



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Appeal 18 of 2007**

**WILFAY INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

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

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

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

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

**ANTHONY 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**

This is an application by the appellant for stay of execution of the decree of the subordinate court made under the provisions of **Order XLI rule 4(1)** of the **Civil Procedure Rules**. The appellant being dissatisfied with the judgment of the subordinate court delivered on the 15<sup>th</sup> January 2007 in Nakuru Chief Magistrate's Court Civil Suit No. 2624 of 2003 (*as consolidated with Nakuru CMCC No. 2623, 2625, 2628, 2629, 2630 of 2003 and 591 of 2005*), has appealed to this court. Pending the hearing and determination of the said appeal, the appellant has sought stay of execution of the said decree of the subordinate court. The application is supported by the grounds stated on the face of the application and the annexed affidavit of Mrs Fatuma Kiboro, the Managing Director of the appellant. In the said affidavit, Mrs Kiboro has deponed that the appellant was dissatisfied with the entire judgment of the subordinate court and would wish to get a second opinion from the High court. The appellant was frustrated in its effort to secure the subordinate court file so that it could make an appropriate application for stay of execution. This was due to the fact that the said file was misplaced. She deponed that the appellant was willing to provide security for the due performance of the decree pending the hearing of the said appeal.

The application is opposed. All the respondents have sworn replying affidavits in opposition to the application. They have deponed that the appellant's business was failing and in the event that this court would grant stay of execution of the decree of the subordinate court, there was a likelihood that the appellant would be unable to satisfy the decree should the appeal be dismissed. At the hearing of the application, I heard the submissions made by Miss Nyagol, learned counsel for the appellant and by Mr. Mutonyi, learned counsel for the 1<sup>st</sup> to 7<sup>th</sup> respondents. The issue for determination by this court is whether the appellant has established a case so as to entitle this court grant it the order of stay of

execution sought. The principles to be considered by this court in determining whether or not to grant an order of stay of execution are well settled. In **Mukuma –vs- Abuoga [1988] KLR 645** at page 647, the Court of Appeal held that:

***“It was laid down in M. M. Butt –vs- The Rent Restriction Tribunal Civ App No. Nai 6 of 1979, (following Wilson –vs- Church (No. 2) (1879) 12 Ch 454 at p. 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without undue delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”***

In the present application, it has been argued by the appellant that it would suffer substantial and irreparable loss if the decretal sum awarded by the subordinate court is paid to the respondents before the hearing and determination of the appeal. The appellant is apprehensive that it would unlikely to recover the said decretal sum if the same is paid to the respondents and the appeal filed is successful. The appellant has stated that it is willing to provide security for the due performance of the decree. On the other hand, the respondents have argued that the appellant is not doing very well in its business and it is likely to collapse before the appeal is heard and determined. The respondents would therefore be frustrated from realising the fruits of their judgments.

Having considered the arguments made, I do hold that the appellant has established that it would suffer substantial loss if stay of execution is not granted. It is clear from the nature of the pleadings filed by the respondents that the appellant would be unlikely to recover the decretal sum were it to be successful on appeal if the said sums were paid to the respondents. Although the appellant was first required to present the application for stay of execution before the court which issued the decree in accordance with the provisions of **Order XLI rule 4(1)** of the **Civil Procedure Rules**, I am satisfied with the explanation given by the appellant that it was unable to procure the subordinate court’s file so as to make a timely application for stay of execution. In any event, the respondents did not raise any objection to the appellant presenting his application for stay of execution before this court, which is an appellate court.

For the reasons stated above, I will allow the application for stay filed by the appellant. The execution of the decree of the subordinate court in the suit from which the appellant filed this appeal is hereby stayed pending the hearing and determination of the appeal filed by the appellant. The appellant deponed that the entire decretal amount plus costs is Kshs 535,000/=. I hereby order that the appellant deposits the sum of Kshs 200,000/= in an interest earning account in the joint names of the counsel for the appellant and counsel for the respondents. The said amount should be deposited within fourteen (14) days of the delivery of this ruling in default thereof the stay of execution granted herein shall automatically lapse. The respondents shall have the costs of the application.

It is so ordered.

**DATED at NAKURU this 9<sup>th</sup> day of May 2007.**

**L. KIMARU**

**JUDGE**