



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 759 OF 2016
ISAAC MWANGI MARI.....APPLICANT
VERSUS
ASVINKUMAR VELANI.....RESPONDENT
RULING

1. The application dated 15th December, 2016 seeks orders that:-

1. ***“This application be certified as urgent.***
2. ***Service be dispensed with in the first instance.***
3. ***That a stay of execution in CMCC.2878 OF 2015 be granted pending the hearing and determination of this application.***
4. ***The said leave do operate as a stay of all proceedings.***
5. ***The costs of this application be provided for.***
6. ***Any other orders that meets the ends of justice.”***

2. It is stated in the affidavit in support and the supplementary affidavit sworn by the applicant, **ISACK MWANGI MARI** that a default judgment was entered against him on 14th July 2016. Being aggrieved by the said judgment, the applicant lodged the appeal herein. It is further stated that the appeal has high chances of success and will be rendered nugatory if stay of execution is not granted. The Applicant denies owing the Respondent any money and described the Respondent’s claim as false and malicious.

3. The application is opposed. It is stated in the replying affidavit that the applicant has not demonstrated that he will suffer substantial loss. That the claim herein is a monetary claim of Ksh.540,000/= arising out of a failed sale of motor vehicle transaction. The Respondent further stated that he is employed and is capable of refunding the decretal sum. That he also has moveable and immoveable assets valued at not less than Ksh.10 million

4. **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.”

5. The Application at hand was filed on 16th December, 2016. The ruling the subject of this appeal was delivered on 23rd November, 2016. The application was filed timeously.

6. The applicant has exhibited a copy of the extracted decree. If execution proceeds, the appeal may be rendered nugatory and the applicant will thereby suffer 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.”

7. The Respondent has not exhibited any documents in support of the assertion that he is capable of refunding the decretal sum in the event that the appeal is successful.

As stated by the Court of Appeal in the case of **Nairobi 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 respondent or the lack of them. One 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.”

8. The Applicant has not offered any security for the due performance of the decree. However, the court can exercise its discretion and make orders for the deposit of security.

9. On whether the appeal has high chances of success, under ***Order 42 Rule 6 (2) of the Civil Procedure Rules***, the Applicant is seeking orders of stay pending appeal from the subordinate court to the High court. The applicant is not required to prove that he has 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- Martha Njeri Wanyoike & 3 others –vs- Peter Machewa Mwangi & 5 Others; Bake ‘N’ Bite (Nrb) Limited –vs- Daniel Mutisya Mwalonzi [2015] eKLR**).

10. Prayers No. 1, 2, and 3 of the application are spent. Prayer No. 4 of the application is misplaced and appears out of context. However, the interest of justice would be secured by allowing stay of execution in **CMCC 2878 OF 2015** pending the hearing and determination of the appeal herein. It is so ordered on condition that the Applicant do deposit the decretal sum in a joint interested earning bank account of the counsels of both parties herein or in court within 30 days from the date hereof. Costs in cause.

Date, signed and delivered at Nairobi this 14th day of June, 2017

B. THURANIRA JADEN

JUDGE