



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 72 OF 2018**

**KENYA MEDICAL RESEARCH INSTITUTE.....APPLICANT**

**VERSUS**

**GEORGE WAINAINA NGUGI.....DEFENDANT**

**RULING**

1. The application dated 13<sup>th</sup> February, 2018 seeks orders that there be a stay of execution of the judgment and subsequent decree delivered by the Honourable Mrs. M'masi (SPM) on 14<sup>th</sup> September, 2017 pending the hearing and determination of the Applicant's appeal.
2. The application is based on the grounds stated therein and is supported by the affidavit of its Legal Manager, Margaret Rigoro. It is stated that on 14<sup>th</sup> September, 2017 judgment was entered in the lower court for the sum of Ksh.3,525,500/= against the Applicant. That the Applicant is aggrieved by the said judgment and has appealed herein. It is averred that the Applicant's goods have been proclaimed by auctioneers. The Applicant is apprehensive that if execution proceeds it will suffer irreparable loss and render the appeal nugatory.
3. It is deponed that the Respondent is not in a position to refund the decretal sum in the event that the appeal is successful. It is further stated that the appeal is arguable with high chances of success. The Applicant is willing to provide security for the due performance of the decree by depositing the decretal sum in an interest earning account or any other security ordered by the court.
4. The application is opposed. It is stated in the replying affidavit sworn by counsel for the Respondent, Wambui Njogu, that the Application herein is defective as it has been filed by a firm of Advocates that does not have the conduct of the matter on behalf of the Applicant and without an order for change of Advocates. It is further stated that the Appeal has no merits and has no chances of success and is meant to delay the Respondent from enjoying the fruits of his judgment. That the Applicant has not demonstrated that he will suffer irreparable loss particularly taking into account that the application seeks to stay a monetary decree.
5. The application was canvassed by way of written submissions which I have considered.
6. On whether the Applicant counsel is regularly on the record, it is noted that the application dated 6<sup>th</sup> March, 2018 which sought orders that leave be granted for the firm of Ngetich Ciira & Associates to come on record on behalf of the Respondents was allowed on 7<sup>th</sup> March, 2018.
7. 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.”**

8. The appeal herein was filed within time. The application at hand was filed on 13<sup>th</sup> February, 2018 five months after the delivery of judgment of the lower court was on 14<sup>th</sup> September, 2017. The delay is not unreasonable.

9. The Applicant has expressed its apprehension that the Respondent may not be in a position to refund the decretal sum. The Respondent has not said anything about his financial resources. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR**

**“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 Applicant has offered security for the decretal sum.

11. Although the decree herein is a monetary decree, there could be difficulties in refunding the same. 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 be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”**

12. To balance the competing interest of both parties herein, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the respective parties herein or in court within 30 days from date hereof.

Date, signed and delivered at Nairobi this 3<sup>rd</sup> day of Oct., 2018

**B. THURANIRA JADEN**

**JUDGE**