

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL CASE NO. 147 OF 2019

THE STANDARD GROUP LIMITEDAPPELLANT

VERSUS

LEWIS KAMANGA GATHERU RESPONDENT

RULING

The appellant filed a Notice of Motion dated 29th March, 2019 seeking an order of stay of execution of the judgment of the lower court delivered on 7th March, 2019 pending the hearing and determination of the appeal. The reasons for seeking the said order are set out on the face of the application and the supporting affidavit sworn by the appellant's senior legal officer. The application is brought under Order 42 Rule 6(2) of the Civil Procedure Rules.

The respondent has opposed the application and there is a replying affidavit sworn by the respondent on 30th April, 2019 to that effect. The application was filed timeously and the respondent has not raised any issue in that regard. The appellant has the right of appeal while the respondent holds a judgment in his favour in which the lower court awarded him a total sum of Kshs. 4 Million plus costs and interest. The cause of action was defamation attributed to the appellant against the respondent.

Both parties have filed submissions and cited some authorities. The appellant is supposed to demonstrate that substantial loss may result unless the order sought is given. See **Mukuna vs. Abuoga (1988) KLR 547, Joseh Simiyu Mukenya vs. Agnes Naliaka Cheseto(2012) e KLR.**

The order sought is discretionary which discretion has to be exercised judicially taking into consideration and balancing the interests of both parties – see **Absalom Dora vs. Jaibo Transporters (2013) e KLR.** The appellant has expressed apprehension that the respondent may not be in a position to repay the decretal sum if the same is paid to him and the appeal succeeds. Decided cases have held that, once the applicant raises such a doubt, the evidential burden shifts to the respondent to show what resources he has to meet the decretal sum in the event the appeal against him succeeds.

I believe the reasons are obvious in that, the financial capacity of the respondent is only known to him – see **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR .**

In answer to the said allegation, the respondent in his replying affidavit has stated that it is in the appellant's knowledge that he is a State officer, employed by the government of Kenya in the Judiciary with a fixed place of work and abode, therefore it is not true that he is a person whose means are unknown. On the contrary, the respondent depones he is a Senior Resident Magistrate and has annexed a copy of his payslip and also copies of title deeds in his name.

The applicant has offered to provide security as the court may deem reasonable and appropriate. That is an attractive offer, but which must be considered against the nature of the case, the circumstances and the basic requirement of whether or not substantial loss may be visited upon the appellant if the order is not granted. This court takes judicial notice of the fact that the respondent being a judicial officer, is employed on permanent and pensionable terms. There is no evidence that there is any threat of loss of his employment. It is true that the title deeds annexed to his replying affidavit have not been supported by a search certificate. However, if there were any encumbrances against such titles the same would have been endorsed thereon.

Prima facie therefore, the respondent has established that he is a man of means and discharged the burden of proof required of him, to dislodge the apprehension of inability to repay the decretal sum in the event the appeal against him succeeds. The appeal cannot be rendered nugatory in view of that position.

In the circumstances, and in the exercise of the court's discretion, the appellant's application must fail. The same is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 17th Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE