



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 123 OF 2015**

**PATRICK KANAKA MUNYAO.....PLAINTIFF**

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

**CEMENTERS LTD.....DEFENDANT**

**RULING**

1) On 18<sup>th</sup> august 2017, this court awarded Patrick Kinaka Munyao the plaintiff herein, judgement in the sum of Ksh.21,987,000/= against Cementers Ltd, the defendant, for the injuries he sustained as a result of an accident while in the course of his employment with the defendant in its construction site at Yaya Centre along Lenana Road on 12.1.2014. The defendant has now taken out the motion dated 17.10.2017 in which it sought for the following orders *inter alia*:

- 1. This application be certified urgent and be heard ex parte in the first instance.***
- 2. The firm of Mucheru-Oyatta and Associates be allowed to come on record on behalf of the defendant in place of the firm of Njongoro & Co. Advocates.***
- 3. There be a stay of execution of the judgment and decree of this honourable court delivered on 18<sup>th</sup> August 2017 pending the hearing and determination of this application.***
- 4. The time for filing a notice of appeal from the judgment and decree of this honourable court delivered on 18<sup>th</sup> August 2017 be extended by a period of fourteen days from the making of such order; and***
- 5. There be a stay of execution of the judgment and decree of this honourable court delivered on 18<sup>th</sup> August 2017 pending the hearing and determination of the intended appeal.***
- 6. Any other order be made as this honourable court deems fair and just.***

2) The aforesaid motion is supported by the affidavit of Dipak Halal and a supplementary affidavit the same deponent swore. When served with the motion, the plaintiff filed a replying affidavit he swore to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels appearing in this matter were invited to make oral submissions. 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. I have also considered the rival oral submissions of learned counsels appearing in this suit. The defendant/applicant avers that it only came to know of the judgment after the period required to file a notice of appeal had lapsed. The record

shows that the defendant and its advocate were actually absent at the time of delivery of judgment. The plaintiff did not controvert the assertion that the defendant was not aware of the judgement date but only came to know of its existence after the period allowed to file a notice had lapsed. I am convinced that defendant has given a plausible reason to enable this court extend time to file an appeal out of time.

4) The other prayer is that for an order of stay pending appeal. The defendant has beseeched this court to grant it an order for stay pending appeal. It is its submission that it will suffer substantial loss if the order for stay is denied. The defendant clearly stated that if the decretal sum is paid to the plaintiff, he will not be in a position to refund the money in the event the appeal is successful. The plaintiff did not dispute this allegation but he instead concentrated on the question as to what is the suitable security for the due performance of the decree should be provided. Let me start by stating that the plaintiff having failed to controvert the assertion that he has no capacity to refund the decretal sum when required, I am satisfied that the defendant has established that it would suffer substantial loss if the order for stay is denied.

5) The defendant has proposed to provide an insurance bond as security for the due performance of the decree. The plaintiff opposed this proposal alleging that due to the turbulent times in the insurance industry the suggested security may not guarantee due performance of the decree. There is no doubt that the court is given unfettered discretion to determine the kind of security to be given. I think the response the plaintiff gave in answer to the defendant's offer on security in my view is too general and cannot be used to diminish an insurance bond as a form of security.

6) In the end, I find the motion to be with merit, the same is allowed as follows:

- i. The defendant/applicant is given leave of 14 days to file and serve a notice of appeal.**
- ii. An order for stay of execution of the decree is given pending the filing, hearing and determination of the intended appeal on condition that the defendant/applicant provides an Insurance Bond or a bank guarantee to cover the decretal sum from a reputable Insurance Company and or bank within 21 days.**
- iii. In default, the motion shall be deemed as having been dismissed.**
- iv. Costs of the motion to abide the outcome of the appeal.**

**Dated, Signed and Delivered in open court this 24<sup>th</sup> day of November, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant