



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 208 OF 2012

1. ATHI RIVER MINING LIMITED
2. VEHICLE & EQUIPMENT LEASING LIMITED APPELLANTS

VERSUS

JACKSON KIBONGE JEREMIA RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court at Kajiado of Hon P.A Olengo PM in Principal Magistrate Case No. 1 of 2011 dated 15th November 2012)

(Before B. Thuranira Jaden J)

R U L I N G

1. The **Notice of Motion** dated 19/3/2013 seeks orders that there be a stay of execution of the decree pending the hearing and determination of the appeal herein.
2. It is averred in the affidavit in support that the Respondent has proclaimed the Applicant's goods and if the execution proceeds the Applicant's appeal will be rendered nugatory. That the parties entered into a consent for the payment of a sum of Kshs.730,000/= pending the hearing and determination of the appeal but the Respondent has threatened to execute for the balance. The decree is for Kshs.2,400,296/=. The Applicant has expressed fears that the Respondent may not be able to refund the decretal sum in the event that the appeal is successful.
3. The application is opposed. According to the replying affidavit sworn on 10/5/2013. It is deponed that the Respondent failed to comply with the consent orders hence the auctioneers were instructed to proceed to recover the balance of the decretal sum. That the appeal is not *prima facie* as it only on quantum. The Respondent urged the court to order the Appellants to pay the costs of the lower court case together with special damages and that the balance of the decretal sum be deposited in court in the unlikely event that the court allows the application.
4. 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.”**
5. There are no complaints of delay. Although the appeal is only on quantum, the Applicant is

already enjoying a substantial amount of part of the decretal sum of Kshs.750,000/= paid through the consent orders recorded herein. At least the Respondent is enjoying some fruits of his judgment. 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.”

6. 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.”

7. With the foregoing, my view is that the interests of justice will be served by the deposit of security by the Applicant for the balance of the decretal sum. Consequently, I allow the application on condition that the Applicant deposits security for the balance of the decretal sum in court within 30 days from the date hereof. In default execution to proceed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 22nd day of **May** 2014.

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B. THURANIRA JADEN

JUDGE