



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 124 OF 2014**

**CORPORATE INSURANCE COMPANY LIMITED.....APPELLANT**

**VERSUS**

**EMMY CHEPTOO LETTING.....1<sup>ST</sup> RESPONDENT**

**PUMA CARS LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

By a Notice of Motion dated 15<sup>th</sup> September, 2014 and filed in Court on the same day, the appellant, Corporate Insurance Company Limited seeks from this Court orders for stay of execution of the Judgment and decree in **Milimani Chief Magistrate's Court Civil Suit No. 2544 of 2008** and any consequential orders arising there from pending the hearing and determination of this appeal, together with costs of this application.

The application is predicated on the grounds that being dissatisfied with the Judgment delivered on 10<sup>th</sup> March, 2014 by the chief Magistrate's court, the appellant has lodged a Memorandum of Appeal; That if stay is not granted, the applicant stands to suffer irreparably; That the applicant unsuccessfully sought stay of execution pending appeal in the Lower Court on 12<sup>th</sup> September, 2014; that the appellant is ready and willing to deposit an Insurance Policy bond as security and or abide by any terms as to security as may be ordered by this Court and that the appeal is merited with a high chance of success.

The application is further supported by the sworn affidavit of Nancy Shikuku, the Chief Legal Officer of the appellant Insurance Company, who deposes that the appellant was sued by the 1<sup>st</sup> Respondent Emmy Cheptoo Letting for a sum of Ksh 2,300,000.00 vide **Milimani Chief Magistrate's Court Civil case No. 2544/2008**. The appellant then enjoined two third parties to the suit, but that judgment was delivered against the appellant who has challenged the same vide this appeal and that unless stay is granted, the appeal herein shall be rendered nugatory as the 1<sup>st</sup> Respondent will not be in a position to refund the decretal sum of Kshs 4, 331, 838.00 as she has no known means of restitution.

It is further deposed that the appellant is a stable Insurance Company engaged in underwriting business hence it is ready and willing to deposit an Insurance bond as security or comply with any terms as may be given by the Court and that they have a meritorious appeal.

The 1<sup>st</sup> Respondent Emmy Cheptoo Letting opposed the application by the appellant/applicant and swore an affidavit on 19<sup>th</sup> September, 2014 replying to the application. The 1<sup>st</sup> Respondent contends that she

had a good claim against the appellant and that as the Court below found the 2<sup>nd</sup> Respondent wholly to blame for the loss of the subject Motor Vehicle, the appellant is wholly indemnified and therefore it will suffer no loss since any sums that may be payable by the appellant will be recovered from the 2<sup>nd</sup> Respondent as ordered by the Court, since the said 3<sup>rd</sup> party/2<sup>nd</sup> Respondent has not appealed against the decision of the Lower Court.

The 1<sup>st</sup> Respondent maintains that if the decretal sum is paid out to her, she has the necessary means of repaying the money as she has sufficient assets which include apartments on LR. 330/726 Apt B 11.

The 1<sup>st</sup> Respondent further deposes that the application for stay has not been filed without delay as it was lodged after 6 months from date of Judgment. Further, that the application is not brought in good faith and is merely intended to deny her the fruits of her lawfully obtained Judgment; and that the Lower Court correctly dismissed a similar application for stay of execution pending appeal herein.

The parties agreed to dispose of this application by filing written submissions. The applicant/appellant filed theirs on 10<sup>th</sup> October, 2014 whereas the 1<sup>st</sup> Respondent filed her written submissions on 17<sup>th</sup> November, 2014.

The appellant's submissions mirror the grounds on the face of the application and the supporting affidavit, while highlighting that they have complied with the conditions set out under Order 42 Rule 6 (2) of the Civil Procedure Rules to warrant stay of execution pending appeal being granted.

The appellant maintains that their appeal has high chances of success and relied on the case of **David Omwenga Vs John Tkeleyio Kisii High Court 149/2005 eKLR** where the Court citing **Butt Versus Rent Restriction Tribunal (1982) KLR 7** stated;-

***“If there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed.”***

Further, it is submitted that an arguable appeal is not one that will necessarily succeed but one which raises triable issues and therefore that the appeal only ought to raise a legitimate point or points deserving judicial determination.

