



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 267 OF 2018

ROBERT WAWERU MAINA t/a

AUNTIQUE AUCTIONS LIMITE.....APPLICANT

VERSUS

HUSSEIN POTHIWALLA.....RESPONDENT

RULING

1. The application dated 17th June, 2018 seeks orders that this honourable court be pleased to order a stay of execution on the Judgment/Decree CMCC No.5019 of 2013 Milimani Commercial Courts entered against the Appellant by the honourable trial court on the 11th June, pending the appeal.

2. It is stated in the grounds and the affidavit in support that judgment was entered for the Respondent against the Applicant in the sum of Ksh.200,000/= and the Applicant's Counter-claim dismissed with costs. The Applicant is dissatisfied with the said judgment and has filed an appeal. The Applicant has expressed apprehension that if execution proceeds he stands to suffer irreparably and the appeal rendered nugatory as it may not be possible to recover the decretal sum from the Respondent. The Applicant is willing to furnish security for the due performance of the decree by depositing half of the principal amount.

3. The application is opposed. It is stated in the replying affidavit that the Respondent is entitled to the fruits of the judgment and that it has not been shown that he is not capable of refunding the decretal sum. That half the decretal sum be paid to him.

4. The application was disposed of by way of written submissions which I have considered.

5. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

“No order for stay of execution shall be made under sub-rule (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.”

6. The judgment of the lower court was delivered on 11th June, 2018. The application at hand was filed on 18th June, 2018. There was no unreasonable delay.

7. The Applicant has averred that the Respondent may not be capable of refunding the decretal sum. The Respondent has not said anything to dispel this fear. 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 both parties, I allow stay of execution pending appeal on condition that the Applicant do deposit the decretal sum in an interest earning bank account of the counsels for the parties herein or in court within 30 days from the date hereof.

Dated, signed and delivered in Nairobi this 12th day of March, 2019

B. THURANIRA JADEN

JUDGE