



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 194 OF 2012

1. **BOLPAK TRADING COMPANY LTD.**
2. **ANDREW MBIKU SILA APPELLANTS/APPLICANTS**

VERSUS

JOSHUA WAMBUA KIMONGO RESPONDENT

RULING

1. The application dated 13/3/2013 seeks an order of stay of execution of the Judgment/Decree obtained in **SRMCC No. 16 of 2011** pending the hearing and determination of the Defendants'/Applicants' appeal herein.
2. The application is supported by the affidavit in support sworn by **Lindsey Mugambi**, the Legal Officer of **Directline** Insurance Company Limited, the insurers of motor vehicle registration No. KBA 330Z. It is deponed in the said affidavit that the Applicants have filed an appeal against the judgment delivered by the **SRM's Court, Tawa** on 11/10/12, wherein judgment was entered for the Respondent against the Applicants on a 100% liability basis. The Applicants are apprehensive that if the decretal sum is paid to the Respondent, the Respondent may not be in a position to refund the same if the intended appeal is successful as the Respondent is a person of unknown means. The Applicants have further asserted that they have made this application without delay and they are ready to deposit security. The Applicants posited that if there is no stay of execution, execution will take place thereby rendering the appeal nugatory. A further affidavit sworn on 21/5/13 further stated that the appeal has high chances of success.
3. In opposition to the application, the Respondent, **Joshua Wambua Kimongo** swore a replying affidavit on 27/3/13. It is contended by the Respondent that the appeal has no chances of success and that the application is brought with the intention of delaying the Respondent from enjoying the fruits of her judgment. The Respondent also stated that she is a man of means and is capable of refunding the Kshs.155,621/= decretal sum.
4. The application was canvassed by way of written submissions which I have duly considered.
5. Under **Order 42 rule 6 (2)** states as follows:

“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 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.”**
6. The application herein was filed without unreasonable delay. Judgment was entered on 11/10/2012 and the instant application filed on 18/3/2013. In any event the issue of delay has not

been raised by the Respondent.

7. The Applicants have expressed their fear that if the decretal sum is paid, the Respondent may not be able to refund the same in the event that the appeal is successful.

In the event that the Respondent is unable to refund the decretal sum, the appeal will be rendered nugatory thereby causing substantial loss to the Applicant.

8. Liability was denied and the trial court found the Applicants 100% liable for the accident. It is rather difficult to tell at this stage what will be the final decision in the appeal herein. In the circumstances of this case, the interests of both parties will be taken care of by the deposit of the entire decretal sum in court or in a joint interest earning account of both parties. Consequently, I order that such a deposit be made within 30 days from date hereof. In default execution to issue.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **20th** day of **March 2014**.

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B. THURANIRA JADEN

JUDGE