



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 360 B OF 2017**

**KENYA INSTITUTE OF PROJECT MANAGEMENT.....APPLICANT**

**VERSUS**

**MERCY IMMACULATE MIYANDAZI.....RESPONDENT**

**RULING**

1. The application dated 17<sup>th</sup> July, 2017 seeks orders that pending the hearing and determination of this Appeal there be an order for stay of execution of the judgment delivered on 5<sup>th</sup> July 2017 by the Lower Court.
2. It is stated in the affidavit in support that summary judgment was entered on 5<sup>th</sup> July, 2017 by the Lower Court for a liquidated sum of Ksh.97,600/=. It is further stated that the Lower Court erred in many ways, including determining a matter where it had no jurisdiction.
3. The application is opposed. It is stated in the replying affidavit that the affidavit in support of the application at hand has been sworn by an unauthorized person. It is stated that the issue of jurisdiction was raised through a Preliminary Objection which was ruled upon by the trial magistrate and that the said ruling was not appealed against. The application is seen by the Respondent as a delaying tactic meant to prevent him from enjoying the fruits of the judgment while the Respondent is experiencing financial difficulties. It is further stated that the Applicant has not demonstrated the loss it stands to suffer and has not deposited any security nor complied with Order 42 rule 6 (2) Civil Procedure Rules. The Respondent urged the court to release the sum of Ksh.20,000/= to him and for deposit of security of Ksh.70,000/= and that the decretal sum be deposited with him or in court. The Respondent further deponed that the appeal has no likelihood of success.
4. The Appellant filed a further affidavit and attached a copy of the Applicant Company's Resolution authorizing him to sign pleadings and swear affidavits on behalf of the company. The court was invited to look at the merits of the case as opposed to technicalities of procedure. It is further stated that the Preliminary Objection was dismissed for none attendance. The Applicant's position is that it's appeal which has merits will be rendered nugatory and an academic exercise as the Respondent has alluded to her financial difficulties. The Applicant is willing to deposit reasonable security for the due performance of the decree.
5. The issue raised by the Respondent regarding whether the deponent of the supporting affidavit was authorized by the Applicant company has been addressed by the further affidavit. The question of jurisdiction and the Preliminary Objection are matters to be addressed in the appeal.
6. 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.”**
7. The judgment of the Lower Court was delivered on 5<sup>th</sup> July, 2017. The application at hand was filed on 18<sup>th</sup> July, 2017. There was no unreasonable delay.

8. The Applicant Company is apprehensive that it will suffer substantial loss if the orders sought are not allowed. It is noted that the Respondent has alluded to financial difficulties. The Respondent may therefore not be capable of refunding the decretal sum in the event that the appeal is successful. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR**:

**“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”**

9. On whether the appeal has high chances of success, under Order 42 Rule 6 (2) of the Civil Procedure Rules, the Applicant is seeking orders of stay pending appeal from the Subordinate Court to the High Court. The Applicant is not required to prove that he has an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of the decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

10. To balance the competing interests of both parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsel for Applicant and the Respondent herein or in court within 30 days from the date hereof. Costs in cause.

**Date, signed and delivered at Nairobi this 1<sup>st</sup> day of March, 2018**

**B. THURANIRA JADEN**

**JUDGE**