



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 627 OF 2017

JOHN NJOROGE MUHIA.....APPLICANT

VERSUS

ROSE KARIMI NJOROGE.....1ST RESPONDENT

CITY HOPPER LTD.....2ND RESPONDENT

FREDRICK GITHAIGA WERU.....3RD RESPONDENT

RULING

1. The application dated 7th December, 2017 seeks orders that execution of the said decree and all consequential orders and steps be stayed until the appeal preferred against the said judgment is heard and determined.

2. It is stated in the grounds and the affidavit in support that the Applicant is on the verge of facing execution. That if the execution is carried out, the Applicant stands to suffer substantial loss as the 1st Respondent will not be able to refund the decretal sum which is in excess of Ksh.8,177,281/=. It is further stated that the appeal has merits. The Applicant is willing to deposit security for the due performance of the decree.

3. The application is opposed by the 1st Respondent. It is stated that the appeal does not have high chances of success and is merely a means to prevent the 1st Respondent from enjoying the fruits of her judgment. The court was implored to order that about Ksh.3,000,000/= be paid to the Advocates and the balance be deposited in a joint interest earning account in the names of the advocates.

4. The 2nd and 3rd Respondents are not opposed to the application.

5. I have considered the application, the response to the same and the submissions made by the counsels for the respective parties herein.

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 application was filed without unreasonable delay.

8. The Applicant has expressed apprehension that the 1st Respondent if paid may not be in a position to reimburse the decretal sum in the event that the appeal is successful. The 1st Respondent has not disclosed whether she has the capability to refund. 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. To balance the competing interest of both parties herein, I will allow the application on condition that 50% of the principal sum is deposited in a joint interest earning bank account of the counsels for the Applicant and the 1st Respondent or in court within 30 days from date hereof. Security for the other 50% to be deposited in court within the same period of 30 days.

Date, signed and delivered at Nairobi this 5th day of Dec., 2018

B. THURANIRA JADEN

JUDGE