



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 18 OF 2016**

**BRINKS SECURITY SERVICES LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**LUCAS OUMA KARAKACHA .....RESPONDENT**

**RULING OF THE COURT**

1. Before me is an Application by way of Notice of Motion dated 15/08/2016 filed by the Appellant/Applicant Brinks Security Services limited. It was brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 1A (1) and (2) and Section 3A of the Civil Procedure Act. The application has four prayers, two of which have been spent as follows:-

1. (Spent)

2. (Spent)

3. That this Honourable court be pleased to grant a stay of execution of the decree in **Mavoko PMCC No. 713 of 2015** and the Respondent be restrained by way of whether by himself, his agents or by his servants from attaching, selling or removing for sale any proclaimed assets of the Applicant pending the hearing and determination of the Appeal lodged herein.

4. That the costs of this Application be provided for.

2. The Application has grounds on the face of the Notice of Motion. Among the grounds is that the Respondent has proclaimed the Applicant's tools of trade and if sold the Applicant will suffer irreparable loss and that the Appeal is arguable as it has raised issues to do with lack of jurisdiction by the trial court which took into account irrelevant considerations when assessing damages payable, as well as that the Application was filed without undue delay and further that the Applicant is willing to abide by any conditions to be imposed.

3. The Application is opposed. A Replying Affidavit sworn on 23/08/2016 and filed on 24/08/2016 by the Respondent. It was deponed inter alia that the Applicant had not satisfied the requirements for grant of stay under Order 42 of the Civil Procedure Rules and that the Application was meant to deny him the fruits of his judgement.

4. Both the Applicant and Respondent filed their written submissions through their Counsels on record. The Applicant's submissions were filed on 27/09/2016 while the Respondent's submissions were filed on 6/10/2016. I have perused both submissions and considered the issues raised as well as the authorities cited.

5. An order for stay of execution pending hearing of appeal is predicated upon Order 42 Rule 6 of the Civil Procedure Rules. The said Rule provides the parameters under which stay of execution of a decree or order can be granted pending Appeal. It provides:-

“6(2) No order for stay of execution shall be made under sub-rule (1) unless-

**a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and 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.”**

The information gleaned from the memorandum of Appeal reveals that the judgement of the trial court was delivered on the 6/7/2016 and the present Application filed on 16/08/2016 and the present application filed on 16/08/2016 which indicates that the Application was made within one month and 6 days. I find the application was filed more or less within the time prescribed for the lodging an Appeal. Hence I find there was no inordinate delay in filing the Application. Indeed there is no argument advanced by the Respondent alleging that the present Application was filed after delay. I find the Application was filed without any inordinate delay.

As regards the issue of substantial loss the Applicant has stated that the goods proclaimed are actually its tools of trade and that if they are sold then the Applicant's operations will be paralyzed. There is also a possibility that the Respondent might not be able to refund the money if paid out in the event the Appeal succeeds. The Respondent was silent on this aspect yet he was obliged to assuage the Applicant that he would readily refund the monies in the event of success of the Appeal. The Appeal lodged herein does not appear in my view to be frivolous.

On security the Applicant has indicated its willingness to abide by any conditions to be imposed by this Honourable court. Indeed the Respondent should not be unduly kept away from the fruits of the judgment while at the same time the Applicant's interests should also be considered so as not to render the Appeal nugatory in the end should it succeed. The court has to strike a balance and it is in this regard that I find the decretal sums should be deposited in an interest earning account as the parties canvass the Appeal.

6. In the result the Applicant's Application dated 15/08/2016 is allowed in the following terms:-

**a. The Applicant to deposit the decretal sums into an interest earning account in the joint names of the Advocates for the parties within the next forty five (45) days from the date hereof failing which the order of stay shall lapse.**

**b. The costs of the Application to abide in the Appeal.**

It is so ordered.

**Dated and delivered at Machakos this 17<sup>th</sup> day of January, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

N/A for Kimuli - for the Appellant/applicant

N/A for Nzavi - for the Respondent

Kituva - Court Assistant