REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 341 OF 2017

ABDALLA JUMA KATHENGE.....APPLICANT

VERSUS

JOHNSON KITHEKA KATHENGE.....RESPONDENT

RULING

1. The application dated 12th July, 2017 seeks orders that there be a stay of the judgment delivered on 13th June 2017 by Hon. P. Ngare Gesora, Chief Magistrate in Nairobi CMCC No. 233 of 2011 and the decree thereon pending the hearing of this appeal.

2. It is stated in the grounds and affidavit in support of the application that the judgment of the Lower Court was delivered on 13th June, 2017. The Applicant is apprehensive that the Respondent may proceed with execution and thereby occasion substantial loss to the Applicant. It is contended that the Respondent who is the Applicants elder brother routinely registers his property in the names of the wives and children and it would be unlikely to recover the decretal sum. The Applicant has offered to deposit security for the due performance of the decree and has proposed a deposit of half the principal amount. In the decree in a joint interest earning bank account in the names of the counsels for the parties herein.

3. The application is opposed. It is stated in the replying affidavit that the application herein is a ploy meant to delay and deny the Respondent of the fruits of the judgment. It is stated that the Applicant has not placed any material before court to show that the Respondent is a man of straw. That the Applicant will not suffer any prejudice if the orders sought are not granted. That the appeal is unlikely to succeed. It is depond that if the application is allowed, the Applicant should be made to deposit the entire decretal sum in a joint interest earning account agreeable to both parties.

4. In a further affidavit in response to the replying affidavit, the Applicant reiterated that he has met all the conditions for the grant of stay.

5. The application was canvassed by way of written submissions. I have considered the said submissions and the cited authorities.

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 13th June, 2017. The application at hand was filed on 13th July, 2017. There was no unreasonable delay.

8. The Respondent has not discharged the evidential burden to show what resources he has. *Prima facie*, the Applicant fears that he stands to suffer substantial loss may be justified. 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. The Applicant has deponed that the Respondent's assets are routinely registered in the wives or children's name. The Respondent has not rebutted this evidence. It is therefore not possible to tell if the decretal sum can be recovered in the event that the appeal is successful. 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."**

10. The judgment herein is for Ksh.1,000,000/=. Although this is a monetary decree, as observed above, there is no reassurance that the same can be recovered without difficulty. As stated by the Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009**.

> **"It is plain from the grounds set forth in the draft memorandum of appeal that the applicants have asked the appellate court to interfere with the awards of damages and there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent's land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might he greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so."**

11. To balance the 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 counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 1st day of October, 2018

B. THURANIRA JADEN

JUDGE