



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 134 OF 2013

1. JOSEPH WAMBURU TUMBU
2. SIMON KIMANI TUMBU APPELLANTS/APPLICANTS

VERSUS

JANE MWENDE MBATHA RESPONDENT

RULING

1. The application dated 22/7/2013 seeks orders that there be a stay of execution of the judgment delivered on 21st November 2012 pending the hearing and determination of the appeal **No. 136 of 2013** on similar terms as those given in the application seeking leave to appeal out of time being **Misc. Application No 26 of 2013**.
2. According to the affidavit in support of the application, the Applicants were granted leave to appeal out of time on condition that the Applicants do provide security in the form of an insurance bond pending the hearing and determination of the application. That the Applicants complied with the said condition which orders had since lapsed, hence the application at hand. It is further averred that the Applicants' properties have been proclaimed and the Applicants stand to suffer loss and damage.
3. The application is opposed. The Respondent in her replying affidavit has contended that the Applicants have not demonstrated what substantial loss they will suffer. That liability was conceded by consent in the Respondent's favour at the ratio of 80:20. The Respondent urged the court to let her enjoy the fruits of her judgment and if stay of execution is allowed, the Respondent should be allowed to enjoy 50% of the decretal sum and the balance deposited in an interest earning account.
4. Under **Order 42 rule 6** provides 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. The appeal is on quantum of assessment of damages only. The Respondents' averment that consent judgment was entered on liability remained uncontrovered. The court therefore has to balance the interests of both 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, I think the interests of justice will be served by the payment of 50% of the decretal sum to the Respondent and the deposit of the balance in court or in an interest earning account of both parties within 30 days from date hereof. In default execution to issue.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 26th day of November, 2014.

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B. THURANIRA JADEN

JUDGE