

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HIGH COURT CIVIL APPEAL NO. 43 OF 2015

BONFACE NZIOKA MALUNDIAPPLICANT/APPELLANT

VERSUS

JEREMIAH KARIUKI MWANIKIRESPONDENT

RULING

1. This is an application for stay of execution brought by notice of motion under Section 3(a) of the Civil Procedure Act (Cap 21) Laws of Kenya and under Order 42 Rule 6(1) of the 2010 Civil Procedure Rules.

2. The application is anchored in the supporting affidavit of Yvonne K. Maragia dated 2nd November 2015. It is also supported by the grounds on the face of the motion. Among those grounds are that there is threat of execution unless stay is granted. The second ground is that the appeal is arguable and has a high probability of success. The third ground is that unless stay of execution is granted, the applicant's appeal will be rendered nugatory and that the applicant is likely to suffer irreparable damage. Furthermore, the applicant has stated that he may suffer substantial loss if execution were to proceed and his appeal succeeds. Finally, the applicant has stated to he is willing to deposit Kshs. 1,000,000/0 in a joint interest account with the plaintiff/respondent as security for the due performance of such decree or order as may be ultimately be binding on him.

3. In her supporting affidavit, the applicant has amplified in evidentiary terms what has been stated in the grounds in support of the motion for stay of execution. However, she has added in paragraph 8 that the plaintiff/respondent will not suffer any prejudice if these orders are granted. It is for those reasons that stay of execution is sought. Counsel for the applicant filed a written submission in support of the order for stay of execution. It is important to point out that the decretal amount was in the sum of Kshs. 4,720,934.85 plus costs and interest, which counsel submits is a colossal sum of money. In addition, counsel submitted that the respondent has neither disclosed to the court what his financial standing is nor has he disclosed any assets that he owns and that in case he is paid the entire decretal amount and the appeal favours then Applicant, he will be able to satisfy the orders given in the appellate court.

4. The Respondent has opposed the application for stay of execution. According to his counsel, an applicant for stay of execution, must satisfy three conditions before an order is made in his favour in terms of Order 42(6) of the 2010 Civil Procedure Rules. Those conditions are as follows:

- i. the applicant must satisfy the court that there shall be substantial loss resulting unless the execution of the decree is stayed.
- ii. 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.
- iii. Such application must be brought without unreasonable delay.

5. Counsel for the Respondent also filed submissions in opposition to the grant of an order of stay of execution pending the hearing of the appeal. He also cited a number of authorities which I have perused.

6. I have perused the affidavit evidence of the parties and I have also considered their submissions. I find that the appellant has an arguable appeal. I also find that the subject matter of the appeal should be

preserved pending the hearing and determination of the appeal. I have agonized over the amount of money to be deposited as security and I find that the applicant should deposit a sum of Kshs. 1,500,000/- into the court as a condition of granting the stay of execution. The applicant should deposit this sum of money within a period of two months failing which the stay order will lapse automatically.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **6th** day of **JUNE 2016**

In the absence of both counsel for the applicant and the respondent and in the absence of the parties.

Court clerk R. Njue

J. M. BWONWONGA

JUDGE

06.06.16