



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.106 OF 2005**

**MWAURA KARUGA T/A LIMIT ENTERPRISES.....PLAINTIFF**

**Versus**

**KENYA BUS SERVICES LTD.....DEFENDANT**

**AND**

**KARANJA KABAGE.....1<sup>ST</sup> APPLICANT/DIRECTOR**

**SAMUEL KIMUCHU GICHURU.....2<sup>ND</sup> APPLICAN/ DIRECTOR**

**EDWINS MUKABANA MASSIMBA.....3<sup>RD</sup> APPLICANT/DIRECTOR**

**STANLEY MURAGE.....4<sup>TH</sup> APPLICANT/DIRECTOR**

**RULING**

**Substitute security**

[1] The Directors herein applied by a Motion dated 14<sup>th</sup> April 2015 for review of orders made on 19<sup>th</sup> March 2015 which required them to deposit the decretal sum in court. They have made a request for the court to substitute the security thereof with an order that, one of the Directors to provide a bank guarantee of a similar amount from a reputable bank. The applicants listed five (5) reasons in support of their request which I will condense as follows:-

- a. That the guarantee is easier to realize and ensures that the funds are available to the decree-holder in the event the appeal fails;
- b. That it is easier, faster and cost effective to obtain a guarantee than borrow money to deposit in an account;
- c. That a bank-guarantee offers benefit to both parties.

[2] They relied on Order 42 rule 6 (2)(b) of the Civil Procedure Rules which they stated envisages any security that will ensure due performance of the decree as may be ultimately binding on the judgment-debtor. They cited the case of **Kilimanjaro Safari Club Ltd vs County Council of Olkejuado** where Visram J (as he then was) held that Order 44 on Review may be invoked in a case of substitution of a security, and that the essence of security is to protect both sides. The substitution will not prejudice the judgment-creditor.

[3] The judgment-holder opposed the application on grounds that court orders should be obeyed. Further, a bank guarantee will not earn any interest compared to a deposit in interest earning account in a bank. They also urged that the applicants have not come out clean to say that they are unable to raise the cash.

### DETERMINATION

[4] Order 42 rule 6 (2) (b) of the Civil Procedure Rules is very clear that stay will not be ordered unless.

***...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.***

First of all, the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick. The question is this; will bank-guarantee grow in tandem with the decretal sum herein which also attracts interest until payment in full? I think not. Also, contrary to the submission by the Applicants, bank-guarantee will not ensure due performance of the decree which may ultimately be binding herein or produce benefits to both parties. It will only produce benefits to the applicant in the sense that they will have provided insufficient security-if at all there is such benefit in cheating the law. I have stated before, in the case of **Apar Industries Limited vs Joe’s Freighters Limited [2015] eKLR** and I am glad it is a matter directly in issue in this application, that:-

***From the extracted Decree the amount due on the judgment is Kshs.104, 577, 533/= in addition to costs and interest thereon. It is worth repeating that security in Order 42 rule 6 of the CPR is for the performance of the decree which might ultimately be binding on the judgment-debtor-Applicant. See the case of VisramRavjiHalai&Ano. vs. Thorntorn&Tupin [1963] Ltd Civil App. No. NAI 15 of 1990, where the Court of Appeal held that the court ought not to place the Plaintiff in a position in which should the appeal fail, it would be difficult for plaintiff to realize the fruits of his litigation due to the inadequacy of the security ordered. Accordingly, I order stay of execution of the decree herein but on condition that the Applicant deposits the entire decretal sum as reflected in the decree herein in a joint escrow account at Kenya Commercial Bank, Milimani High Court Branch; Nairobi within 45 of today. The account should be interest earning account in the joint names of the counsels for the parties. The Applicant will also pay costs of the application. It is so ordered.***

[6] In civil litigation especially where security required is in monetary form, it is prudent that courts are sensitive to the economic realities of the day and should direct that such funds be invested in an interest earning account so as to prevent any loss to the party who will ultimately realize or take back the security. This practice is common where courts have had to issue intermediate orders of preservation of funds which are under the process of recovery within the regimes of breach of trust fund, anti-money laundering and anti-corruption statutes. In this manner, both parties are protected; the successful party takes home the deposit plus the interest he is entitled to. The benefit is more appreciated when one fathoms that the appellant, if he is the successful party will also have interest on the deposit as return on investment. The order as the one I issued on 19<sup>th</sup> April 2015 is most ideal as it will serve the interest of both parties in line with the purpose of relief of stay of execution as formulated in law. On this, see the enunciation in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** that:

***“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves.***

**This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...’.**

[7] For those reasons, I decline the applicants’ request for substitution of security herein. The upshot is that I dismiss the application dated 14<sup>th</sup> April 2015 with costs to the judgment-creditor. I, however, hereby grant the applicants 14 days from today to deposit the entire decretal sum in an interest earning account in the terms set out in the ruling of 19<sup>th</sup> May 2015. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 8<sup>th</sup> day of May 2015.**

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**F. GIKONYO**

**JUDGE**