



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 97 OF 2012

TILLY KITUKUAPPELLANT/APPLICANT

VERSUS

WINFRED KALUMU KISENGESE RESPONDENT

(Being an appeal from the Ruling of the Senior Resident Magistrate's Court at Mutomo of Hon S.K. Mutai SRM in Senior Resident Magistrate Case No. 8 of 2011 dated 28/7/2012)

(Before B. Thurairajadurai J)

RULING

1. The application dated 9/10/2012 seeks the following orders:-
 - **This Honourable Court be pleased to consolidate** Civil Appeals Nos. 101 of 2012, 98 of 2012, 96 of 2012, 10 of 2012, 100 of 2012, 99 of 2012 and 95 of 2012 **for purposes of this application.**
 - **This Honourable Court do order a stay of execution of the judgment and decree made by the Honourable Senior Resident Magistrate's Court Mutomo pending the hearing and determination of the Applicant's appeals filed at the High Court of Kenya in Machakos in Civil Appeals Nos.101 of 2012, 98 of 2012, 10 of 2012, 100 of 2012, 99 of 2012 and 97 of 2012 pending the hearing and final determination of the Applicants' appeals.**
 - **Costs of the application be provided."**
2. The application is supported by the affidavit of **Lillian Waweru**, a Legal Manager of the Applicant's insurer. The gist of the application is that the lower court has determined liability on 100% basis and entered judgment for the Respondents against the Applicant. The Applicant is dissatisfied with the decisions of the trial court hence this appeal. The Applicants are apprehensive that the Respondents will proceed to execute the decrees, thereby rendering the appeals herein nugatory. The Applicants have argued that their appeals have high chances of success. It was further averred that the Respondents are people of unknown means and address and therefore that the Applicants will suffer loss and damage in the event that the appeal is successful. The Applicants are willing to deposit the decretal sum.
3. In opposition to the application, the Respondent swore a replying affidavit on 25/10/2012. The Respondent has stated that she is capable of refunding the decretal sum in the unlikely event that the appeal is successful and should therefore not be barred from enjoying the fruits of the

judgment.

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. The appeal was filed timeously. The appeal is on both liability and quantum.

6. The Appellants have expressed their fear that they would suffer loss should the appeal succeed and the Respondent is not able to refund 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. Consequently, I allow the application on the condition that the decretal sum be deposited in court or in a joint interest earning account of counsels for both parties with 30 days from date hereof. In default execution to issue. Costs in cause.

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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