On whether the appellant shall suffer irreparable loss if stay order is not granted, it is submitted that the decretal sum is colossal to the tune of

Kshs 4, 331, 838.00 which if paid out to the 1<sup>st</sup> Respondent, shall not be recovered should the appeal be successful. It is further submitted that the 1<sup>st</sup> Respondent might as well dispose of her property before this appeal is determined hence there is no guarantee of recovery if paid. Further, that the purported apartments on No. Bill LR 330/726 & 330/461/1 is not proven to be registered in her names and that certainty of Title No. Nandi Hills/Kosoiyoo/Bl 1/423 and value is in question. It is further submitted that there is no evidence that the said property is not encumbered.

The appellant relied on the 2 cases of **Kenya Orient Insurance Limited Versus Paul Mato & Another High Court Civil Appeal 40/2014 Mombasa and Morris Mutua Muora Another Versus Tranthi Murithi Murage High Court Civil Appeal 37/2007 Nyeri** to advance the argument that the burden of proving that the 1<sup>st</sup> Respondent was in a position to repay back the decretal sum if the appeal succeeds, shifted on her.

On the other hand, it is submitted that the appellant is a stable Insurance Company capable of settling the claim should the appeal be unsuccessful.

The appellant is also willing to deposit security and that the appeal and application herein were filed within reasonable time and without delay. The appellant prayed for orders of stay of execution pending appeal.

In her written submissions the 1<sup>st</sup> Respondent opposes the application and commences with an observation by Kuloba Judge in Machira T/A Machira & Company Advocates Versus East African Standard (2002) 2 Kenya Law Report 63, 65-66 that:-

***“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so for successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of judicial discretion.***

***The ordinary principle is that a successful party is entitled to the fruit of his Judgment or of any decision of the Court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings or execution, pending appeal.***

***Of course, in the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law to prevent abuse of the process of the Court.”***

According to the 1<sup>st</sup> Respondent, the appellant has not satisfied the conditions for stay of execution pending appeal as set out in Order 42 rule 6(2) of the Civil Procedure Rules which conditions must all be met before stay can issue. On whether the appellant shall suffer substantial loss if stay is not granted, the 1<sup>st</sup> Respondent relied on the case of Lalji Bhimji Sanghani Builders & Contractors Versus Nairobi Golf Hotels Kenya Limited CC 1990 (95 (UK) and Pamela Akinyi Opundo Vs Barclays Bank of Kenya Limited CC 800/2003 [2011] eKLR to the effect that the burden of proof lies on the applicant seeking stay of execution to demonstrate the impecuniness of the respondent that if the money is paid out and the appeal succeeds then she will not be in the position to refund the money, which has not been proved.

That the 1<sup>st</sup> Respondent demonstrated that she has sufficient means to reimburse the money by attaching evidence of the property she owns which are over 17,000,000 as valued. Secondly, that no loss will be occasioned to the appellant as the Court found the 2<sup>nd</sup> Respondent wholly to blame for the loss of the 1<sup>st</sup> respondent's car and therefore liable to indemnify the appellant for that loss. In addition, that since the 2<sup>nd</sup> Respondent has not appealed, the appellant can directly recover all sums from the 2<sup>nd</sup> Respondent.

The appellant is also accused of undue delay in filing this application 6 months after the date of judgment in the Lower Court and that it used delaying tactics by first filing a similar application in the Lower Court.

Relying on the case of SOC Finac Company Limited Vs Nephath Kimotho Mutua [2013] eKLR 589 that;

***“Taking into account the principle of proportionality and equality of arms as required under the overriding objective principle I am of the view that in the absence of evidence that the appellant stands to suffer substantial loss coupled with the fact that the respondent has a judgment in his favour I am of the considered view that there would be a much larger risk of injustice if the Court found in favour of the appellant, than if it determined this application in favour of the respondent”***

The 1<sup>st</sup> Respondent urged this Court to dismiss the appellants application with costs. I have carefully and consciously considered the appellant's application for stay of execution of decree pending hearing and determination of this appeal. I have also considered the objection to the said application; the rival submissions by the respective parties, advocates and the authorities relied on including the applicable law.

