



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO. 86 OF 2018**

**BUDGET DRIVING SCHOOL....APPLICANT/APPELLANT**

**VERSUS**

**ANN SYOMBUA MUSEE.....RESPONDENT**

*(Being an Appeal from the Judgment in Kitui Chief Magistrate's Court Civil Suit No. 463 of 2016*

*by Hon. J. M. Munguti (PM) on 19/09/18)*

**RULING**

1. By way of Notice of Motion the Appellant/Applicant, seeks stay of execution of the Judgment and/or Decree in **Kitui CMCC No. 463 of 2016** herein, and/or any other consequential orders arising therefrom pending hearing and determination of the Appeal.
2. The Application is premised on grounds that the Applicant stands to suffer irreparable loss and grave prejudice while no prejudice or such loss stands to be suffered by the Respondent if the same is allowed. That he is able and willing to abide by the terms as to security as shall be ordered by the Court And the outcome of the Appeal.
3. The Application is supported by an affidavit sworn by **Patricia Mugambi**, a Legal Officer with **Geminia Insurance Company Limited** the insurer of the Appellant who deposed that she was informed by the Advocate in conduct of the matter that the Respondent was awarded damages in the sum of **Kshs. 2,400,000/=** and special damages of **Kshs. 5,500/=** less **20%** contributory negligence. That the insurer is able to pay the sum awarded if the Appeal is not successful, but the sum is substantial such that the respondent will not be in a position to refund if the Appeal is successful as she has no known means of restitution. That the Applicant is willing to comply with any terms of security that may be ordered by the Court.
4. An affidavit in reply was sworn by **Ann Syombua Musee** who deposes that the Application is not made in good faith as it is aimed at delaying payments in the matter to derail her from enjoying fruits of the Judgment. That after the accident she has had to rely on handouts from friends and relatives to pay hospital bills and feed her family which she has never refunded and she is pressured as she had promised to pay upon finalization of the claim. That as a result of the accident she cannot do manual work as she used to do and the Appeal will make it difficult for her to survive. She called upon the Court to order the Applicant to pay her half the decretal amount of **Kshs. 1,042,606.50cts** and to deposit the balance of an equal amount in a joint account.
5. Pursuant to directions given parties were to dispose off the Application by way of written submissions but only the Applicant complied and I have duly taken the same into consideration.
6. The general principles of granting stay of execution are generally that:
  - (i) Substantial loss may result to the Applicant unless the order is made.
  - (ii) The Application has been made without undue delay;
  - (iii) Such security as the Court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant (**See Order 46 Rule 6(2) of the Civil Procedure Rules**).
7. This is a case where the Appeal was filed within the stipulated time which demonstrates the fact that it was done timeously.
8. The issue to be addressed is whether the Applicant will suffer substantial loss if the order sought is not granted. In the case of **Machira t/a**

Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63 it was held as follows:

***“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars where no pecuniary or tangible loss is shown to be satisfaction of the court, the court will not grant stay.”***

In the case of Sewakambo Diskson vs. Ziwa Abby HCT-00 CA MA 178 OF 2005 it was stated that”

***“.....Substantial loss is a qualitative concept, it refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value that is merely nominal.....”***

9. It is averred that the decretal amount is substantial and the Respondent has no source of income such that she would not be able to refund the amount if the Appeal succeeds. In the case of **Kenya Hotel Properties LTD vs. Willesden Properties LTD Civil Application No. NAI 322 of 2006 (UR)** it was stated that:

***“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain rides to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicant if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all.”***

10. In her reply in as much as the Respondent has called upon this Court to reach a finding that the Application is an abuse of the Court process, she goes ahead to state that she cannot even do manual work therefore she is forced to rely on handouts from friends and relatives.

11. This is proof that she is a person of straw such that she cannot repay the money in case the Appeal succeeds.

12. The general complaint in the Appeal is on the award on quantum which they find excessive.

13. In the premises I allow the Application by granting the order sought on condition that the Applicant pays the **Kshs. 300,000/=** out of the decretal sum to the Respondent and the balance to be deposited in an interest earning account to be held by both Advocates in a reputable financial institution within **30 days**.

14. Costs shall be in the Appeal.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 26<sup>th</sup> day of February, 2019.**

**L. N. MUTENDE**

**JUDGE**