REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 755 OF 2016

FRANCISCO KABIRA GATHARA......................................1ST APPLICANT

ELENA WACHERA KARIUKI...2ND APPLICANT

VERSUS

JOHN MUKIRIA WAWERU...1ST RESPONDENT

GRACE NJERI KIMANI ....2ND RESPONDENT

RULING

1. The application dated 15th December, 2016 seeks orders of stay of execution of the exparte judgment entered on 5th July, 2016 vide civil suit No. 3018 of 2016 and any other consequential orders thereto pending the hearing and determination of this application and the appeal herein.

2. The application is supported by the grounds stated in the application and is supported by the affidavit sworn by Elena Wachera Kariuki, the 2nd Applicant.

3. It is stated that exparte judgment was entered against the Applicants on 5th July, 2016 in the sum of Ksh.3,617,896/=. The said amount arose out of an alleged sale of shares. The Applicants complaint is that they were not served with summons to enter appearance or any court process at all. According to the Applicants, they came to learn of this suit when a copy of the decree, a plaint, a verifying affidavit witness statements, list of documents and two demand letters were thrown into their compound by an unidentified person.

4. Subsequently the Applicants applied to have the exparte judgment set aside but the application was dismissed, hence the appeal herein. The Applicants are apprehensive that if the Respondents proceed with execution, the appeal will be rendered nugatory. It is stated that the appeal has high chances of success and the Applicants stand to suffer substantial loss. That the appeal has been filed timeously and the Applicants are willing to abide by any terms set by the court regarding the prosecution of the same.

5. The application is opposed. According to the replying affidavit, the parties herein entered into an agreement but the Applicants failed to honour their side of the bargain.

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. During the hearing of the appeal, the parties opted to file written submissions. I have considered the said submissions.

10. The ruling of the lower court was delivered on 9th December, 2016. The instant application was filed on 15th December, 2016. The application was filed timeously.

11. The Applicants have a right of appeal. The loss of the decretal sum would be substantial loss and may render the appeal nugatory. 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."**

12. The Respondents have not shown that they are capable of refunding 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."**

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

Date, signed and delivered at Nairobi this 15th day of June, 2017

B. THURANIRA JADEN

JUDGE