The primary law for consideration is order 42 Rule 6 of the Civil Procedure Rules which provide that:

***1) No Appeal or Second Appeal shall operate as a stay of execution of 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 order and whether the 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 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 order set aside.***

***2) No order for stay of execution shall be made under sub rule (1) unless;-***

***(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.”***

Before delving into case law and whether the application satisfied the conditions set out in order 42 Rule 6 (2) of the Civil Procedure Rules, it is essential to briefly set out the circumstances giving rise to this appeal.

Albeit the original pleadings in Chief Magistrate Courts 2544/2008 are not annexed to this application, the handwritten and uncertified copies of judgment attached to the replying affidavit of Emmy Cheptoo Letting who is the 1<sup>st</sup> Respondent herein reveal that the respondent sued the appellant herein in the Lower Court claiming for Ksh 2,300,000/- being the value of Motor Vehicle Reg. No. KAW 142E which was stolen while it was under the Insurance cover from the appellant. The appellant denied the claim and caused two third parties to be enjoined to the suit to indemnify it.

The 1<sup>st</sup> Third party was in custody of the suit (insured) Motor Vehicle when the theft occurred and they had an agreement with the 1<sup>st</sup> Respondent to sell it on her behalf. The 2<sup>nd</sup> Third party on the other hand, had installed the tracking device in the stolen insured Motor Vehicle but the tracking signal could not be picked from the security gadget that had been fitted thereby leading to failure to recover the stolen Motor Vehicle.

The 1<sup>st</sup> Respondent had taken out a comprehensive insurance policy over her motor vehicle with the appellant and after it was stolen, she reported loss to the appellant. The motor vehicle was in custody of the 2<sup>nd</sup> Respondent for purposes of selling it on behalf of the 1<sup>st</sup> Respondent when it vanished with the 2<sup>nd</sup> Respondent's driver on his way to the car bazaar. The trial Magistrate found the defendant/appellant herein liable to compensate the plaintiff/1<sup>st</sup> respondent for the loss of the motor vehicle which was comprehensively insured. She also found the 1<sup>st</sup> Third Party/2<sup>nd</sup> Respondent Puma Cars Limited liable for the loss as the motor vehicle was in custody of their driver who disappeared with it. The Magistrate found that the 2<sup>nd</sup> Respondent was negligent in failing to screen their driver whom they entrusted with the motor vehicle and that they also ought to have taken out an Insurance cover for the vehicles under their custody.

It should be noted that to date, no appeal has been filed by the 2<sup>nd</sup> Respondent challenging the decision of the trial Magistrate that found them wholly liable to indemnify the appellant herein for the loss of the motor vehicle in question.

The appellant was dissatisfied with the judgment delivered on 10<sup>th</sup> March, 2014 and filed this appeal on 3<sup>rd</sup> April, 2014 and on 14<sup>th</sup> April, 2014 the appellant sought before the subordinate Court an order for stay pending appeal as provided for under order 42 Rule 2 (1) of the Civil Procedure Rules, which application was dismissed on 12<sup>th</sup> September, 2014. The uncertified copy of judgment indicates date of delivery as 10<sup>th</sup> March, 2013.

From the above expositions, the main issue for determination is whether the applicant has satisfied the conditions set out in order 42 Rule 6 of the Civil Procedure Rules.

From the onset, however, it should be noted that the granting of stay of execution pending an appeal as governed by order 42 Rule 6 of the Civil Procedure Rules is an exercise of the discretion of the Court on sufficient cause being established by the applicant. And the incidence of the legal burden of proof on matters which the applicant must prove lies with the applicant. In Halsbury's Laws of England, Vol 17 paragraph 14, it is stated thus: ***"Incidence of the legal burden.....in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.***

In *James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR*, the Learned Judge held that;

***"Sufficient cause being a technical as well as legal requirement will depend entirely on the applicant satisfying the Court that:-***

***a) Substantial loss may result to the applicant unless the order is made;***

***b) The application has been made without unreasonable delay; and***

***c) Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant. These conditions are the essence of order 42 Rule 6 of the Civil Procedure Rules which I need not recite in verbatim. The conditions share as inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution."***

(i) As to what substantial loss the applicant is likely to suffer if stay is declined, it should be appreciated that this is a monetary decree. The principal sum was Ksh 2,300,000/= which was the value of the lost motor vehicle, and which, it is not disputed that the 1<sup>st</sup> Respondent purchased and comprehensively insured it against any loss or damages. She then intended to sell it before it mysteriously disappeared while in the custody of the 2<sup>nd</sup> Respondent, whom the Lower Court found wholly liable for the loss and ordered them to indemnify the appellant herein.

