



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 130 OF 2009

1. WINFRED MUTHEU KIAMUKO

2. TITUS MAUNDI NZAMBU.....PLAINTIFFS/RESPONDENTS

VERSUS

1. SWALEH BREKI ISLAM

2. MASH BUS SERVICES LIMITED.....DEFENDANTS/APPLICANTS

R U L I N G

1. The application dated 4/7/12 seeks an order of stay of the decree given by this Honourable Court by **Hon. Mr Justice George Dulu** on 7th June, 2012 and the Plaintiffs be restrained from proceeding with execution of the said decree pending the hearing and determination of the Defendants'/Applicants' appeal in the Court of Appeal.

2. The application is supported by the affidavit of **George Mahugu**, the counsel for the Applicants. It is deponed that judgment was entered herein in favour of the Respondents on 7/2/2012 for the sum of Kshs.7,363,286/= together with costs and interest. The Applicants were aggrieved by the said judgment and filed a Notice of Appeal. The Applicants are apprehensive that if a stay of the decree and all the consequential orders is not granted, the Respondents may execute the same, thereby rendering the appeal nugatory as the Respondents may not be in a position to refund the decretal amount if the appeal is successful. The Applicants have further averred that they have brought the application without delay and that they are ready to provide reasonable security for the performance of the decree.

3. In opposition to the application, the Respondents filed a replying affidavit sworn by the 1st Respondent, **Titus Maundu Nzambu**. It is the Respondents' case that there is no threat of execution. That the Applicants have not demonstrated that they would suffer substantial loss and that no security has been provided for the performance of the decree. It is further asserted that the 1st Respondent is a successful banker and the 2nd Respondent is a propertied man and that are capable of refunding the decretal sum in the event that the appeal is successful.

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

5. **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.”

6. Liability was apportioned by the consent of both parties at 20% against the Plaintiffs/Respondents and 80% against the Defendants/Applicants. Subject to this apportionment of liability, judgment was entered for the Plaintiffs/Respondents at Kshs.7,363,286 plus costs and interest.

7. Although the Respondents have not yet commenced the execution process the threat of execution is real. Any execution could result in substantial loss to the Applicants. Although the Respondents have stated that they are capable of refunding the decretal sum in the event that the appeal is successful, they have not given evidence of any assets that they have save for generally stating that the 1st Applicant is a successful banker and that the 2nd Respondent is a propertied man. The facts as to the Respondent’s capability is within their knowledge therefore proof of the same lies on their side. 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. The application herein was filed without any delay. However, the court has to 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 propositions, 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. A liability having been settled by consent, I am persuaded that the Respondents can enjoy 2/3 of the decretal sum while the rest awaits the outcome of the appeal. Consequently, I make the following orders:-

a. The Applicants to pay 2/3 of the decretal sum within the next 30 days from date hereof. In default execution to issue.

b. The Applicants to provide security within 30 days from date hereof for the remainder of the decretal sum.

c. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **12th** day of **March** 2014.

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B. THURANIRA JADEN

JUDGE