



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Appeal 32 of 2010**

**JOSEPHAT NYINGI**  
**PETER.....1<sup>ST</sup>**  
**T APPLICANT**

**JAMES NYINGI**  
**MATOLO.....**  
**.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**W.K.N (A minor suing thro his**  
**father**

**and next friend H.N.N)**  
**.....**  
**RESPONDENT**

**RULING**

1. By a notice of motion dated 17<sup>th</sup> February, 2010, Josephat Nyingi Peter and James Nyingi Matolo (hereinafter referred to as the applicants), seek an order of stay of execution of the decree pending the hearing and determination of their appeal. The applicants have not stated in their motion which decree they seek to stay. However, from the supporting affidavit sworn by Josephat Nyingi Peter it is apparent that the decree sought to be stayed is the one arising from the judgment delivered on 15<sup>th</sup> January, 2010 in Thika CMCC No.559 of 2007. That judgment is the subject of the applicants' appeal filed in this court. Following interim orders issued by Rawal J. of 17<sup>th</sup> February, 2010, the applicants deposited a sum of Kshs.150,000/= in this court as security for the due performance of the decree.

2. The applicants' main ground is that they have filed an appeal which raises arguable issues and which appeal they believe has high chances of success. The applicants contend that unless an order for stay of execution is granted they will suffer substantial loss as the decree holder is a minor who has no means of refunding the decretal amount should the applicants be successful in their appeal.

3. The application is opposed through a replying affidavit sworn by H.N.N who is the father and next friend of W.K.N (hereinafter referred to as the respondent). The respondent contends that the applicants will not suffer any loss, as the money subject of the decree will be invested for the minor. The respondent maintains that the application is nothing other than an attempt to delay the respondent from reaping the fruit of their litigation. Several authorities were referred to in support and in opposition to the application.

4. Having given due consideration to this application, I find that the applicants' contention that the decree holder is a minor is not disputed. Secondly, it is apparent that the decree holder has no resources of his own and therefore refunding the decretal sum if paid to him may be a challenge. I am satisfied that in the circumstances of this case, the ends of justice would be best satisfied by granting a conditional order of stay of execution. Accordingly, I issue an order staying the execution of the decree in Thika CMCC No.559 of 2007 pending the hearing and determination of the appeal filed herein, on the following conditions:

- (i) That the sum of Kshs.150,000/= deposited in court by the applicants shall be released to the parties' counsel to be deposited into an interest earning account with a reputable financial institution in the joint names of the parties'

advocates within 15 days from the date of release of the money.

- (ii) The applicants shall file and serve a record of appeal within 90 days from the date hereof.
- (iii) The applicants shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of execution pending appeal shall stand discharged unless otherwise extended by the court.
- (iv) Costs of this application shall be costs in the appeal.

Dated and delivered this 7<sup>th</sup> day of May, 2010

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mungla H/B for Ngugi for the applicants

Kinyanjui for the respondent

Eric - Court clerk