Although the appellant contends that it will suffer substantial loss as the 1<sup>st</sup> Respondent is of no known or certain means to reimburse the decretal sum should the appeal succeed, in my view, that argument is groundless for reasons that the appellant is already indemnified by the judgment of the subordinate Court which found the 2<sup>nd</sup> Respondent/3<sup>rd</sup> party liable to indemnify the appellant.

What the appellant needs to do is simply execute the judgment against the 2<sup>nd</sup> Respondent, after paying the appellant. It is, in my view, as simple as that, since from the record, the 2<sup>nd</sup> Respondent has not even shown any intention of challenging the judgment as decreed against it in favour of the appellant. What loss, if any, therefore, is the applicant/appellant likely to suffer and which has regrettably not demonstrated?

The other reason is that the 1<sup>st</sup> respondent has, in my most considered view fully demonstrated before this Court and in the Lower Court, on a balance of probabilities, that she is a person of means and has annexed evidence of some of her assets from which she can raise the decretal sum and reimburse the appellant should this appeal succeed.

even though the appellants' counsel has endeavored in his submissions to state that there is no guarantee that the assets which are at the disposal of the 1<sup>st</sup> Respondent may be available and that they are likely to be disposed of while this appeal is pending, which in their view will render the appeal nugatory, that argument, in my view is not grounded on any evidence that the 1<sup>st</sup> Respondent is likely to dispose of all her assets with the intention of defeating orders of this Court.

Besides, this Court has the power to order for the preservation of any property given as security for the due performance of decree pending determination of an appeal, where there is strong suspicion that a party is likely to commit acts that would frustrate enforcement of a decree.

In ***Antoine Ndiaye Vs African Virtual University [2015] eKLR***, the Court held that in as much as all the prerequisites in order 42 Rule 6 of the Civil Procedure Rules are important and must be considered in an inextricable manner, but substantial loss occurring to the applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution, citing the rendition by Ogolla J in **Tropical Commodity Suppliers Limited** case that;

***“Substantial loss does not represent any particular mathematical formula. Rather it is qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.....”***

In ***HCC Misc Appl 42/2011 at BGM in James Wangalwa & another Vs Agnes Naliaka Cheseto, [2012] eKLR*** the Court stated that:

***“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail...”***

The Court in the above case went further to emphasize that, at paragraph 13 of its ruling:-

***“[13] so the applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like in the case here, substantial loss lies in the liability of the respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the respondent cannot pay back. The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant, following after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the Court to show that the respondent is not able to refund the decretal sum should the appeal succeed. It is not therefore enough for a party to just allege as is the case here that the respondent resides out of Kenya and his means is unknown.”***

Unlike in the above case where the respondent was alleged to be residing outside Kenya with unknown means, in the instant case the 1<sup>st</sup> Respondent, it has not been shown resides outside Kenya, or that she has no known or valuable assets or means or that she is about to leave the jurisdiction of this Court or that she has embarked on an asset disposal spree to defeat the decree of the court.

What was emphasized by the appellant’s counsel in his submissions is that title documents for the properties allegedly owned by the 1<sup>st</sup> Respondent were not produced, regarding the fixed assets even to show that the said assets are free from encumbrance, and that there is no certainty that the said assets cannot be sold in the period preceding this appeal. No doubt, it was incumbent upon the appellant to prove those kind of allegations to controvert the 1<sup>st</sup> Respondent’s contention that she is in a position to refund the decretal sum should the appeal succeed. To the contrary, no such evidence has been exhibited before this Court to discredit the 1<sup>st</sup> Respondent’s contention. The 1<sup>st</sup> Respondent exhibited a copy of title Deed to L.R Nandi/Hills/Kosoiyoo/BL.1/423 Measuring 3.00 Hectares registered in her name and a valuation report for plot No. L.R. No. 330/726 & 330/461/1 Anglican Heights Estate, Lavington, Nairobi. The valuation was carried out by Kenya Valuers and Estate agents Limited. The plots measure 0.5333 acres and 0.0116 Hectares respectively with an estimated value of Ksh. 17,000,000.00 for each apartment of 24 units. In my view, the 1<sup>st</sup> Respondent discharged the evidential burden of proving that she owns valuable assets to wit, land and buildings which are under construction and whose value far much exceeds the decretal sum herein.

