



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 238 OF 2012**

**MONICAH MUTHONI KIRUKU.....PLAINTIFF**

**- V E R S U S -**

**AMALGAMATED LOGISTIC INTERNATIONAL LTD.....1<sup>ST</sup> DEFENDANT**

**DENNIS NDWIGA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgement in the sum of 17,722,004/= was entered in favour of

Monicah Muthoni Kiruku the plaintiff herein and against Amalgamated Logistic International Ltd and Dennis Ndwiga , the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein on 9<sup>th</sup> September 2016. Being dissatisfied with the aforesaid decision, the defendants filed a Notice of Appeal to express their intention to challenge the decision in the Court of Appeal. The defendants have now taken out the motion dated 5<sup>th</sup> December 2016 in which they sought for *inter alia*:

1. ***THAT this application be certified as urgent and service thereof be dispensed with in the first instance and matter be heard exparte.***
2. ***THAT this honourable court e pleased to grant a temporary stay of proceedings and execution of the judgment, decree and all consequential orders delivered on 9<sup>th</sup> September, 2016 pending hearing and determination of this application for stay of execution pending appeal.***
3. ***THAT there be a stay of proceedings and execution of the judgment, decree and all consequential orders delivered on 9<sup>th</sup> September, 2016 pending the hearing and determination of the defendants/applicants appeal.***
4. ***THAT the costs of this application be provided for.***

2. The motion is supported by two affidavits sworn by Dinah

Musungu Ogulla. When served, the plaintiff filed a replying affidavit to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the suit recorded a consent order to have the application disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion

and the facts deponed in the affidavits filed in support and against the motion plus the rival submissions after re-evaluating the case that was before the trial court. It is the submission of the defendants that unless the order for stay of execution is given they would suffer irreparable loss when the plaintiff moves to recover the decretal sum which amount is colossal. It is argued that the defendants have an appeal which has great chances of success. The defendants' insurer have indicated that it is willing to make a deposit of kshs.10,000,000/= as security for the due performance of the decree. This court was also urged not to grant the orders for review prayed in the motion dated 13.12.2016 since a grant of the order may prejudice the defendants' appeal.

4. The plaintiff is of the view that the defendants motion was filed

as an afterthought and is merely intended to delay her enjoyment of the fruits of the judgement. The plaintiff also pointed out that her application for review has no bearing on the appeal hence it should be allowed. The plaintiff further argued that the motion for stay was filed after undue delay for three(3) months from the date of delivery of judgment. It was further argued that the appeal has no merit and stands no chance of succeeding. The plaintiff beseeched this court to issue an order directing the defendants to pay to her part of the decretal sum in case it is inclined to grant the order for stay.

5. Having considered the material placed before this court plus the

written submissions, it is not in dispute that the defendants filed a notice of appeal 18 days after the delivery of judgement and the motion for stay was filed about three months from the date of delivery of judgment. One of the principles to be considered in such an application is that the application for stay must be filed without unreasonable delay. In my humble view, I find a delay of three months not unreasonable. Therefore, I hold that the motion was timeously filed.

6. The other principle which must be considered is whether or not the applicants will suffer substantial loss if the order for stay is denied. It is on record that the defendants have stated that if the decretal sum is released to the plaintiff it will be extremely difficult to recover the same should the appeal succeed. The plaintiff did not address this court over the issue in her replying affidavit. I am therefore convinced that the defendants are likely to suffer substantial loss in case the order for stay is denied. The decretal sum is a colossal amount which if paid to the plaintiff may turn out to be extremely difficult to recover if the appeal turns successful.

7. The third and final principle is the provision of security. The defendants are on record proposing to make a deposit of ksh.10,000,000/=. On her part, the plaintiff has stated that due to the injuries she sustained she has requested this court to issue an order directing the respondent to make to her partial payment of the decretal sum to enable her meet her medical expenses. After a careful consideration of the rival proposals I am convinced that the defendants' proposal appears plausible. If this court makes an order directing the defendants to pay to the plaintiff part of the decretal sum, it may send the wrong signal. It will amount to anticipating that the Court of Appeal will retain the judgment sum or at least uphold the partial amount the defendants are now seeking to be paid. It is therefore, in my humble view untenable to make the order for tentative payments pending appeal. Who knows? The Court of Appeal decide to upset the award already given altogether.

I have already stated that the defendants have proposed that they are ready make a deposit of ksh.10,000,000/= as security for the due performance of the decree.

9) The defendants' insurer is saying that the aforesaid sum is the defendants' policy limit. I think the defendants' proposal is reasonable and properly justified by the insurer.

10) Having disposed of the application for stay, let me now turn my attention to the plaintiff's motion for review dated 24.10.2016. It is the plaintiff's submission that this court should review its decision so that the prayer for interest is included in the award. The defendants opposed this prayer claiming that the

motion does not meet the requirements for an application for review. It is also argued that the same may affect the appeal. After a careful consideration of the competing arguments, I am convinced that if the motion is allowed it won't substantially affect the appeal. I am satisfied that this court inadvertently was silent on the issue touching on interest. It is not in dispute that the plaintiff prayed to be paid interest. There is no reason why interest should not be given. Consequently the motion dated 24.10.2016 is allowed so that the judgment sum should attract interest at court rates from the date of judgment until full payment.

11) In the end and for the avoidance of doubt this court issues the following orders:

**i. The motion dated 5.12.2016 is allowed, in that an order for stay pending appeal is given on condition that the defendants do deposit a sum of ksh.10,000,000/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this suit within 30 days from the date hereof. In default the motion will be deemed as having been dismissed.**

**ii. The motion dated 24.10.2016 is allowed as proposed by this court hereinabove.**

**iii. Each party to bear its own costs.**

**Dated, Signed and Delivered in open court this 29<sup>th</sup> day of September, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant