



**REPUBLIC OF KENYA**

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

**CIVIL CASE 378 OF 2011**

**EZEKIEL NZUKI MUMO .....PLAINTIFF**

**VERSUS**

**JOHN KINUTHIA.....1<sup>ST</sup> DEFENDANT**

**BEATRICE W. NGARI .....2<sup>ND</sup> DEFENDANT**

**RULING**

On 5<sup>th</sup> July, 2015 the court gave judgment in favour of the plaintiff in the total sum of Kshs. 10,741,000/= general damages and Kshs. 63,976/= special damages. The 1<sup>st</sup> defendant was aggrieved by the said judgment and have lodged a notice of appeal dated 19<sup>th</sup> July, 2016.

There is now before me an application by way of Notice of Motion under Sections 1A and 1B of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules for the basic order of stay of execution pending the determination of the appeal. The application is by the 1<sup>st</sup> defendant who is apprehensive that if the order of stay is not issued the decree will be executed and the appeal rendered nugatory. It is the 1<sup>st</sup> defendant's position that the appeal has high chances of success and involves a substantial sum of money. There is a supporting affidavit sworn by Lucy Muriithi who in addition to other reasons depones that the 1<sup>st</sup> defendant is willing and able to abide by any conditions the court may give to secure the judgment sum. The application is opposed and there is a replying affidavit sworn by the plaintiff.

It has now transpired that the 1<sup>st</sup> defendant made an offer to pay part of the decretal sum pending the hearing and determination of the appeal. This has been confirmed by both parties. The provisions of Order 42 Rule 6 of the Civil Procedure Rules are clear. The application has been filed timeously and it is true that the plaintiff has no known source of income. The apprehension on the part of the defendant that if the decretal sum is paid to the plaintiff, and the appeal subsequently succeeds it may lead to substantial loss is well founded. Recovery thereof may become a challenge.

The 1<sup>st</sup> defendant has offered security which in my view is reasonable. Accordingly this application succeeds on the following conditions. There shall be a stay of execution of the decree herein on condition that the 1<sup>st</sup> defendant shall pay to the plaintiff a sum of Kshs. 2,000,000/= out of the decretal sum. The balance of the decretal sum shall be deposited in an interest earning account in the joint names of both advocates on record.

These two conditions shall be complied with within 30 days from the date of this ruling and the costs of this application shall be on appeal.

***Dated, signed and delivered at Nairobi this 22<sup>nd</sup> Day of February, 2017***

**A. MBOGHOLI MSAGHA**

**JUDGE**