



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 691 OF 2017**

**KANAKE PETER WAHIIRE.....APPLICANT**

**VERSUS**

**JOSEPH MAINA KAMAU.....RESPONDENT**

**GEOFFREY KAMAU MAINA (suing as the Administration**

**of the estate of CICILIA RIGURU MAINA (Deceased).....RESPONDENT**

**RULING**

1. The application dated 11<sup>th</sup> December, 2017 principally seeks orders that the Honourable Court be pleased to order a stay of execution of the judgment/decree given by Honourable E. Wanjala dated 9<sup>th</sup> November, 2017 in the civil case No. 1258 of 2015 pending the hearing and determination of the Civil Appeal herein.

2. Secondly, the judgment entered on 9<sup>th</sup> November 2017 and all other consequential orders be stayed.

3. The application is premised on the grounds stated therein and is supported by the affidavit of Philomen Theuri, a Legal manager with the Applicant's Insurer. It is stated that judgment was entered in the Lower Court against the Applicant in the sum of Ksh.1,300,000/=. The Applicant is dissatisfied with the said judgment and lodged the Appeal herein. It is stated that if the application herein is not allowed, the Appeal will be rendered nugatory. The Applicant is apprehensive that the Respondent may not be able to refund the decretal sum in the event that the Appeal is successful. The Applicant is willing to deposit security in the form of an insurance bond for the due performance of the decree. It is averred that the Appeal has high chances of success.

4. The application is opposed. It is stated in the replying affidavit that the deposit for an insurance bond as security is inadequate. The court was urged to order that the Applicant do pay 70% of the decretal sum to the Respondent and deposit the balance in a joint interest earning bank account of the respective counsels for the parties herein. It is stated that the Respondent is a person of means who is able to refund the decretal sum in the event that the Appeal is successful.

5. 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. In the case at hand, there are no allegations of delay. The application was filed timeously.

7. On whether the Applicants will suffer substantial loss, it is noteworthy that the Respondent has not given the details of her resources to the court to demonstrate that she is capable of refunding the decretal sum. 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. 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 or in court within 30 days from the date hereof. Costs in cause.

**Date, signed and delivered at Nairobi this 16<sup>th</sup> day of May, 2018**

**B. THURANIRA JADEN**

**JUDGE**