



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.26 OF 2019**

**DAVID MWANGI.....1<sup>ST</sup> APPELLANT**

**GEORGE NDUMBI KIMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**VERONICA GATHONI NDUNGU**

(suing as the personal representative of the estate of

**STEPHEN NDUNGU BURUGU.....RESPONDENT**

**RULING**

1. This is a ruling on application dated 18<sup>th</sup> February 2018. It seeks to stay judgment and decree in Nakuru CMCC No.1008 of 2016 pending hearing and determination of this appeal.

2. Grounds on the face of the application are that the appeal has overwhelming chances of success and the appellant is willing to deposit the entire decretal sum in a joint fixed interest earning account in the names of both advocates

3. Further that the respondent is a woman of straw and if the decretal amount is paid to her, she may not be able to refund; that if stay is not granted, the appeal will be rendered nugatory and the the appellant stand to substantial loss and damage.

4. The application is supported by affidavit of the 1<sup>st</sup> appellant. He restated grounds on the face of the applicant.

5. In response, the respondent filed replying affidavit sworn by her. She averred that the appellants has not demonstrated how they will suffer substantial loss if the court decline to order stay of execution. She averred that the estate of the deceased stand to suffer delay fruits of judgment resulting in justice being defeated.

6. Further, the respondent averred that if court is inclined to allow the application, the appellants be ordered to deposit the entire amount in a joint interest earning account.

7. In their written submissions, the appellants submitted that the application herein meets the threshold for grant of orders sought. Appellants cited the case of **Stanley Karanja Wainaina & Another Vs Ridon Anyangu Mutubwa[2016]eKLR** where the court set out the following conditions for grant of stay pending appeal:-

i. The application must be made without delay.

ii. That the applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.

iii. Such security as the court orders for due performance of such decree as may ultimately be binding on him has been given by the applicant.

8. On the first condition, the appellants submitted that the judgment was delivered on 25<sup>th</sup> January 2019 and the application herein filed on 14<sup>th</sup> January 2019 a period of 21 days. Appellant further cited the case of **Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another [2014]** where the court allowed a similar application which was filed one year after delivery of judgment. It is evident that the

application herein was filed without delay.

9. On the issue of substantial loss and security for stay, the appellants in their submissions restated the averments in the defendant's affidavit, which were also stated in grounds on the face of the application.

10. On the respondents inability to refund decretal amount, the appellants cited the case of **Nairobi civil Application No.238 of 2005 National Industrial credit Bank Limited Vs Aquinas Francis Wasike & Another (UR)** where the court of appeal stated as follows:-

**“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 details the resources owned by the respondent or lack of them. Once an applicant expresses 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 peculiar within his knowledge.”**

11. In the instant case, apart from saying the estate of the deceased will suffer due to delay in enjoying fruits of successful litigation, the respondents never showed means of paying back the decretal amount in the event that the appeal is successful. It would therefore be in the interest of justice to deposit the decretal amount in a joint interest earning account. This will secure the interests of all parties herein. This addresses the issue of appeal being rendered nugatory as well.

12. From the foregoing, I find that the application herein is merited and do do allow on condition that the decretal amount is deposited in a joint interest earning account in the names of both advocates herein.

13. **FINAL ORDERS**

1. Stay of execution do issue pending herein determination of the appeal herein.
2. Decretal sum to be deposited in a joint interest earning account in the names of both Advocates.
3. Compliance with Order 2 above within 30 days from the date of this ruling.
4. Costs in the cause.

**Judgment dated, signed and delivered at Nakuru this 11<sup>th</sup> day of July 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Schola/Jenifer Court Assistant

N/A Counsel for Appellant

Orege Counsel for Respondent