



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 136 OF 2013

1. JOSEPH WAMBURU TUMBU
2. SIMON KIMANI TUMBU APPELLANT/APPLICANTS

VERSUS

MICHAEL MUTISO MULWA RESPONDENT

RULING

1. The application dated 22/7/13 is brought under **Order 42 Rule 6 (1) (2) Order 51 Rule 1** of the **Civil Procedure Rules, section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law. The application seeks an order for stay of execution of the judgment delivered on 21st November 2012 pending the hearing and determination of the **Appeal No. 136 of 2013** on similar terms as those given in the application seeking leave to appeal out of time being Misc. Application No. 28 of 2013.
2. The application is supported by the affidavit of **Lilian Munyiri** sworn on 22/7/2013. According to the said application, judgment was delivered by the lower court on 21/11/2012. An application seeking the leave of the court to appeal out of time was allowed on 27/6/13. The Applicants' fear is that the Respondent may move to execute before the determination of this appeal, thereby rendering the appeal nugatory.
3. In opposition to the application, the Respondent swore a replying affidavit on 29/7/13. The Respondent's stand is that the Applicants have not demonstrated what prejudice would be suffered if the stay pending appeal is not granted. That liability was conceded on 80:20 basis and judgment entered for a sum of Kshs.120,000/=.
4. The application was canvassed by way of written submissions which I have duly considered.
5. The conditions to be met under **Order 42 rule 6 (2)** are 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 threat of execution is real. According to the affidavit in support, the Applicants' goods had already been proclaimed before a stay was granted. If the execution proceeds the appeal will be rendered nugatory. The Respondent has not demonstrated that he is capable of refunding the decretal sum should the appeal succeed. 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.”

7. The application to appeal out of time was allowed on 26/6/2013 according to the unchallenged contention in the affidavit in support. The appeal was filed on 2/7/2013. The delay must have therefore been explained in the application to appeal out of time.
8. Although the Applicant has averred that security in the form of an insurance bond has already been deposited, I note from the Memorandum of Appeal that the Applicants’ complaint is that the award of General Damages was manifestly excessive. The Respondent’s liability was conceded in his favour at 80:20. The court must therefore balance the interests of both parties.
9. As stated by the Court of Appeal in **Kenya Shell Ltd. Vs Kibiri & Another (1986) KLR**

“In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

10. Taking into account the circumstances of this case, my view is that the interests of justice will be served by the payment of 50% of the decretal sum while the applicants pursue their appeal.
11. Consequently, I allow the application on condition that the Applicant do pay 50% of the decretal sum to the Respondent within 30 days from the date hereof. In default execution to issue.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 13th day of February 2014.

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B. THURANIRA JADEN

JUDGE