



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 348 OF 2018**

**BERNARD MWANGALA .....1<sup>ST</sup> APPELLANT/APPLICANT**

**HON. ATTORNEY GENERAL .....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**KIPKAI ENTERPRISES LIMITED.....1<sup>ST</sup> RESPONDENT**

**JANE NYABOKE NJAGI T/A**

**NJAGI NYABOKE & COMPANY ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 16<sup>th</sup> May, 2019 principally seeks orders that there be a stay of execution of the Order issued on 30<sup>th</sup> July, 2018 in Nairobi CMCC No. 488 of 2011 Kipkai Enterprises Limited & another v Lower Apartments & 2 others committing the First Appellant to Civil Jail pending the hearing and determination of the Appeal herein.
2. Secondly, that the sum of Kshs.50,000/= deposited in court by the first appellant on 30<sup>th</sup> July, 2018 be treated as security pending hearing and determination of this Application and Appeal.
3. The background facts to the instant application is a lower court order dated 30<sup>th</sup> July, 2018 wherein the Applicants were committed to civil jail for five days for disobedience of court orders. Earlier on, the lower court had on 9<sup>th</sup> April, 2011 issued orders restraining the Applicants from disconnecting the Respondents water supply. These were the orders said to have been disobeyed.
4. The Applicants were dissatisfied with the said orders and filed an appeal herein. It is stated in the grounds and the affidavits in support sworn by Bernard Mwangala and Brenda Lucheno that if the orders sought herein are not granted, the Appeal will be rendered nugatory.
5. The application is opposed. It is stated in the replying affidavits filed by Edgar Munene and Jane Nyaboke Njagi that a similar application had earlier on been dismissed by this court and that the current application is full of falsehoods and mis-presentation of facts regarding the dismissal of the earlier application that was before this court. It is further averred that the present application has been filed after undue delay.
6. The application was canvassed by way of written submissions which I have considered.
7. The ruling herein delivered on 16<sup>th</sup> May, 2019 reflects that the court did not delve into the merits of the earlier application filed on 30<sup>th</sup> July, 2018 which sought similar orders as the orders sought in the instant application. The application dated 30<sup>th</sup> July, 2018 was found to be fatally defective. Indeed the court clearly stated that the Applicants were at liberty to file a competent application for consideration by the court. It was therefore quite in order for the Applicants to file the application at hand.
8. 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.”**

9. The application dated 30<sup>th</sup> July 2018 was determined on 16<sup>th</sup> May, 2019. The instant application was filed on 20<sup>th</sup> May, 2019. There was no undue delay.

10. The 1<sup>st</sup> Applicant, Bernard Mwangala, has contended that if he proceeds to serve the sentence the appeal herein will be rendered nugatory and an academic exercise. Clearly, being committed to civil jail before the appeal herein is heard would be irreversible and the 1<sup>st</sup> Applicant will suffer substantial loss.

11. On 3<sup>rd</sup> September, 2019, the court made orders for the deposit of security of Ksh.50,000/= cash bail or in the alternative the Applicant to execute a bond of Ksh.100,000/= with one surety of a like sum. The record reflects that the cash bail of Ksh.50,000/= was deposited in court on 3<sup>rd</sup> September, 2019.

11. With the foregoing, this court is satisfied that the Applicants have met the conditions for the grant of the orders sought. Consequently, the application is allowed with costs in cause. The cash bail deposited in court on 3<sup>rd</sup> September, 2019 to remain as security herein pending the hearing and determination of the Appeal.

Dated, signed and delivered in Nairobi this 2<sup>nd</sup> day of Oct., 2019

**B. THURANIRA JADEN**

**JUDGE**