



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 73 OF 2018**

**COMMERCIAL TRANSPORTERS LIMITED.....1<sup>ST</sup> APPLICANT**

**JOHN MBURU KIGE .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ELIJAH NGIGE KURIA.....RESPONDENT**

**RULING**

1. The application dated 13<sup>th</sup> June, 2018 seeks orders that this Honourable Court be pleased to stay execution of the orders given on 12<sup>th</sup> of June 2018 and the judgment and decree given on 12<sup>th</sup> February, 2018 in Milimani Chief Magistrates Court (Milimani) Civil Case Number 10524 of 2007 Elijah Ngige Kuria v commercial Transporters Limited and John Mburu Kige, against the Applicants herein pending the hearing and determination of the Applicants' appeal against the trial court's Judgment and decree of the 12<sup>th</sup> of February 2018.

2. Secondly, that the decretal sum Ksh.3,376,606.02 deposited in court by the Applicants herein be preserved pending the hearing and determination of the Applicants' appeal against the trial court's judgment and decree of the 12<sup>th</sup> of February, 2018.

3. It is stated in the grounds and the affidavit in support of the application that the Applicants are desirous of filing an appeal but their application for stay pending appeal was dismissed by the trial court on 12<sup>th</sup> June, 2018. That the Applicants deposited the decretal sum of Ksh.3,376,606.02 pending the hearing of their application before the lower court. That the Respondents suit was filed out of time and the appeal has high chances of success and will be rendered nugatory if the instant application is not allowed. The Applicants are apprehensive that the Respondent whose means are unknown is not in a position to reimburse the decretal sum in the event that the appeal is successful.

4. The application is opposed. It is stated in the replying affidavit that the suit was filed after the Respondent had obtained leave to file suit out of time. That the appeal has no chances of success and will prejudice the Respondent who will not be able to enjoy the fruits of his judgment.

5. The application was argued by way of written submissions which I have considered.

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. It is not in dispute that the application for stay was dismissed by the lower court on 12<sup>th</sup> June 2018. The instance application was filed the following day on 13<sup>th</sup> June, 2016. There was no delay.

8. The Applicants' contention that they stand to suffer substantial loss as the Respondent is not in a position to refund the decretal sum has not been rebutted. 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.”**

9. The Respondent has already deposited the decretal sum in court.

10. With the foregoing, I allow the application. The decretal sum to remain deposited in court until the appeal is disposed of.

**Dated, signed and delivered in Nairobi this 19<sup>th</sup> day of Nov., 2018**

**B. THURANIRA JADEN**

**JUDGE**