



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CASE NO. 72 OF 2018**

**(FORMERLY CIVIL APPEAL NUMBER 564 OF 2018)**

**TOM AKOYO MBIRIKA).....1<sup>ST</sup> APPELLANT/APPLICANT**

**VIOLET MUKABI JORAM.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**SHAMSHI KASSAM HOLDINGS.....RESPONDENT**

**RULING**

The Appellants seek an order to stay execution of the judgement delivered on 16/11/2018 by the Honourable Mr. Peter Muholi, Senior Resident Magistrate in **Milimani CMCCC No. 380 of 2014** upon such terms of security as the court may deem fit to grant pending hearing and determination of the appeal. The application, which is dated 10/12/2018 is based on the grounds that the Respondent may proceed to attach the Appellants' goods which would cause the Appellants irreparable harm and prejudice. The Appellants also rely on the ground that the license agreement which the Respondent relied on before the magistrate's court had been declared a forgery by the Government Document Examiner. The Appellants claim that it may not be possible to recover the decretal sum from the Respondent if they were to pay the decretal sum to the Respondent.

The court has looked at the supporting affidavit sworn by the 1<sup>st</sup> Appellant together with the annexures attached. He avers that the learned magistrate failed to consider the Appellants evidence and that the sum of Kshs.1,477,450/= was not proved. The court has looked at the judgement of the Learned Magistrate in which the court awarded the sum of Kshs. 1,477,450/= to the Respondent having found that the goods held by the Respondent had attracted storage charges. The court has also considered the averments in the replying affidavit sworn by Imran S. Tarmohamed, the Respondent's director who deponed that the Respondent will be in a position to pay the decretal amount if the appeal succeeds. He further depones that the Respondent stands to suffer prejudice if an order for stay is issued since it continues to hold the Appellants goods which the Appellants have refused to collect. The 1<sup>st</sup> Appellant swore a further affidavit which was filed in court on 19/2/2019 claiming that the Respondent was holding the Appellants' property valued at Kshs. 19 million which could act as security.

Under Order 42 Rule 6 of the Civil Procedure Rules, an Appellant must show the court that substantial loss will result unless an order of stay is granted. He must also make the application without unreasonable delay and furnish security as the court may order for the due performance of the decree that may ultimately be binding on him. The application was brought without delay. The Appellants have not shown the court that they will suffer substantial loss if the orders of stay are not granted. The Appellants have not furnished security for the due performance of the decree that may be ultimately be binding of them. No record was presented to court to confirm that the Appellants goods which they claim the Respondent is holding are worth 19 million. The Appellants have not given any reason for the failure to collect their goods from the Respondent. The goods cannot act as security.

The application dated 10/12/2018 is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 28<sup>th</sup> day of March 2019.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. M. Munoko for the Appellants

Mr. E. Ondarifor the Respondent

Mr. V. Owuor- Court Assistant