



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1413 of 2005

JOHN ALLAN OKEMWA..... PLAINTIFF

VERSUS

HOSEA KIPLAGAT.....DEFENDANT

RULING

1. The Defendant seeks by **notice of motion dated 28th November 2012** review of the order of Odunga, J delivered on 17th October 2012. By that order the court granted a conditional stay of execution pending the hearing of an appeal lodged by the applicant with a requirement that the Defendant deposit KShs 8,000,000/00 in a joint interest-earning account in the names of advocates for the parties. This was to be done within 45 days from the date of the ruling, in default of which the order of stay would be vacated. Review is sought so that instead of making a deposit of Kshs. 8,000,000/00 the defendant will instead provide a bank guarantee as security within a time to be directed by the court.

2. The application is stated to be brought under **Article 159(2)(d) of the Constitution, sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules.**

3. The application is premised upon the grounds -

i. That the amount of KShs 8,000,000/00 is inordinately high as the decretal sum was on account of *mesne* profits, which figure was reached without proper assessment of the profits so claimed.

ii. That the amount of KShs 8,000,000/00 is inordinately high and ought to be reduced or alternative security be ordered at the court's discretion within a reasonable time as the court may direct.

There is a supporting affidavit sworn by the Defendant.

4. The Plaintiff has opposed the application as set out in his **grounds of opposition dated 14th January 2013**. Those grounds include -

i. That the application has been brought with inordinate delay.

ii. That the application is brought in bad faith, is vexatious and an abuse of the court process.

iii. That the Defendant has not exhibited any evidence of his inability to raise the sum of KShs. 8,000,000/00.

iv. That there are no grounds upon which to grant the review sought.

5. I have considered the material now before the court and the submissions made by the learned counsels appearing for the parties.

6. The issue of the kind of security that ought to have been ordered must have been raised, or ought to have been raised, before Odunga J. when the application for stay of execution was canvassed. The Defendant cannot now seek to litigate that issue at this stage. In ordering security by way of deposit of the decretal sum in an interest earning account, Odunga J must have considered the alternative forms of security as suggested by the learned counsels appearing before him. If no alternative forms of security were suggested, they ought to have been suggested, and the issue simply cannot be raised at this late stage.

7. In the circumstances, I find no merit in the application at hand and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2013

**H.P.G. WAWERU
JUDGE**

DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2013