



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT NAIROBI**

**CIVIL APPEAL NO. 580 OF 2015**

**NATIONAL BANK OF KENYA ..... APPELLANT**

**VERSUS**

**ESTHER WAMBUI KARIUKI .....RESPONDENT**

**RULING**

The respondent sued the appellant for a sum of Kshs. 75,000/= which had been allegedly withdrawn from her account without her authority. Her cause of action was that, having been a customer of the appellant, the appellant owed her a contractual duty of care to prevent the said loss and therefore held the appellant accountable. The lower court gave judgment in the respondent's favour which led to the present appeal by the appellant.

The application before me is by way of Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 63 (2) of the Civil Procedure Act seeking a stay of execution of the lower court judgment pending the hearing of the appeal. The application is opposed and the respondent has filed grounds of opposition.

The grounds for the order sought are set out on the face of the application alongside an affidavit sworn by one Samuel Mundia, the Head of Commercial Transactions and Litigation at the appellant's legal department.

In line with the requirement under Order 42 Rule 6 of the Civil Procedure Rules, the appellant states it has complied therewith and is ready to furnish security for the due performance of the said decree. There is apprehension on the part of the appellant that it will not be able to recover the whole sum if it is paid to the respondent.

On the other hand the respondent states that the appellant has not demonstrated it will suffer substantial loss if the application is disallowed and the application is intended to delay the execution of the judgment. Both parties have filed submissions.

The judgment of the lower court was delivered on 18<sup>th</sup> November, 2015 and the application filed on 4<sup>th</sup> December, 2015. I find that there was no delay. As to the fear of suffering substantial loss, I note that the appellant is a financial institution offering banking services. If the sum of Kshs. 75,000/= is paid to the respondent and not refunded if the appeal succeeds, this cannot be said to amount to substantial loss. In any case, the respondent who had an account with the appellant leading to the present dispute by implication has demonstrated that she is not a person of straw.

On the other hand the appellant has offered to furnish security for the due performance of the decree. It must be remembered however, the respondent lost the money while the appellant was the custodian and in a position to safeguard the same. The opening of an account with the appellant is a prima facie demonstration on the part of the respondent that she is able to refund the said sum if the appeal succeeds.

In view of the foregoing, I allow the application but there shall be no stay of execution as sought by the appellant. The appellant shall satisfy the decree and await the determination of its appeal.

Each party shall bear their own costs for the application.

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

**A. MBOGHOLI MSAGHA**

**JUDGE**