



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 82 OF 2013**

**NGIRARIOUS MWANGI .....**  
**APPELLANT/APPLICANT**

**VERSUS**

**WASHINGTON ODHIAMBO WANYANG'**

(Suing as Legal Representative of the Estate of

MARY OKELLO.....  
..... **RESPONDENT**

**R U L I N G**

1. The application dated 20/5/2013 seeks an order of stay of execution of the judgment/decree issued by the trial court on 12<sup>th</sup> April 2013 by the **Honourable N. Gesora** pending the hearing and determination of the Applicant's Appeals filed herein. The application is supported by the application sworn by **Lindsey Mugambi**, the Legal Manager of the Applicant's insurer.
2. It is deponed in the said affidavit that in the lower court judgment, the Applicant was found 100% liable and the Respondent awarded Kshs.4,243.052 as General Damages. The Applicant was aggrieved by the said judgment and appealed to this court. The Appellant is apprehensive that if there is no stay of execution, in the event that the Respondent executes, the appeal herein will be rendered nugatory. The Applicant is ready and will deposit the decretal amount in an interest earning account of both parties or furnish security for the decretal sum. The Applicant fears that if the decretal amount is paid, the Respondent would not refund it if the appeal is successful.
3. In opposition to the application, the Respondent, **Washington Odhiambo Wanyang'** swore a replying affidavit on 11/6/2013. The Respondent's contention is that on 30/4/2013, the Applicant's insurer had written to him expressing readiness and willingness to pay Kshs.3 Million of the decretal sum. That the Respondent should be allowed to enjoy the fruits of his successful litigation. It is the Respondent's contention that the Applicant has not demonstrated the Respondent's inability to pay the decretal sum if the appeal is successful and averred that it would be fair and just for the Respondent to be ordered to pay Kshs.3 Million.
4. **Order 42 rule 6 (2)** states 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."**

5. The appeal herein challenges the judgment on both liability and the award of General Damages. The Memorandum of Appeal demonstrates an arguable appeal. The Applicant did not challenge the affidavit evidence that at some point in time he was ready to pay the sum of Kshs.3 Million to the Respondent. It is however not clear why the payment flopped. On the other hand, the Respondent is the successful litigant who should not be denied the fruits of his judgment. 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.”**

6. The Respondent has however not demonstrated his ability to refund the decretal sum in the event that the appeal is successful. It is not sufficient for the Respondent to sit back and merely state that the Appellant has not demonstrated the (Respondent’s) ability to pay. The facts on whether the Respondent is able to pay or not are in his own knowledge and therefore the responsibility to prove so lies on him.
7. 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. In the circumstances of this case, my humble view is that the interests of justice would be served by the payment of 50% decretal sum pending the hearing of the appeal. The said amount to be paid within 30 days from the date hereof. In default the execution issue.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 12<sup>th</sup> day of **March** 2014.

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**B. THURANIRA JADEN**

**JUDGE**