



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 195 OF 2013

**1. MULTIPLE HAULIERS (E.A) LTD.
2. JAMES IGOGO WACHIRA APPELLANTS/APPLICANTS**

VERSUS

NAKAY KUKAN KIPASI RESPONDENT/RESPONDENT

(Before B. Thurania Jaden J)

R U L I N G

1. The application dated 30/9/2013 seeks orders that pending the hearing and final determination of the appeal filed herein, there be a stay of execution of both the judgment and the decree of the subordinate court delivered on 14th June, 2013 at **Machakos in CMCC No. 546 of 2012** and all consequential orders emanating therefrom.
2. The gist of the application is that judgment was delivered after the case had proceeded to a full hearing but without the Defendant's witnesses being called as the Applicants' advocates representative proceeded to close the defence case. That efforts made after the delivery of the judgment to have the judgment set aside and re-open the case were not successful, hence this appeal. It is argued that the Applicants' appeal has overwhelming chances of success and that therefore the Appellants are likely to suffer substantial loss and prejudice if execution of the decree proceeds as the Respondent is of unknown means and will not be able to refund the decretal sum. The Applicants are willing to abide by any conditions set by the court on security for the due performance of the decree.
3. In opposition to the application, the Respondent filed a replying affidavit sworn on 24/10/13. The Respondent has averred that the Applicants chose to close their case without calling any witnesses and there is therefore no chance of the appeal succeeding. That the application was brought too late in the day and is only meant to deny the Respondent of the fruits of his judgment. That the allegations that the Respondent is a person of unknown means are baseless.
4. **Order 42 rule 6 (2)** 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.”**

5. The Judgment of the lower court was delivered on 14/6/2013. The Applicant opted not to call witnesses and therefore squandered the opportunity to present their evidence. Thereafter no application for the re-opening of the case seems to have been made until the delivery of the judgment. From the facts at hand, it is highly unlikely that the Applicants will succeed on a 100% basis.
6. 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.”

7. On the other hand, As stated by 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. I think the interests of justice in this will be served by the payment of 50% of the decretal sum to the Respondent and the deposit of the balance in court or in an interest earning account of both parties within 30 days from date hereof in default execution to issue. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 15th day of May 2014.

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B. THURANIRA JADEN

JUDGE