



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 170 OF 2019**

**EQUITY BANK LIMITED.....APPELLANT**

**VERSUS**

**SAMUEL STANLEY KIARIE MUNGAI.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> respondent in this application sued the appellant and two others in the lower court claiming damages for malicious prosecution, and special damages incurred in the process of defending himself in a criminal case lodged against him. The appellant denied the claim but after a full trial judgment was entered in favour of the 1<sup>st</sup> respondent against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Aggrieved by the said judgment the appellant lodged an appeal by way of Memorandum of Appeal filed on 27<sup>th</sup> March, 2019.

There is now before me an application by way of Notice of motion dated 28<sup>th</sup> March, and filed on 1<sup>st</sup> April, 2019 for the substantive order that there be a stay of execution of the lower court judgment delivered on 1<sup>st</sup> March, 2018 pending the hearing and determination of the appeal.

The application is supported by grounds set out therein, in addition to the supporting affidavit sworn by Kariuki Kingori the Legal Services Manager of the appellant. The application is opposed and there is a replying affidavit sworn by the 1<sup>st</sup> respondent. Both parties have also filed submissions and cited several authorities which I have considered.

The judgment of the lower court having been delivered on 1<sup>st</sup> March, 2019, the Memorandum of Appeal and Notice of Motion were filed timeously. The appellant has to demonstrate that substantial loss may be incurred if the order sought is not granted. It is feared that if the decree is satisfied then the 1<sup>st</sup> respondent may not be in a position to refund the said sum hence substantial loss may result.

The appellant is ready to abide by any terms given by the court including the deposit of such sums as may be ordered by the court. Above all, the appellant believes it has an arguable appeal that may be rendered nugatory.

The 1<sup>st</sup> respondent has a judgment in his favour which he desires to execute. His interest however has to be balanced with that of the appellant who also has the right of appeal. The 1<sup>st</sup> respondent has stated that he has been unemployed, and failed to find employment in the banking sector as at the date of swearing his affidavit in May, 2019.

Where there is apprehension on the part of the applicant that if the decree is satisfied, the respondent may not be in a position to repay the same in the event the appeal succeeds, it behoves the respondent to satisfy the court, that is not the position.

The respondent is unemployed and has not been able to find a job, at least as at the time he swore his affidavit. The fear on the part of the applicant is therefore well founded. The appeal is against both liability and quantum going by the memorandum of appeal.

I have considered the material presented before me in line with the cited authorities. I am inclined to allow the application on condition that, the appellant shall deposit the decretal sum in an interest earning account in the names of both advocates on record within 30 days from the date of this ruling. The costs shall be on appeal.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of November, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**