

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 442 OF 2019

PATRICK NJOROGÉ.....APPLICANT

VERSUS

SAVASTIAN OWINO OGOLLO.....RESPONDENT

RULING

1. The application dated 2nd August, 2019 seeks orders that there be a stay of execution of the judgment delivered on 24th July, 2019 Milimani CMCC No. 3293 of 2017 Savastian Owino Ogollo v Letshego Kenya Ltd and Patrick Njoroge and any consequential decree thereon pending the hearing and determination of this Appeal.

2. Judgment was entered in the lower court against the applicant for the sum of Ksh.1,500,000/=. The Applicant is apprehensive that the Respondent may commence execution proceedings and thereby render the appeal nugatory and occasion substantial loss to the Applicant. It is contended that the Respondent may not be capable of refunding the decretal sum. The Applicant is willing to provide security for the due performance of the decree.

3. The application is opposed. It is stated in the replying affidavit that the application is a delaying tactic meant to deny the Respondent the enjoyment of the fruits of his judgment. It is averred that the Respondent is not able to work following the accident the subject of this suit. He urged the court to order the payment of half of the decretal sum to him and the deposit of the balance in a joint account.

4. The application was canvassed by way of written submissions which I have considered.

5. In an execution for stay of execution, 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.”

6. The judgment of the lower court was delivered on 24th July, 2019. The instant application was filed on 6th August, 2019. There was no unreasonable delay.

7. It was contended by the Applicant that the Respondent may not be able to refund the decretal sum. The Respondent has not said anything to allay these fears. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

8. It is apparent from the Memorandum of Appeal that the appeal is both on liability and quantum. It is therefore not prudent to release part of the decretal sum to the Respondent at this stage as the results of the appeal could go either way. Consequently, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the parties or in court within 30 days from the date hereof. Costs to abide the outcome of the appeal.

Date, signed and delivered at Nairobi this 21st day of Nov., 2019

B. THURANIRA JADEN

JUDGE