



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**MISCELLANEOUS CIVIL SUIT NO. 45 OF 2014**

**AHMED MZEE FAMAU T/A NAJAA COACH LTD**

**BATODO HANGAH .....PLAINTIFFS**

**VERSUS**

**VERONI NGII MUIA A.K.A.**

**VERONICA MUIYA A.K.A.**

**VERONICA NGUI MUIA .....DEFENDANT**

**RULING**

The application dated 16<sup>th</sup> December, 2014 seeks two prayers namely; leave to appeal out of time and stay of execution of the decree in Malindi CMCC No. 292 of 2013. The Respondent filed a replying affidavit sworn on 17<sup>th</sup> December, 2014. Parties agreed to determine the application by way of written submissions.

The Applicant contends that the application has been brought without inordinate delay. The judgment of the trial court was delivered on the 22<sup>nd</sup> October, 2014 and they were granted thirty days stay of execution. The application was filed on 16<sup>th</sup> December, 2014. The dispute is on the amount of quantum payable to the Respondent and if execution is allowed to proceed the intended appeal would be rendered nugatory. The Applicant will suffer irreparable loss and damage as he has an arguable appeal. The Applicant is willing to provide security.

On her part, the Respondent contends that no appeal has been filed. There was inordinate delay in the filing of the application. Parties recorded a consent on liability before the trial magistrate. The court assessed the amount of quantum payable to the Respondent and no irreparable damage will be sufficed by the Applicant. It is the Respondent's position that under Order 42 Rule 6 an appeal must have been filed. In this case no appeal has been filed yet the Applicant had ample time to file the appeal.

The application herein was filed on the 16<sup>th</sup> December, 2014. The judgement of the trial court was delivered on the 22<sup>nd</sup> October, 2014. There is a difference of less than two months from the date of judgement to the date of filing the application. I do find that the delay is not inordinate. I will therefore grant the Applicant leave to file his appeal out of time.

With regard to the prayer for stay of execution, the pleadings show that parties recorded a consent on liability. The Applicant quantified damages at Kshs. 150,000/- while the Respondent had sought to be awarded Kshs. 600,000/-. The trial court awarded Kshs. 450,000/- as damages. The Respondent has not indicated whether she is in a position to refund any amount that would have been paid to her should the appeal succeed. The Respondent has emphasized on the need for proving an irreparable loss. An irreparable loss is a subjective element. What is irreparable loss to one party may not be irreparable damage to the other. The Applicant was the owner of the accident vehicle. To call upon him to pay Kshs. 450,000/- could make him incur an irreparable damage. However, the Respondent is equally entitled to the fruits of her judgement.

Since the Applicant conceded liability to a certain extent, it is established that by all means some amount

of money would be paid to the Respondent. The Applicant himself had offered to pay Kshs. 150,000/-. It would be unfair to make the Respondent wait until when the appeal is heard and determined. I do order that the Applicant pays to the Respondent a sum of Kshs. 250,000/- within sixty (60) days herein.

In the end, the application dated 16<sup>th</sup> December, 2014 is hereby allowed. The Applicant to file his memorandum of appeal within fourteen (14) days hereof. The Applicant to pay the Respondent a sum of Kshs. 250,000/- within sixty (60) days hereof. Costs shall follow the outcome of the appeal.

**Delivered and dated at Malindi this 17th day of March, 2015.**

**Said J. Chitembwe**

**JUDGE**