



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO.556 OF 2010**

KIOKO MANG'ELI ..... 1<sup>ST</sup> APPELLANT

KIMANI CHEGE..... 2<sup>ND</sup> APPELLANT

VERSUS

MURAGE & MWANGI ADVOCATES..... RESPONDENT

**RULING**

Notice of Motion dated 1.12.2010 seeks stay of execution of Decree issued in CMCC No.4766 of 2009 pending hearing and determination of this appeal.

The appellants submit that they have met the provisions given under Order 42 rule 6(1) and (2) Criminal Procedure Code Rules which came into force on 10/12/2010.

Summary judgment was entered against the Appellants. The Appellants will suffer substantial loss since they will be forced to pay unexplained and exaggerated interest and costs. The Respondent did not represent them. He represented a limited liability Company known as N – Link Communication Ltd.

The Respondent has simply deponed that he is not a man of straw but no evidence has been demonstrated. Further this application was filed within 3 weeks of judgment it is not delayed.

On issue of security the applicant has offered security by their willingness to deponent the entire decretal amount in an interest earning account as may be directed by court within 30 days.

The Applicant relies on authorities filed in court. Namely

(1) **HCCA No.44/2008 University of Nairobi & Another –vs- Peter Kiplangat Tumu** where security was by a guarantee

(2) **HCCA No. 18/2007 of Nakuru Wifay Investments Ltd –vs- Monica Wangui Mweman & others** the court ordered deposit of Kshs.200,000/= in an interest earning account.

The Respondent has submitted that the Applicant has not satisfied the requirement of “substantial loss”. The court has said (Musinga J) “It is not enough to depone that he will suffer substantial loss”. Further the substantial loss can be show the “Respondent is a man of straw and therefore that he will be unable to refund the payment if appeal is not successful.

It is submitted that successful litigant should not be kept from the fruits of his judgment and that

money decree cannot be subject of stay of execution order.

In Kenya Shell Ltd. N. Benjamin Karuga the court said it is not normal for an appeal to be rendered nugatory in money decree. The court proceeded to say that “however money decree can be stayed.”

In my view the parties on both sides are afraid that whoever wins the appeal shall not be able to access funds to execute decree. The Applicant has shown willingness to deposit the entire decretal amount in an interest earning account to buy a stay of execution. This appears reasonable and just to me. The Appellant shall be deprived of decretal amount which is a substantial loss in the circumstances of this case I order the Applicant to deposit the full decretal amount in an interest earning account in the joint names of advocate for Appellant and the Respondent to be held until the appeal is determined.

The account shall be opened within 30 days from this order failing which the stay shall lapse.

Stay of execution is therefore granted in the said terms.

**Dated and delivered this 14<sup>th</sup> day of March, 2012.**

**J.N. KHAMINWA**  
**JUDGE**