



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

**CIVIL DIVISION**

**CIVIL APPEAL 276 OF 2016**

**GUARANTY TRUST BANK (KENYA) LIMITED...APPELLANT**

**V E R S U S**

**EVANGELINE WANJIRA NJOKA.....RESPONDENT**

**RULING**

This is an application by the Appellant by Notice of Motion dated 27<sup>th</sup> May 2016 for the main order that there be stay of execution of decree pending hearing and determination of the appeal herein. It is brought under Sections 1A, 1B, 3A and 65(1)(b) of the Civil Procedure Act and Order 42, rule 6 of the Civil Procedure Rules. Sub-rule (1) of rule 6 donates to the court the jurisdiction to make the order sought subject to the conditions set out in sub-rule (2) of the rule. These conditions are:

- i. that the court must be 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
- ii. that such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

There is a supporting affidavit sworn by one RUTH MUIRURI who describes herself as the Head of Legal of the Appellant.

The Respondent has opposed the application upon the grounds set out in her replying affidavit sworn on the 6<sup>th</sup> June 2016. Those grounds are, that the Appellant shall suffer no substantial loss or damage or prejudice; that the appeal is vexatious with the intention of delaying payment of the decretal sum thus denying her the fruits of her judgment; that there has been unjustifiable and inordinate delay in filing this application; that the appellant's allegation that her assets are unknown is fallacious as she is the Chief Executive Officer of Kenya National Commission for UNESCO; that the appeal has no chances of success; that the appellant cannot claim it will suffer irreparable loss if the orders sought are not granted as it had a month to settle the decretal amount; that without prejudice to the foregoing that it is in the interests of justice that the appellant is compelled to pay the full decretal sum to be deposited in a joint interest earning account in the names of the Advocates appearing pending hearing and determination of the appeal.

I have duly considered the submissions of the learned counsels appearing and the authorities cited. It is paramount to state at the outset that the prospect of success or otherwise of the appeal is not one of the matters that I must consider in this application. It suffices that the Appellant has an undoubted right of

appeal which it has duly exercised, and that there is a proper appeal before the court. Whether or not the appeal is meritorious is a matter to be decided when the appeal is heard.

I have already set out above the matters that I am required by the law to consider. May substantial loss result to the Appellant unless the order of stay of execution sought is made? The Appellant's case is that should it be apprehensive that were it to pay this sum over to the Respondent it will have great difficulties recovering the same should its appeal succeed as her assets are unknown.

A court will normally not grant a stay of execution of a money decree. That, however, is not to say that the court will never grant a stay of execution of a money decree. It will depend on the circumstances of the case at hand. Should the Appellant succeed in demonstrating that it will have extreme difficulty in recovering the decretal sum from the Respondent in the event that it succeeds in its appeal, it will have succeeded in showing that it stands to suffer substantial loss. In that event the court would be entitled to order stay of execution of the decree in the interests of justice.

In the present case, the Respondent has denied the assertions by the Appellant and has stated that 'the appellant's allegations that assets are unknown and therefore if any monies were to be credited into account, it would not be recovered if the appeal is successful, is at best fallacious, baseless and meant to embarrass considering I am a lady of sound financial standing'. She has however not made any effort to show that she has any assets that the Appellant can have resort to, to recover the decretal sum in the event the appeal succeeds.

Still, I am not shifting the burden of proof from the Appellant to the Respondent; it is the Appellant's burden to prove the Respondent's inability to refund the decretal sum in the event of the appeal succeeding. But, equally, it is within the Respondent's peculiar knowledge as to what assets she may own, and she has not stated that she owns any assets by attaching a schedule of assets. I am satisfied on a balance that the Appellant may have difficulty recovering from the Respondent the decretal sum in the event of it succeeding in its appeal. An order of stay of execution of decree is therefore in the interests of justice.

The application has been brought without unreasonable delay. The Appellant is also prepared to give such security as the court may order for the due performance by it of the decree that may ultimately be binding upon it should its appeal fail. The Respondent is not opposed to deposit of the decretal amount in a joint interest earning account in the names of the advocates.

In the event, therefore, I will allow the application. There shall be an order of stay of execution of decree pending hearing and disposal of the appeal. This shall be subject to the condition that the Appellant does, within thirty (30) days of delivery of this ruling, deposit in an interest-earning account the decretal sum. The said account shall be opened in the joint names of the advocates on record for the parties who shall agree on the bank or financial institution in which to open the account.

Costs of this application shall be in the appeal.

*Dated, signed and delivered at Nairobi this 6<sup>th</sup> Day of April, 2017.*

**A. MBOGHOLI MSAGHA**

**JUDGE**