



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CIVIL APPEAL NO. 18 OF 2016

RAILI ENTERPRISES.....APPLICANT

VERSUS

GEORGE MUTINDA KIOKO & AUGUSTINA PRISCILLA M. KIOKO (administrators and legal

representatives of the estate of **GODFREY KIOKO MUTINDA**).....**1ST RESPONDENT**

DAVID MUNYOKI.....2ND
RESPONDENT

RULING

1. The application dated **2nd June, 2016** is for Stay of Execution of the Judgment and Decree pending hearing and determination of **Civil Appeal No. 18 of 2016**.
2. The application is premised on grounds that: the Judgment was delivered on **10th May, 2016** and being aggrieved, the Applicant filed an **Appeal No 18 of 2016** at **Kitui High Court**. Unless Stay of Execution is granted, the Appeal shall be rendered nugatory and if the Appeal proceeds irreparable harm and damage will be occasioned to the Applicant being a **3rd Party** as recovery from the Plaintiff will not be possible.
3. The application is supported by an affidavit sworn by **Dilip Gudka** who described himself as a partner in the business name sued who averred that from the testimony of the Plaintiff at the hearing, he is an administrator and will not be in a position to repay if the judgment succeeds; in the circumstances the Appeal shall be rendered nugatory. If execution proceeds irreparable loss and damage will be occasioned as recovery will not be possible and the entity sued as a **3rd Party** is only a business name and the Appeal has overwhelming chances of success therefore the Stay of Execution should be granted unconditionally.
4. The Respondent through the firm of **J. K. Mwalimu and Company Advocates** filed grounds of opposition stating that the Judgment and subsequent Decree to be issued is a monetary Decree and payment of the same will not make the Appeal nugatory. The Respondent is a retired Teacher and Landlord per the evidence adduced therefore a man of means who can easily refund any monies paid to him. The Complaint against the Applicant is not against the Respondent or the award made by the Court but the Defendant before the Lower Court whose share has already been paid by **M/S CIC General Insurance Company Limited**, a sound Financial Insurer in Kenya that can easily refund the same if the Appeal succeeds; the Applicant has not furnished security for the due performance of the Decree as required in law.

5. The application was canvassed by way of written submissions. It was submitted by the Applicant that unconditional stay of execution should be granted because; The Appeal has a high chance of succeeding; the Judgment sum is big and if paid the 1st Respondent, a legal representative of the Deceased will not be in a position to refund the monies; the 2nd Respondent has already paid ½ the decretal sum; Therefore the Applicant will suffer irreparable sum.

6. The 1st Respondent on the other hand submitted that the Applicant failed to comply with conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** namely:

“That substantial loss will result if the stay is not granted; to provide such security as the court may order as may ultimately be binding on it by payment of a portion of the decree.”

7. Stay in case of an Appeal is provided by **Order 42 Rule 6(1)(2)** of the **Civil Procedure Rules** which stipulate thus:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (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. This Court has not had the benefit of perusing the Judgment of the Lower Court, however, a perusal of the Memorandum of Appeal filed clearly show that the Judgment was delivered on the **10th day of May, 2016** and the Appeal was filed on the **27th May, 2016**. The application for stay was subsequently filed on the **2nd June, 2016**. This was done timeously.

9. It has been submitted that the Applicant shall suffer irreparable loss. In the case of **Machira t/a Machira & Co. Advocates vs. East Africa Standard (No. 2) (2002) KLR 63** it was held as follows:

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to be satisfaction of the court, the court will not grant stay.”

In another case of **Sewakambo Diskson vs. Ziwa Abby HCT-00 CA MA 178 of 2005** it was stated thus:

“.....Substantial loss is a qualitative concept, it refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value that is merely nominal.....”

10. It is submitted that the sum in issue is big which may not be refunded by the 1st Respondent being a legal representative of the Estate of the Deceased if the Appeal is successful. It was stated that the 1st Respondent is a retired Teacher and a Landlord therefore capable of refunding the sum. What is not in dispute is the fact that he represents the Estate of the Deceased such that if the sum is squandered refunding it may not be easy. The decree is a monetary one but the circumstances set out may not be

favourable for refund purposes.

11. It has been stated and admitted that part of the decretal sum has been paid by the 2nd Respondent therefore if part of it is withheld pending hearing of the Appeal no injustice will be occasioned.

12. In the result, I allow the application for Stay of Execution on condition that the Applicant deposits **Kshs. 560,000/=** in Court within **7 days**. In default the application shall stand dismissed. Costs of the application shall abide the outcome of the Appeal.

Dated, Signed and Delivered at Kitui this 2nd day of February, 2017.

L. N. MUTENDE

JUDGE