



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 572 OF 2002**

**OBADIAH KIMANI NJORO .....1ST APPELLANT**

**NICHOLAS NGATIA .....2ND APPELLANT**

**SIMON KERAU .....3RD PLAINTIFF**

**VERSUS**

**ESTHER NJOKI WAITITU (SUING AS PERSONAL REPRESENTATIVE OF**

**ERIC KIARIE NJENGA.....RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion dated 7<sup>th</sup> November 2013 brought under Order 51 rules 1 and Order 42 rule 6 of the Civil Procedure rules 2010. The applicant seeks a stay of execution of decree and cost in CMCC No. 3791 of 2012 pending the hearing and determination of this application and appeal and further the court be pleased to consolidate Civil Appeal no. 502 of 2013 with Civil Appeal 572 of 2013.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Sospeter Aminga; that applicant's application seeking to have the Memorandum of Appearance be deemed properly on record and setting aside default judgment and filing a defence out of time was dismissed by Hon. Atambo on 13<sup>th</sup> September, 2013. Aggrieved by the said decision the applicant filed an appeal Civil Appeal No. 502 of 2013 on 24<sup>th</sup> September 2013 and further sought a stay of the delivery of the said judgment this application was denied and judgment was subsequently delivered by Hon. C. Obulutsa on 18<sup>th</sup> October 2013 who found in favour of the appellant and awarded them Kshs. 6,015,985.99 in damages. The appellants aggrieved by the said decision filed an appeal against the said decision. The appellant argued that execution is eminent and will render the intended appeal nugatory and that the appellant will suffer substantial loss if stay is not granted and the appeal is successful.
3. The appellants argue that they are ready to deposit part of the decretal sum as security in an interest earning account in the names of both parties' advocates and are ready and willing to comply with any conditions given by this Honorable Court; that the respondent will not suffer any prejudice if the orders sought are granted and that the Appellant's Insurer UAP Provincial Insurance Company limited is able to pay the remainder of the decretal sum if the appeal is not successful and that the application was brought without any unreasonable delay.
4. The application was opposed and the respondent filed grounds of opposition dated 29<sup>th</sup> November 2013. The respondent argues that the application is misconceived and an abuse of the Court process and argues that the applicant has failed to show its appeal has good chances of success and has also failed to show how it will suffer substantial or irreparable damage if the respondents

executes the judgment in her favor and that although the decretal amount is substantial the respondent is a woman of ascertainable means and would be able to refund the money if the appeal is decided in the appellants favor; that although granting orders of stay is the discretion of the Court the Court ought to balance the interests of both parties and in the interest of justice for the Court to set terms and conditions as concerns the depositing of the full decretal amount in a joint account as security and that the appellants have not met the threshold of Order 42 and are merely using the appeal as a delaying tactic to deprive the respondent from enjoying the fruits of her judgment.

5. The appellant in reply to the appellant's grounds of opposition sought to lay out grounds of appeal and reiterated the grounds on face of the application. The appellant argued that no proof has been adduced that the respondent is a woman of means and these are matters to be stated under oath.
6. Parties filed written submissions. Which I have read and considered.
7. In this application am guided by Order 42 rule 6(2) which provides;

*(2) "No order for stay of execution shall be made under sub rule (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".*

The application herein was brought during the pendance of the stay of 30 days granted by the lower Court as such I find that this application was brought within good time. The applicant argues that it will suffer substantial loss in the event the decretal sum is paid to the respondent who is of unknown means in the event their appeal is successful. I note that there was no replying affidavit filed by the respondent to rebut this fact. The decretal sum is over 6 million. I have looked at the grounds of appeal and I note that the issue of jurisdiction has been raised that the lower Court did not have pecuniary jurisdiction to hear the matter this ground demonstrate that there could be an arguable appeal. In balancing the interest of both parties I order that the appellants shall deposit a sum of Kshs. 3 million. The said amount shall be deposited in a joint account interest earning account in the names of the respective counsels within 21 days from the date of this ruling. On the issue of consolidation I am of the view that the applicant seeks an order for consolidation at the time the matter is placed the court for directions. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 30<sup>th</sup> day of *October* 2014.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....**For the Appellant s/Applicants**

.....**For the Respondent**

.....**Court clerk**