The appellant, undeniably, is a stable Insurance Company, which would be in a position to pay off the amount as decreed should the appeal fail. However, this has to be balanced out against denial of the 1<sup>st</sup> Respondent from benefiting from her lawfully obtained judgment. It would be against the sound principle for the exercise of judicial discretion if this Court were to hold that because the appellant is a stable Insurance Company then it would suffer substantial loss of Ksh 4.4 million if the said money were paid out to the 1<sup>st</sup> Respondent in execution of decree. I am in agreement with the decision by L. Njagi J in ***Pamela Akinyi Opundo Vs Barclays Bank (Supra)*** that:

***“an appeal cannot be rendered nugatory in a monetary decree if payment is made and it is not just to deny a successful party the benefit of judgment merely because he is poor.”***

Further, I am enjoined to accept the observation in ***Stephen Wanjohi Vs Central Glass Industries Limited Nairobi High Court Civil 6726/91*** that ***“Financial ability of a decree holder solely is not a reason for allowing a stay. It is enough that the decree holder is not a dishonorable miscreant without any form of income.”***

Unlike in the ***Kenya Orient Insurance Company Versus Paul Mathenge Gichuki (supra)*** case where the Court accepted the appellant’s submissions that the burden of proof that the respondent can refund the decretal sum if the appeal succeeds shifts to the respondent the moment the appellant states that it is unaware of the respondent’s resources, in this case, the 1<sup>st</sup> Respondent has consistently sworn that she owns permanent assets in Nairobi and Nandi Hills whose estimated value and especially for the Nairobi asset alone, exceeds the decretal sum by over one hundred million,(Ksh 100,000,000.00) going by the proven valuation.

The respondent did not merely state that she owns some properties whose value exceeds the decretal sum. She adduced evidence to prove her allegation.

On the facts disclosed in this case, I find that the applicant has not demonstrated the condition that it will suffer any loss, leave alone substantial loss unless the order of stay of execution is made.

(ii) On whether the application was brought without unreasonable delay, the record shows that judgment in the Lower Court was delivered on 10<sup>th</sup> March, 2014. The applicant filed an appeal within 30 days stipulated under section 79G of the Civil Procedure Act on 3<sup>rd</sup> April, 2014. It then timeously filed an application for stay in the Lower Court, as provided for under order 42 Rule 6 (1) of the Civil Procedure Rules on 10<sup>th</sup> April, 2014. That application took sometime before it was decided on 12<sup>th</sup> September, 2014. There is no evidence that the appellant was responsible for the delay in determining that application which was filed timeously.

Upon dismissal of the said application for stay in the Lower Court on 12<sup>th</sup> September, 2014 the appellant timeously lodged this application on 15<sup>th</sup> September, 2014. It cannot therefore be true as submitted by the 1<sup>st</sup> Respondent that this application was filed with delay or unreasonable delay.

The appellant correctly exercised the option of first seeking for stay before the Court that made the impugned judgment and when that Court decided against it, it acted with alacrity and filed the present application only three days after refusal of the prayer for stay by the subordinate Court. In the circumstances, I find that the application was filed without unreasonable delay.

(iii) On the question of security for the due performance of decree, the appellant has offered an Insurance Bond as it is a stable Insurance company involved in underwriting business. It has also expressly demonstrated its willingness to abide by any order as to security as this Court may direct.

However, when this Court directed that the appellant deposits in Court the whole of the decretal sum on 27<sup>th</sup> October, 2014 before 20<sup>th</sup> November, 2014, there was initial apparent unwillingness to do so and this Court had on 20<sup>th</sup> November, 2014 to discharge the interim order of stay granted on

16<sup>th</sup> September, 2014 by Hon. Waweru J as extended by myself on 23<sup>rd</sup> September, 2014, before the appellant could comply with the Court orders of depositing in Court the decretal sum on 25<sup>th</sup> November, 2014.

