



**Makena & 2 others v Ntinyari (Civil Appeal E156 of 2023)
[2023] KEHC 24680 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E156 OF 2023
EM MURIITHI, J
OCTOBER 30, 2023**

BETWEEN

FAITH MAKENA 1ST APPELLANT

LYNTONS PHARMACY LIMITED 2ND APPELLANT

FARMERS CENTRE LIMITED 3RD APPELLANT

AND

LYDIA NTINYARI RESPONDENT

*(Appeal from the judgment and decree of the Hon. M.A. Odhiambo,
SRM, delivered on 31/8/2023 in Meru CMCCC No. 150 of 2020)*

RULING

1. The applicant seeks stay of execution pending hearing and determination of the appeal from the judgment of the trial court delivered on 31/8/2023 in a personal injury claim against the appellant and 2 others in Meru CMCCC No. 150 of 2020 where liability was apportioned at 100% against the defendants, now appellants, arising in a traffic accident. It is noted at the outset that the application dated 26/9/2023 for stay of execution was filed without delay before expiry of the 30-day stay granted by the trial court.
2. The Judgment against the appellant was sum is Ksh. 5,863,294 together with costs and interest at court rates. The applicants are ready to deposit into a joint interest earning account in the names of the counsel for the parties the sum of Ksh.3,000,000/- the extent of the statutory obligation of an insurance company (Britam Insurance) under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Insurance Act* cap. 405. The Respondent's replying affidavit queries why the applicant does not talk of the balance of Ksh.2,8 million of the decretal amount plus costs in the primary suit.



3. Despite express averment that “should execution issue and the sum of Ksh.3,000,000/- be paid the respondent will not be in a position to refund this sum in the event the likely appeal succeeds” the Respondent does not rebut this allegation with any cogent evidence. The court accepts that substantial loss would in the event occur.
4. Of course, the appellants are liable to the full extent of the decretal sum, but the security required by Order 42 rule 6 of the Civil Procedure Rules need not be equal to the full amount of the judgment. While the respondent is entitled to recover for the defendant and their insurance, the present statutory limit recoverable from the Insurance is Ksh.3Million, the balance being recoverable from the insured.
5. A deposit of the sum recoverable from the insurance in this case is sufficient security for purposes of the stay of execution pending appeal in the suit where the appeal has been preferred against both the liability and apportionment as well as the quantum of the award, and the not having demonstrated ability or means to reimburse the applicants should the appeal be successful and execution carried out in the meantime. The court does not see the need to provided security for the full amount of the judgment in this case where part of it is recoverable from the insurance and the other part by the insured, in which case, there may be need to order that the security be provided therefore from the two persons.
6. While the respondent may require some money for the future medical expenses awarded by the trial court at Ksh.3,000,000/-, the fact of lack of evidence of ability to refund and the challenge on liability and apportionment as well as the quantum dissuades the court from making an order, as requested by the respondent for her enjoyment of the fruits of the judgment, by partial payment of the decretal sum to her.
7. The court has noted that the proceedings and judgment of the trial court are typed and certified, and it should take the shortest time to prepare and file the Record of Appeal.

Orders

8. Accordingly, for the reasons set out above, the Court does allow the application dated 26/9/2023 for stay of execution pending appeal on conditions that –
 - a. the appellants shall deposit into a joint interest earning account in the names of the Counsel for the parties the sum of Ksh.3,000,000/- within 14 days; and
 - b. the appellant shall file the necessary Record of Appeal within thirty (30) days from today.
9. Directions for purposes of hearing of the appeal shall be taken on 11/12/2023.
Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF OCTOBER, 2023.

EDWARD M. MURIITHI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances:



M/S J. M. Mwangi & Co. Advocates for the Appellants.

M/S Vivian Loice Aketch & Co. Advocates for the Respondent.

