



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.99 OF 2013**

**DIAMOND TRUST BANK LIMITED..... APPELLANT**

**VERSUS**

**RICHARD MWANGI KAMOTHO.....1ST RESPONDENT**

**RISING STAR COMMODITIES LIMITED.....2ND RESPONDENT**

**WILLIAM MUTAVU MULU.....3RD RESPONDENT**

**RULING**

The application is brought by way of Notice of Motion and is premised under the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules, Section 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act**.

The Applicant seeks the following orders:

1. That pending the hearing and determination of the Appeal herein the Honourable Court be pleased to order a stay of any further proceedings in Naivasha SPMCCNo.590 of 2011.
2. That the 1st Respondent do pay the costs of this application
3. That there be liberty to apply.

The Applicant relies on the grounds on the face of the application and the supporting affidavit of **Stephen Kodumbe** and seeks a stay of proceedings in SPMCC No.590/2011 Naivasha which relates to a suit emanating from a Road Traffic Accident involving motor vehicles registration numbers KAW 139R and KAW 433G, a Scania Truck. The Applicant avers that it was a mere financier of the motor vehicle registration No.KAW 433G (Scania truck) purchased by the 2nd Respondent herein under a Hire Purchase Agreement.

Prior to this application, the Applicant had filed an application raising these issues and had requested the subordinate court to strike its name from the pleadings. By a Ruling dated the 12th June, 2013, the application was dismissed and the Applicant being aggrieved by the said Ruling filed a Memorandum of Appeal on the 25th June, 2013 and this application for stay of the proceedings in the lower court pending the determination of the appeal. The Applicant contends that the appeal has high chances of succeeding as the trial magistrate ignored the authorities that had been cited and relied upon in support of the application to strike out the Applicant's name from the plaint and further that the trial court proceeded on wrong principles of the law. Counsel urged this court to grant the orders sought because if the lower court matter were to proceed and be determined before the appeal is disposed of, then the appeal filed herein, would be rendered nugatory and therefore prayed that the application be allowed and costs provided for.

This court notes that the Respondents though duly served with the application and did not file any papers in opposition to the application neither did they attend court on the date fixed for hearing of this application even though they had also been duly served with a hearing notice. Therefore, this court shall consider the application as being unopposed.

After hearing the submissions made by Counsel for the Applicant the issues for consideration are ownership and vicarious liability and whether the Applicant's appeal has overwhelming chances of success.

From the submissions it is noted that the Applicant is a bank and that it provided financing to the 2<sup>nd</sup> Respondent for the purchase of the Scania Truck and was registered as the co-owner of the truck. Without seeming to go into the merits and demerits of the appeal, this court will only say at this juncture that there are numerous authorities on the issue of vicarious liability not being dependant on ownership but upon delegation of tasks and duties to an agent and/or servant.

For the reasons stated above this court is persuaded and finds that the Applicant's appeal has overwhelming chances of success and that the orders sought are merited.

### **CONCLUSION**

- i. There shall be a stay of any further proceedings in Naivasha SPMCC No.590 of 2011 pending the hearing and trial determination of the Appeal against the Ruling dated 12th June, 2013.
- ii. The Applicant to file and serve its Record of Appeal within 90 days of the date hereof.
- iii. Liberty to apply.
- iv. The costs of this application granted to the Applicant.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 16th day of June, 2014.**

**A. MSHILA**

**JUDGE**