Curiously, on 20<sup>th</sup> November, 2014 when the application came up for inter partes hearing, by which date the appellant ought to have complied with the order for security, counsel for the appellant informed the Court that she was not ready to proceed for reasons that her client had informed her the previous day that the 1<sup>st</sup> Respondent had used a proxy to approach the appellant seeking for an out of Court settlement. The 1<sup>st</sup> Respondent's counsel, Mr Masika confirmed that counsel for the appellant had send him an email at 5.00 pm the previous day but that when he contacted his client, the 1<sup>st</sup> respondent, she denied ever seeking out the appellant over a purported negotiated settlement. Counsel for the 1<sup>st</sup> Respondent, nevertheless, was willing to test the appellant's good faith and agreed to give them 14 days to indicate how the appellant wished to settle the claim.

As at the time the matter came up for mention on 1<sup>st</sup> December, 2014 after the appellant deposited the decretal sum in Court, there was no indication that the appellant or 1<sup>st</sup> Respondent was pursuing any line or form of a negotiated settlement of the matter. The appellant's counsel simply informed the Court that they had complied with the order of the Court to deposit the decretal sum in Court and they had deposited Ksh 4,450,750.00 on 25<sup>th</sup> November, 2014. Counsel then sought reinstatement of the order of stay pending ruling as both parties had filed and exchanged written submissions.

Under Order 42 Rule 7 of the Civil Procedure Rules, this Court has the discretion to determine what constitutes security for the performance of the decree. In **Visram Ravji Halai & Another Vs Thornton & Tupin [1963] Limited Civil Application No. Nai 15/1990**, the Court of Appeal held that;

***“the Court ought not to place the plaintiff in a position in which should the appeal fail, it would be difficult for the plaintiff to realize the fruits of his litigation due to inadequacy of the security ordered.”***

In this case, however, the decretal sum has already been deposited in Court, which, in my view, is adequate security.

Before I conclude on this issue of security, I must mention that the appellant dwelt so much on the merits of the appeal. In this case, it is not for this Court at this stage to access the merits of the appeal as filed although that does not mean that it cannot give consideration to the arguments placed before it. Whether or not this appeal succeeds, it is now clear in my mind that the appellant Corporate Insurance Company Ltd does not stand to suffer any loss as the 2<sup>nd</sup> Respondent Puma Cars Limited was ordered to indemnify the appellant for the loss it has to incur in compensating the 1<sup>st</sup> Respondent insured. Therefore, in my humble, keeping the decretal sum away from the 1<sup>st</sup> Respondent is to deny her lawfully obtained judgment.

At the end of the appeal, if successful, this court does not fathom how the appeal can be rendered nugatory since the 2<sup>nd</sup> Respondent who were found to be directly liable to pay the 1<sup>st</sup> Respondent, are very much alive in business and have not shown any intention of challenging the judgment of the lower court which found them wholly liable for the loss.

It all amounts to the same thing as the appellant paying the 1<sup>st</sup> Respondent now and seeking to execute against the 2<sup>nd</sup> Respondent.

Courts of law are enjoined to assist parties to resolve their disputes in an efficient and effective manner and not to escalate disputes between parties. The appellant has not demonstrated what difficulty it has

enforcing the indemnity judgment against the 2<sup>nd</sup> Respondent who for all this time, has been quiet about the whole issue and neither has it intimated that it intends to file an appeal, now almost one year into the judgment impugned by the appellant.

For the above reasons and for the reason that there is no evidence of substantial loss to the applicant/applicant and for the reason that it is not normal in a money decree for the appeal to be rendered nugatory if payment is made (*per Platt Ag J.A in Kenya Shell Limited Vs Benjamin Kanga Kigibu & Ruth Wairimu Kamuga (1982-1988), KAR 1018*), I decline to grant an order of stay of execution of decree pending appeal and direct that the decretal sum deposited in Court by the appellant be released to the 1<sup>st</sup> Respondent's counsel forthwith for onward transmission to their client the 1<sup>st</sup> Respondent.

The costs of this application shall abide the outcome of the pending appeal.

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of **April, 2015**.

**R.E. ABURILI**

**JUDGE**

*Judgment read and pronounced in open court in the presence of:*

*Mr Mwangela holding brief for Miss Gakuya for the appellant; and*

*Mr. Masika for the 1<sup>st</sup> Respondent*

*N/A for the 2<sup>nd</sup> Respondent*

*Court Assistant: Virginia Kavata.*

**R.E.ABURILI**

**JUDGE**

**22/4/2015**