substantial loss may result unless the stay order is granted, whether the application is made without delay and whether the applicant has given security. ( *see Order 42 rule 6(2) of the Civil Procedure Rules*).
  9. It has been stated in the case of *Mukoma versus Abuoga[1988] KLR 645* thus:-

***“...The cornerstone of both jurisdictions. That is what has to be prevented because such a loss would render the appeal nugatory. Therefore it is necessary to preserve status quo”.***

10. With the law and the above authority in mind, I do note that judgment in the case was entered on the **25<sup>th</sup> September, 2012** and stay of execution was granted for **30 days**. The applicants filed the Memorandum of Appeal on the **23<sup>rd</sup> October, 2012**; the application seeking stay for execution of the decree was also filed on the same day. There was no delay in making of the application.
11. The issue to be addressed would therefore be whether the applicants will suffer substantial loss if the order sought is not granted. Judgment was entered in the sum of **Kshs.1, 142,502/=**. It was the contention of the applicant per the memorandum of appeal filed that half of the sum was for use of alternative transport for **90 days**. The finding on liability is also faulted.
12. It has been stated that the respondent is a man of means who is capable of refunding the decretal sum. The respondent did demonstrate to this court that indeed he is an advocate of long standing years but he failed to demonstrate to the court his alleged means. In the premises it cannot be ruled out that if the appeal succeeds and the sum ordered to be paid is not refunded the applicant will not suffer irreparable loss. It will therefore be in the interest of justice to have the applicant furnish some security for due performance of the order.
13. I therefore grant stay of execution of the judgment, decree and all consequential orders in **Machakos CMCC No. 1089 of 2010** pending hearing and determination of the appeal on condition that the applicant deposits **Kshs1,200 000/=** in court within **14 days**.
14. Costs of the application shall abide the outcome of the appeal in any event.

**DATED, SIGNED and DELIVERED at MACHAKOS this 3<sup>RD</sup> day of APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**