



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI CIVIL DIVISION**  
**CIVIL APPEAL NO. 709 OF 2016**

**ODDS & ENDS LTD.....APPELLANT**

**VERSUS**

**JOASH ODHIAMBO AGARE.....RESPONDENT**

**RULING**

1. The Appellant has moved this Honourable Court by way of a Notice of Motion dated 23<sup>rd</sup> November, 2016 under Order 42 Rule 6, Order 22 Rule 22 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law seeking the following orders: -

- (a) That there be an interim order of stay of execution of the decree of the lower court in NAIROBI CMCC NO. 3901 of 2013 pending the hearing and determination of this application;
- (b) That there be stay of execution of the decree herein pending the hearing and determination of the appeal against the judgment and order of the Honourable Magistrate against the Applicant; and
- (c) Costs be provided for.

2. The Motion is premised on the grounds on the body of the application and the Supporting Affidavit of Linda Mukami the Legal Officer of APA Insurance Company, who is the instructing Client. The reasons advanced in support of the motion are that if the decree is executed, the Respondent will obtain the decretal amount of Kshs. 1,266,066/= plus costs and he is not likely to refund the same in case the Appeal succeeds and that will make them suffer irreparable loss, the insurance company is ready and willing to offer security for the decretal sum and is ready to abide by any conditions that may be set by the court, that the appeal raises arguable issues and the application was filed timeously.

3. In its written submissions, the Applicant relies on the grounds and averments contained in the Supporting Affidavit and submitted that the Respondent shall not suffer any prejudice if the orders are granted and if there is any prejudice to be occasioned, the same can be compensated by way of costs.

4. The Respondent filed a Replying Affidavit dated 20<sup>th</sup> January, 2017 and states that APA Insurance Company instructed the Appellant's Advocates to file an appeal against the award for loss of earning and there is no appeal on liability which means that the Appellant admits that the Respondent is entitled to an award of damages. In light of the foregoing, the Respondent avers that the Appellant should pay him one half of the award and secure the other half in a joint account or in court pending appeal. In the written submissions, the Respondent reiterates its request for the payment of half the award and urges the court

not to order full deposit of the decretal sum as he would continue to suffer pending the determination of the appeal.

5. Order 42 Rule 6 of the Civil Procedure Rules outlines the conditions for granting an order of stay of execution which are;

- (a) That the application has been made without unreasonable delay;
- (b) That security for costs has been given; and
- (c) That substantial loss may result to the Applicant unless the order for stay is made.

6. It is noted that the instant application as well as the Appeal were filed 24 days after the judgment was delivered. The application was therefore made without unreasonable delay.

7. The Appellant has offered to furnish security for the due performance of the decree as the court may set, pending the hearing and determination of the appeal. On this note, the Respondent urges the court to make an order for payment to him of one half of the award and secure the other half in a joint account or in court pending the appeal.

8. In the pleadings before this Court, the Appellant has stated that the Respondent may not be able to refund the decretal amount in the likely event that the intended appeal is successful and I find that the Respondent has not demonstrated to this court that he is financially capable of reimbursing the Applicant the decretal amount or a portion of it should the Appeal succeed. However, that said, the Court takes note that this appeal is about the quantum of damages to be paid but not liability and it will be in the interest of justice that the respondent is paid one half of the award pending the hearing and determination of the Appeal.

9. I am alive to the fact that in entertaining an application for stay of execution pending appeal, the discretion of the court is wide. However in exercising such discretion, the interests of both parties have to be balanced in that while the Appellant has an undoubted right of Appeal the Respondent has a decree that he may wish to execute. In so balancing the interest of the parties herein, it's only fair that a stay of execution is granted pending the hearing and determination of the Appeal, which I hereby grant but on condition that the Appellant pays the Respondent one half of the decretal sum and the other half be deposited in a joint account to be opened by the parties' advocate within 30 days of this ruling failure of which the stay lapses.

The costs of the application shall abide the outcome of the Appeal.

**Dated, signed and delivered at Nairobi this 29th day of June 2017.**

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**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant.*

..... *For the Respondent*