



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

**AT MOMBASA**

**CIVIL CASE NO. 33 OF 2017**

CITY STAR SHUTTLE LTD. .... 1<sup>ST</sup> APPELLANT

AMBROSE MOKUA NDERITU ..... 2<sup>ND</sup> APPELLANT

ECONOMIC DEVELOPMENT & MANAGEMENT

LIMITED ..... 3<sup>RD</sup> APPELLANT

VERSUS

MWONI MUTINDA also known as

LILIAN MUTINDA .....RESPONDENT

**RULING**

1. The application before me for determination by way of Notice of Motion is dated 21<sup>st</sup> February, 2017. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) There be a stay of execution of the decision of the Chief Magistrate, Mombasa in Civil Suit No 1816 of 2015 delivered on the 23<sup>rd</sup> January, 2017 and any consequential orders that may be issued including any warrants of attachment pending the hearing and determination of the intended appeal from the Chief Magistrate's Mombasa Civil Suit No. 1816 of 2015; and

(iv) The costs of this application abide in the result of the said appeal.

2. The application is supported by the affidavit of Meshack Mwanzia Kyengo, the applicant's Administrative Manager sworn on 21<sup>st</sup> February, 2017. The respondent filed a replying affidavit on 2<sup>nd</sup> March, 2017 opposing the application. Counsel on record thereafter filed their written submissions, which they highlighted.

3. Mr. Mburu, Learned Counsel for the applicant submitted that their application is premised on the provisions of Order 42 rule 6(1) and 2 of the Civil Procedure Rules (CPR). On the issue of security for costs, he stated that the applicant is a public transport company which is willing to deposit Motor vehicle

log books as security in satisfaction of the decree. He relied on the case of **Firoze Nurali Hirji vs HFCK & Another** [2012] eKLR where Judge Odunga cited the case of **Nduhiu Gitahi vs Warugongo** [1988] KLR 621 that stated that the giving of security can be in many forms. In Counsel's view, the depositing of logbooks will strike a balance for both parties.

4. Counsel argued that the amount of Kshs. 3,425,940/= awarded is a colossal sum and there is imminent risk that if the respondent executes, it is highly unlikely that she will repay the amount, if the appeal is successful. Mr. Mburu contended that the respondent is a minimum wage earner making Kshs. 8,000/= per month, as such if the appeal is successful, the applicant is unlikely to recover the decretal amount. While making reference to the **Firoze Nurali Hirji case** (supra), Counsel submitted that the Judge observed that a litigant must come to court with clean hands. He informed the court that the respondent stated that she earns Kshs. 30,000/= yet she did not prove it. In his view, she was dishonest.

5. Counsel further submitted that flowing from the decision of **Firoze Nurali Hirji**, the Judge was of the view that the High Court when hearing an application for stay of execution of a decision of a subordinate court pending an appeal, is perfectly entitled to consider the chances of success of an intended appeal. He urged this court to consider the underlying objectives of the Civil Procedure Act as provided under section 3A. He prayed for their application to be allowed.

6. In response to the foregoing, Mr. Thiaka, Learned Counsel for the respondent when submitting on the issue of substantial loss relied on the case of **Antoine Ndiaye vs African Virtual University** [2015] eKLR, where the judge cited the case of **Machira t/a Machira & Co. Advocates vs East Africa Standard** ( No. 2) [2002] KLR 63, where the Judge held that in such an application for stay, it is not enough for the applicant merely to state substantial loss will result. He must prove specific details and particulars.

7. Counsel added that where no pecuniary or tangible loss is shown to the satisfaction of the court, it will not grant a stay. Counsel submitted that the respondent works as a photographer in the informal sector and that she was not keeping receipts of the business.

8. On the issue of security, Mr. Thiaka argued that the applicant could be holding motor vehicles whose value is very low. He also stated that vehicles depreciate very fast, thus if log books are deposited as security, the present value will have drastically gone down by the time the appeal will be heard. He prayed for the applicants to deposit a bank guarantee as proper security, if the court grants the application.

9. In response to the foregoing Mr. Mburu submitted that even if someone is in the informal sector, they must be filing annual returns.

**The issue for consideration is if the applicants have satisfied the conditionalities for stay of execution.**

10. For an applicant to qualify for grant of orders of stay of execution, he must satisfy the provisions of Order 42 rule 6(1) and (2) of the Civil procedure Rules, which states as follows:-

***“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, and any other person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such an order set aside”.***

11. The conditions under which an order for stay of execution is granted are provided in Order 42 rule 6 (2) of the Civil Procedure Rules, which states:-

***“No order for stay of execution shall be made under subrule (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.”***

12. In the present case, judgment was entered for the respondent against the three applicants jointly and severally for the sum of Kshs. 3,425,940. She was also granted costs of the suit and interest at court rates. The respondent works in the informal sector and this was not disputed by her Counsel on record. The applicants are thus apprehensive that the respondent will be unable to refund the decretal amount that stands at Kshs. 3,607,418.50 as per the applicants’ exhibit marked MMK3 attached to their supporting affidavit. In paragraph 6 of the said affidavit, the applicants describe the said amount as “*unbearably colossal*” and if they are ordered to part with it, they will be placed in a position of financial embarrassment that would cripple the operations of the applicant leading to inability to meet their financial obligations. It is thus their view that because of the huge sum awarded, the applicants will suffer substantial loss if the money is paid out to the respondent as she may not be in a position to repay them, if their appeal will be successful.

13. It was Mr. Thiaka’s submission that it is not sufficient for an applicant merely to say that substantial loss will result. Specific details and particulars must be proved. He relied on the case of **Machira t/a Machira & Co. Advocates vs East Africa Standard** (No. 2) supra to show that where no pecuniary or tangible loss is shown to the satisfaction of the court, it will not grant a stay. The above decision also stated that the ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage.

14. Much as I agree that the respondent is entitled to the fruits of the judgment in this case, the applicants are equally entitled to exhaust the appeal processes so that at the tail end they will be satisfied that justice was done to both parties.

15. In the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another** Nairobi Civil Application No. 238 of 2005 (unreported) the Court of Appeal stated thus:-

***“This court has stated before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because an appellant would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to show what resources he has since that is a matter which is peculiarly within his knowledge ....”***

16. Section 112 of the Evidence Act provides that:-

***“In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

17. The respondent herein failed to demonstrate to this court that she is not a woman of straw and that she is seized of enough assets from which the applicants can recoup their money from, if their appeal will be successful.

18. I am satisfied that the present application was filed without unreasonable delay. I hold that the applicants have made out a case for grant of the orders sought. I therefore grant stay of execution of the judgment and decree and any other consequential orders issued in Mombasa CMCC No. 1816 of 2015 pending the hearing and determination of the appeal herein.

19. The applicants offered motor vehicle log books as security for due performance of the decree. I agree with Mr. Thiaka's submission that vehicles depreciate fast in value. It is therefore possible that at the time of determination of the appeal their net book value will be zero. This court is under duty to protect the interest of both parties. The respondent sought security in the form of a bank guarantee. Taking into consideration that the applicants are averse to tying down the entire decretal amount in monetary form as it will affect their transport business, the court will in the interest of justice fall back on another form of security to guard the interest of the respondent.

20. The orders for stay of execution are issued subject to the applicants executing and depositing in court a bank guarantee in the sum of Kshs. 3,607,418.50 within 30 days from today. Costs will abide by the outcome of the appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of JULY, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiffs/applicants

Mr. Thiaka for the defendant/respondent

Mr. Muriithi - Court Assistant