



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. 18 OF 2007**

**WILFAY INVESTMENTS LIMITED.....APPELLANT**

**VERSUS**

**MONICA WANGUI MWEMAI.....1<sup>ST</sup> RESPONDENT**

**MARTHA WANGARI WAITHAKAI.....2<sup>ND</sup> RESPONDENT**

**SERAH WANGUI KARIUKI.....3<sup>RD</sup> RESPONDENT**

**EUNICE WANJIKU NJUGUNA.....4<sup>TH</sup> RESPONDENT**

**ANTONY GICHANE KIMEMIA.....5<sup>TH</sup> RESPONDENT**

**JANE WANJA NDUNGU.....6<sup>TH</sup> RESPONDENT**

**RACHAEL NJERI MACHARIA.....7<sup>TH</sup> RESPONDENT**

**COSMAS NDUDA MBILI.....8<sup>TH</sup> RESPONDENT**

**RULING**

Before me is the Notice of Motion dated 28/6/2010, brought pursuant to **Order XKI Rule 14(1)** and **(2)** and **Order L Rule 1** of the **Civil Procedure Rules (2000)**. The applicant is Wilfay Investments Ltd while the respondents are Monica Wangui Mwema, Martha Wangari Waithaka, Serah Wangui Kariuki, Eunice Wanjiku Njuguna, Antony Gichane Kimemia, Jane Wanja Ndungu, Rachael Njeri Macharia and Cosmas Nduda Mbili. The applicant had appealed from the judgment of the Senior Resident Magistrate in Nakuru CMCC 2624/03, 2623/03, 2625/04, 2629/03, 2630/03 and 591/05 where the respondents were parties. The appeals were dismissed by Justice Maraga on 23/2/2010. The appellant seeks that this court do stay execution of the decree passed on 23/2/2010, in the above named suits pending the hearing and determination of its appeal to the Court of Appeal.

The application is supported by the affidavit of the director, Wilfred Kiboro who contends that the appellant is dissatisfied with the judgment and has lodged a Notice of Appeal which has high chances of success; that substantial loss may be occasioned to the appellant if the respondents are allowed to execute

the decree because the means of the respondents is not known and the applicant is unlikely to recover the sums in the event that the appeal is successful. Mr. Kagucia, counsel for the applicant urged that the appellant is a financially stable company which has been in operation for the past 12 years and is willing to abide by any condition that the court will set; that the affidavits filed by Mr. Mutonyi on behalf of the 1<sup>st</sup> to 7<sup>th</sup> respondents and Mr. Maragia, counsel for the 8<sup>th</sup> respondent, do not have any serious objection to the application, save for the sufficiency of security. Counsel urged that a security of Kshs.200,000/- was deposited in an interest earning account on 9/5/2007 pursuant to a court order. The decretal sum was then Kshs.535,000/- and that the same is still available. He urged that the amount of security to be provided is not necessarily one that covers the exact sums that the applicant will be liable to pay but such figure is in the discretion of the court, one that demonstrates the applicant's willingness to pay and the ability to satisfy the decree in the event the appeal is lost. According to counsel, the security of Kshs.200,000/- is sufficient and the sums suggested by the respondent are speculative and contentious.

Mr. Mutonyi, counsel for the 1<sup>st</sup> to 7<sup>th</sup> respondents filed a replying affidavit dated 14/10/2010 and submissions filed on 18/11/2010 in opposing the application. Mr. Mutonyi submitted that no sufficient security has been offered for due performance of the decree. That on 9/5/07 the court granted stay upon the appellant depositing Kshs.200,000/- in a joint interest earning account in the names of both counsel; that the decretal sum was Kshs.535,000/-; that the sum has attracted interest of Kshs.246,246/- making the decretal sum at Kshs.781,246/- excluding costs. His view is that security for costs is to ensure that the successful litigant does not lose out in the event he wins the appeal and that there is no assurance that the appellant will be still in existence and able to pay within the next 5-7 years when the appeal is determined. He urged the court to order an addition sum of Kshs.581,246/- to be deposited in a joint interest earning account of both counsel.

Mr. Maragia, counsel for the 8<sup>th</sup> respondent filed a replying affidavit dated 7/3/2011 and submissions on 7/3/201. He opposed the application and took issue with the security that was deposited, because the costs of Kshs.108,349/- awarded to the 8<sup>th</sup> respondent have not been taken into account. He agreed with Mr. Mutonyi that the applicant may not be in existence by the time the appeal is heard nor can they be guaranteed that it will be able to pay in the event it loses the appeal. He urged that an additional Kshs.200,000/- be deposited with the court.

In an application for stay, the applicant has to demonstrate that the appeal has high chances of success; that the appeal will be rendered nugatory if stay is not granted and substantial loss will be occasioned if execution is allowed to proceed and lastly the applicant should offer security for due performance of the decree. In this case, the respondents do not seriously contest the application for stay based on the other grounds save that they find that the offer of the security already deposited in an account – Kshs.200,000/- to be insufficient. Adequacy of security is a matter of this court's discretion and in my view it all depends on the circumstances of each case. In assessing what is adequate the court has to take into account the applicant's willingness to abide by the terms the court imposes. Though the applicant submits that the applicant is financially stable, no evidence has been adduced to that effect. The appellant's audited accounts for the last several years were not availed nor was there some kind of audit for the court to consider. The security is also supposed to cushion the respondent in the event that the appellant loses the appeal, the respondent does not suffer loss. The appeal arose from matters filed in 2003 and in the event the appeal is lost, the appellant will have to pay costs and interest that will have accrued. In determining the security for costs all these factors have to be taken into account but it is not necessary that the sum equivalent to the decretal sum be availed as security. The security should be reasonable. In my view, the security deposited in 2007 is not sufficient and I will order that there be stay of execution as prayed upon the applicant depositing as security a further Kshs.400,000/- in an interest earning account in the joint names of the counsel. The said deposit to be made within 7 days hereof. It is so ordered.

**DATED and DELIVERED this 14<sup>th</sup> day of October, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Mugweru for the applicant.

N/A for the 1<sup>st</sup>-7<sup>th</sup> respondents.

N/A for the 8<sup>th</sup> respondent.

Kennedy – Court Clerk.