



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 14 OF 2017**

**RAMA MAZIKO RAI.....1<sup>ST</sup> APPELLANT**

**ELEMECH ENGINEERING KENYA LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**NASRUDIN ABDIKER SOMO (Suing thro' father and next**

**friend ABDIKER SOMO).....RESPONDENT**

**RULING**

**1. Rama Maziko Rai and Elemech Engineering Kenya Limited**, Applicants herein, approached this Court by way of Notice of Motion seeking stay of execution of the Judgment and all consequential orders in **Kitui SPMCC No. 128 of 2015** pending hearing and determination of the Appeal.

2. The application is premised on grounds that; the sum awarded in general and special damages **Kshs. 488,722/=** was excessive and unmerited; the application has been brought without undue delay; the Appeal has a high probability of success; the Applicant will suffer substantial loss if the order sought is not granted and the Applicants are ready to deposit security in Court.

3. The application is supported by an affidavit sworn by **Ramji Naran Patel**, the Director of the Applicants who deposed that the Respondent is a minor who was aged 4 years at the time of the accident therefore will not be in position to refund the sum if the Appeal succeeds which will result into the Applicants suffering substantial loss and they are willing to deposit security in Court.

4. In response, **Abdiker Somo** the Respondent filed a replying affidavit where he averred that the Judgment was in respect of general and special damages, interest and costs. That the Appeal is only on the quantum of damages. That the Appellant admitted owing a sum of **Kshs. 300,000/=** as general damages and there is no dispute of **Kshs. 38,722/=** being special damages. That as a condition of granting a stay of execution the Applicants be directed to pay the admitted sum of **Kshs. 338,722/=**. That the balance of the decretal sum and **Kshs. 200,000/=** being security in the sum of **Kshs. 350,000/=** be deposited in Court.

5. The application was canvassed by way of written submissions that I have duly considered.

6. Principles to be considered when determining an application of this nature are stipulated in **Order 42 Rule (6)** of the **Civil Procedure Rules**. It behoves the Applicant to demonstrate that he will suffer substantial loss if the order of stay of execution is not granted. That the application has been brought without undue delay and that he is ready and willing to give security for due performance of the decree.

7. In the case of **Carter & Sons LTD vs. Deposit Protection Fund Board & Two Others Civil Appeal No. 291 of 1997** it was stated that:

***“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay.... the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”***

8. The contention of the Applicant is that the Plaintiff in the Lower Court was a minor aged four (4) years such that if the Appeal succeeds he will not be capable of refunding the decretal sum.

9. In the case of **Mukoma vs. Abuoga (1988) KLR** the Court of Appeal stated that:

***“... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”***

10. The decree herein is a money decree which would ordinarily be refundable in case the Appeal succeeds. In the case of **Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai No. 322 of 2006 (UR) 178/06** the Court of Appeal stated that:

*“The decree is a money decree and normally the courts have felt that 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 riders to that legal position as it became obvious that in certain causes, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”*

11. The reply to the application is silent on whether the Respondent is capable of refunding the decretal amount if paid and the Appeal succeeds. There is nothing to suggest what the guardian of the minor does in life such that he may be able to refund the sum if called upon.

12. The application was made without undue delay. And the Applicant is willing to deposit security in Court.

13. Therefore, I allow the Notice of Motion on condition that the Applicant deposits the entire decretal amount in Court within seven (7) days. In default the order to stand vacated.

14. Costs of the application shall be in the Appeal.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 28<sup>th</sup> day of February, 2018.**

**L. N. MUTENDE**

**JUDGE**