



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO.14 OF 2018**

**CHINA JIANGXI INTERNATIONAL (K) LTD ..APPELLANT/RESPONDENT**

**VERSUS**

**MOSES ADERO OTIENO .....RESPONDENT/APPLICANT**

(Being an appeal from judgment and decree of Hon. Japheth Bill, RM in Mbita CC No.17 of 2017 delivered on 03.05.2018)

**RULING**

1. The application by the respondent dated 30<sup>th</sup> April 2019, seeks an order for stay of execution of this court's judgment delivered on 9<sup>th</sup> April 2019 pending hearing and determination of the application (see prayer 2 of the Notice of Motion) rather than the intended appeal and an order that the sum of Kshs.300, 000/= in a fixed account of the applicant's advocate, should not be released to the appellant pending hearing and determination of the appeal pending in the Court of Appeal.

2. Most significantly, the application is brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and not **Order 42 Rules 6 (1) and (2)** of the **Civil Procedure Rules** which provides for stay in case of appeal and which would invariably be the applicable and enabling provision of the law in the present circumstances.

To the extent that the wrong provisions of the law have herein been invoked by the applicant in seeking orders of stay, the application is misconceived and fatally defective for exercise of this court's discretion in favour of the applicant.

4. It would therefore follow that that the applicant's grounds and submissions in support of the application cannot be sustained and must now be overruled.

In any event, this determination renders prayer two (2) of the application inapplicable for having been overtaken by events.

As regards prayer three (3), the import of the impugned judgment was merely to allow the applicant's appeal, and dismissing the respondent's suit in the lower court against the appellant with costs. There was no order that the amount of Kshs.300, 000/= deposited in the respondent's advocate fixed bank account be released to the appellant.

Even if the application was proper and competent before court, there was nothing capable of being stayed by this court.

5. In sum, the application is devoid of merit and is hereby dismissed with costs to the appellant/respondent.

**J.R. KARANJAH**

**JUDGE**

**16.10.2019**

[Dated and delivered this **16<sup>th</sup>** day of **October, 2019**]

[In the presence of M/s Nyarige holding brief for Mr. Odhiambo for Applicant and Mr. Anyumba for Appellant/Respondent]