REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE MISC APPL. NO. E214 OF 2021

SHERIFF IBRAHIM MISHSIM.....1ST APPLICANT

RAHABMUIRURI WAITHIRA.....2ND APPLICANT

VERSUS

SA (Minor suing Thro father and next friend **BOO).....RESPONDENT**

RULING

1. The Application dated 11th May, 2021 seeks orders **that this honourable court be pleased to grant leave to the Applicants to appeal out of time against the judgment of the Honourable E. Wanjala (Miss.) Principal Magistrate, in Milimani Commercial Courts CMCC No. 6239 of 2019 delivered on 19th March, 2021.**

2. Secondly, **that this honourable court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No.6239 of 2019 delivered on 19th March, 2021 pending hearing and determination of the application herein.**

3. The Application is premised on the grounds set out therein and in the supporting affidavit. The gist of the application is that the Applicant is dissatisfied with the judgment of the lower court and wishes to appeal. The delay in filing the Appeal is blamed on the Advocates failure to diarize the matter and further delay in tracing the file due to the limited accessibility to the court registry. It is further averred that the intended appeal is arguable and that the Applicants stand to suffer substantial loss as the decretal sum may be unrecoverable. It is further stated that the application has been filed without inordinate delay and that the Respondent will not suffer any prejudice that cannot be compensated by way of costs.

4. The application is opposed. It is stated in the grounds of opposition dated 18th May, 2021 that the application is an abuse of the court process, defective and meant to deny the Respondent of the fruits of his judgement.

5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

6. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

> ***No order for stay of execution shall be made under subrule (1) unless—***
>
> ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

7. The judgment of the lower court was delivered on 19th March, 2021. The application at hand was filed on 12th May, 2021. The delay is not inordinate and has been explained to the satisfaction of the court.

8. The Applicants are apprehensive that the decretal sum may not be recoverable in the event that the Appeal is successful. The Respondent

has not said anything about his ability to refund the decretal sum. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

> **"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya."**

8. To balance the competing interest of the parties, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the parties or in court within 30 days from the date hereof. The Appeal to be filed within 14 days from the date hereof. Costs to the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCT., 2021

B. THURANIRA JADEN

JUDGE