



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 498 OF 2016**

**PAUL MWANIKI NTHIGA.....1<sup>ST</sup> APPLICANT**

**STRATEGIC MOBILE LIMITED.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JANE LEMPARASOROI (SUING ON BEHALF OF THE ESTATE OF  
JOSEPH LEMPARASOROI).....RESPONDENT**

**RULING**

1. The application dated 29<sup>th</sup> July, 2016 seeks orders for stay of execution of the judgment and decree and all consequential orders granted in CMCC No. 7665 of 2009 pending the hearing and determination of this appeal.
2. According to the affidavit in support, judgment was delivered in the Lower Court on 30<sup>th</sup> June 2016. The Appellants being dissatisfied with the judgment appealed to this court. It is stated that the Respondents financial resources are not known and would not be in a position to refund the decretal sum if the appeal succeeds. That the appeal which is arguable and has very high chances of success will be rendered nugatory, thereby occasioning the applicants substantial and irreparable loss.
3. The Respondent put in his reply and stated that the intended appeal is not arguable and averred that the applicants have not offered any security for the due performance of the decree as required by the law. It is argued that the applicants have not shown sufficient cause for grant of stay to warrant denying the Respondent the enjoyment of the fruits of the judgment.
4. The application was canvassed by way of written submissions which I have considered
5. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and**

**sufficient cause for not filing the appeal in time.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

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. Order 22 Rule 22 (1) of the Civil Procedure Rules provides as follows:

**“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.**

8. Sufficient cause is established if the conditions set out in Order 42 rule 6(2) are met. (See for example the following persuasive authorities: **Tabro Transporters Ltd v Absalum Dova [2012] eKLR**, **Wachira Karani v Bildad Wachira [2016] eKLR**).

9. On the question of substantial loss, the Applicants have expressed their fear that they may not recover the decretal sum in the event that the appeal is successful. This is substantial loss. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR**:

**“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”**

10. The Respondent has not said anything about his ability to refund the decretal sum. 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.”**

11. On whether the application was filed without unreasonable delay, it is noted that Judgment was delivered on 30<sup>th</sup> June 2016 and the application was filed on 29<sup>th</sup> July 2016 which was 28 days after the judgment was delivered. The appeal was filed timeously.

12. The court must take into consideration the provision of security for the due performance of the decree. The Applicants have not offered any security as required under the law. However, the court can exercise its discretion and make orders for the deposit of security.

13. On whether the appeal raises any triable issues, under Order 42 Rule 6(2) of the Civil Procedure Rules, the Applicants are seeking orders of stay pending appeal from the subordinate court to the High Court. The applicants are not required to prove that they have an arguable appeal, unlike if it was an application in respect of an appeal to the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. (See for example **Nakuru HCCC 211/98 – Maritha Njeri Wanyoike & 3 others vs Peter Machewa Mwangi & 5 others; Bake ‘N’ Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**).

14. To balance the interests of both parties herein, I allow the application on condition that the Applicants do deposit the decretal sum in a joint interest earning account of the counsels for both parties herein or in court within 30 days from the date hereof. Costs in cause.

**Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of March,2017**

**B.THURANIRA JADEN**

**JUDGE**