



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 427 OF 2018**

**SUNTRA INVESTMENT BANK LIMITED.....APPELLANT**

**VERSUS**

**GEORGE MBUGUA KIARIE.....1<sup>ST</sup> RESPONDENT**

**CUSTODY & REGISTRAR**

**SERVICES LIMITED .....2<sup>ND</sup> RESPONDENT**

**CENTRAL DEPOSITORY**

**SETTLEMENT CORPORATION LIMITED.....3<sup>RD</sup> RESPONDENT**

***(Being an appeal from the Judgment and orders given on 30<sup>th</sup> May, 2018***

***by Hon. E.K. Usui, Senior Principal Magistrate***

***in CMCC NO. 2227 OF 2009)***

**RULING**

This is an application by way of Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules for an order that there be a stay of execution of the judgment and decree of the lower court issued on 30<sup>th</sup> May, 2018 pending the hearing and determination of the appeal. The application is supported by an affidavit sworn by the Head of customer care/agents coordination of the appellant, alongside grounds set out on the face of the application.

The application is opposed and the respondents have filed grounds of opposition and or affidavits in reply. Counsel for the parties have also filed submissions and cited some authorities. The appellant has already filed the record of appeal. The same has also been served upon the respondents. What is being awaited is the lower court file to facilitate the hearing of the appeal.

The requirements under Order 42 rule 6 have been fulfilled in terms of timelines and in any case, no serious prejudice has been raised by the respondents in terms of timelines. However, the appellant is said to have offered no security for the order sought and therefore should not be granted the said orders.

There are several observations that have to be highlighted in this application. There is a judgment in favour of the 1<sup>st</sup> respondent against the appellant in the sum of Kshs. 859,880.90 together with costs and interest. Whereas the 1st respondent is entitled to the fruits of his judgment, the appellant has the right of appeal and the court is bound to balance the interests of both parties. It is true that the appellant must demonstrate substantial loss may be suffered if the order for stay is not granted.

It is also generally accepted that where an applicant expresses the fear that if the decretal sum is paid and the appeal succeeds, the respondent may not be in a position to refund the same, the burden of proof shifts to the said respondent to disapprove that allegation- see Civil Appeal No. 18 of 2017 **Amal Hauliers Limited vs. Abdunnassir Abubakar Hassan (2017) e KLR**. The order sought is discretionary which discretion should be exercised judicially – see **Butt vs. Rent Restriction Tribunal (1982) KLR 417**.

The 1<sup>st</sup> respondent in whose favour the lower court found is said to be a resident of the United States. In fact, evidence in the lower court

was given by his sister on his behalf. The appellant has expressed apprehension that if the decretal sum is paid and the appeal succeeds, it may not be recovered from the 1<sup>st</sup> respondent.

The appellant is said to be an investment bank whose credibility has not been questioned by the respondents. Whereas it is true that no security has been offered by the appellant, the concern raised against the 1<sup>st</sup> respondent is justified. Balancing the interests of the parties herein, I am inclined to allow the application on the following terms,

- a. The appellant shall post a Bank guarantee for the entire decretal sum pending the hearing of the appeal.
- b. This shall be done within 14 days from the date of this ruling and or extraction and service of this order.

The costs shall abide by the result of the appeal.

***Dated, signed and delivered at Nairobi this 4<sup>th</sup> Day of July, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**