



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISC. APPLICATION NO. 292 OF 2013

1. KIBE JOSEPH

2. FAMILY BANK LIMITED APPLICANT
VERSUS

RUTH MUTIO KIMILURESPONDENT

RULING

1. The application dated 11/12/13 seeks the following orders:-

1. **“(Spent).**
2. **(Spent).**
3. **That the Applicant be granted leave to appeal out of time and the annexed Memorandum of Appeal be deemed as filed upon the payment of the requisite court fees.**
4. **That the court do grant a stay of execution pending hearing and determination of the appeal.**
5. **That the Applicant be allowed to provide sufficient security in form of a security bond to ensure that if the appeal does not succeed, the Respondent shall be able to get the fruits of their judgment without delay.**
6. **That the costs of this application do await the outcome of the appeal”.**

2. According to the affidavit in support and the supplementary affidavit, there was a 20 days’ delay in filing the appeal. This is blamed on the misplacement of the file in the insurer’s office. The Applicants have argued that they stand to suffer substantial loss if there is no stay of execution. The Applicants are also apprehensive that if the decretal sum is paid, the Respondent will not be in a position to refund the same in the event that the appeal is successful. The Applicants are ready to deposit security in terms of an insurance bond.

3. The application is opposed. According to the replying affidavit, the issue of the misplacement of the file is questionable. It is further averred that no explanation has been given for the inordinate delay. That the Respondent should not be delayed further from the enjoyment of the fruits of her judgment. The Respondent has proffered that since the Applicants were ready to pay Kshs.380,000/= during the negotiations between the parties, then the said amount should be released to the Respondent and the balance deposited in an interest earning account of both parties.

4. The application was canvassed by way of written submissions which I have duly considered.

5. **Order 42 rule 6** provides as follows:-

“No order for stay of execution shall be made under subrule (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.”**

6. The 20 days’ delay is not inordinate and has been explained.

7. The Applicants have expressed the fear that the Respondent may not be able to refund the decretal sum in the event that the appeal is successful. However, the Respondent has not demonstrated her ability to refund the decretal sum in the event that the appeal is successful. It is noted that the negotiations alluded to have been denied. As stated by the Court of Appeal in **National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & Another Civil Application Nai 238 of 2005 (UR. 144/2005):-**

“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.”

8. With the foregoing, I allow the application on condition that the entire judgment amount be deposited in court or in an interest earning account of both counsels for the advocates herein within 30 days from date hereof. In default execution to issue.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 5th day of **February** 2015.

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B. THURANIRA JADEN

JUDGE