

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 139 OF 2018

MASH EAST AFRICA LIMITED.....APPELLANT

- V E R S U S -

JULIUS KAZUNGU.....RESPONDENT

RULING

1) Mash East Africa Ltd, the appellant herein, took out the motion dated 27th March 2018 in which it sought for an order for stay of execution of the decree in Nairobi C.M.C.C. no. 4307 of 2014 Julius Kazungu =vs= Mash East Africa Ltd pending appeal. The motion is supported by the affidavit of Lennox Kitsao Shalo. When served with the aforesaid motion, Julius Kazungu, the respondent herein, filed grounds of opposition to resist the motion. When the motion came up for interpartes hearing, learned counsels made oral submissions.

2) I have considered the grounds stated on the face of the motion and those stated as grounds of opposition. I have further considered the rival oral submissions. I have already stated that the appellant/applicant is seeking for an order for stay of execution of the decree pending appeal. The respondent does not perse oppose the application for stay but he is opposed to the sort of security being offered. The applicant proposes to provide a bank guarantee as security for the due performance of the decree. The respondent is of the submission that a deposit of the decretal sum is a better form of security compared to a bank guarantee.

3) The background of this motion is short and straightforward. The respondent's claim arose out of an alleged cost of a television set the respondent had allegedly consigned to the appellant to deliver in Mombasa from Nairobi. Following an exparte hearing on 5.7.2017, judgment was entered in favour of the respondent and against the appellant in the sum of ksh.4,043,990/45 on 28.9.2017. The appellant filed an application seeking to set aside the exparte judgment which application was dismissed thus giving rise to this appeal.

4) The question which this court must grapple with is the appropriate security for the due performance of the decree. I have already set out the arguments of both sides. The court has a wide discretion to balance the scales of justice. The appellant has offered to give a bank guarantee while the respondent is of the submission that a cash deposit of the decretal sum will suffice. The amount involved is not pocket change but a colossal amount of over four million shillings. I think a bank guarantee from a reputable bank will do.

5) In the end, I allow the application for stay of execution pending appeal on condition that the appellant/applicant provides a bank guarantee from a reputable bank within 30 days. In default, the motion will be treated as having been dismissed.

6) Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents