



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 47 OF 2007

FIDELIS WAMBUA MUSEMBI.....PLAINTIFF/RESPONDENT

-VERSUS-

ROYAL MEDIA SERVICES.....DEFENDANT/APPLICANT

RULING

1. Judgment in this suit was delivered on the 22nd February 2018.

The plaintiff was awarded general damages in the sum of Kshs.4,000,000/=. That sum has not been paid. Instead, an Appeal has been filed challenging the whole judgment.

2. By an application dated 22nd March 2018, the Appellant seeks an order for stay of execution of the decree pending hearing and determination of the Appeal to the Court of Appeal – as a Constitutional right under **Article 48 of the Constitution, 2010**.

3. The application is opposed by a Replying Affidavit sworn by the Respondent, Fidelis Wambua Musembi, a Senior Nakuru Advocate of over twenty-five years practice. He avers that in the unlikely event that the intended Appeal succeeds, he would be capable of refunding/repaying the decretal sum and that nothing was placed before the court to demonstrate his inability to pay.

4. When parties appeared before me on the 5th June 2018 for argument of the application, they both submitted that they are not opposed to the stay orders, but urged that the court determines the conditions of the stay orders.

The applicant is willing and ready to deposit in an interest earning joint account of the advocates a sum of Kshs.1.5 Million while the respondent proposed Kshs.2 million and the balance be withheld by the Applicant pending hearing of the appeal.

5. I have considered the above proposals, and the authorities cited. Under **Order 42 rule 6(1) and (2) of the Civil Procedure Rules**, the conditions that a party ought to meet for an order of stay to be granted are well stated. I need not reproduce them here.

6. Substantial loss is the cornerstone – **C.A No.93 of (2017) Jubilee Hauliers Ltd and Others -vs- Brian Muchiri Waihenya (2017) e KLR**.

The court must satisfy itself that the conditions set under **Order 42 Rule 6(2) (a)(b)** – that no substantial loss will be occasioned if the order is denied and that security for due performance of the decree is assured.

7. The decretal sum is Kshs.4,000,000/= (without costs).

I have stated above that no evidence was placed before the court to place a doubt in its mind that the Respondent would be unable to repay so as to necessitate him rebutt the allegations.

I shall therefore exercise my unfettered discretion and order as follows:

- 1. That the Applicant/Defendant shall deposit a sum of Kshs.2,000,000/= in a joint interest earning account in the parties Advocates names, in a reputable Bank within Nakuru Town within 30 days of this order.***
- 2. That the balance of Kshs.2,000,000/= shall be paid to the Respondent within 30 days of this order.***
- 3. That costs of the application shall be costs in the cause.***
- 4. That failure by the applicant, Royal Media Services Limited to comply with orders 1 and 2 within the period stated, the stay orders will automatically lapse.***

Dated, signed and delivered this 6th Day of June 2018.

J.N. MULWA

JUDGE