



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CIVIL APPEAL NO. 26 OF 2013**

*(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CIVIL CASE NO. 131 OF 2012 OF THE CHIEF MAGISTRATE'S COURT AT MALINDI BEFORE HON. Y. A. SHIKANDA – AG. SRM)*

**TAHMEED COACH LIMITED**

**SALIM HAMISI**

**NASSIR HAMOUD ..... APPELLANTS**

**VERSUS**

**SALIM MAE PEKU (LEGAL REPRESENTATIVE**

**OF SADIKI SALIM PEKE (DECEASED)) ...RESPONDENT**

**RULING**

The application dated 22nd September, 2014 seeks an order of stay of execution of the Judgment of the trial magistrate pending the hearing and determination of the Applicant's Intended Appeal. The application is supported by the affidavit of Erastus Mwaniki sworn on 18th September, 2014. The Respondent filed a replying affidavit sworn on 23rd October, 2014.

Mr. Kariuki, Counsel for the Applicants submitted that the intended appeal is arguable. If execution is done, the appeal will be rendered nugatory. The Applicant was ordered to deposit in court Kshs. 300,000/- as security and this was done. The Applicants would like to pursue the appeal.

Mr. Kilonzi, Counsel for the Respondent opposed the application. Counsel submitted that an appeal does not act as a stay of execution. No substantial loss would befall the Applicants. The loss to be suffered must be proved and mere allegations cannot suffice. Further, the supporting affidavit was sworn by someone who is not a party to this suit and must be expunged. There is no proof that the person swearing the affidavit was authorised under seal by his employer, Direct Insurance Company. The deposit of Kshs. 300,000/= was for purposes of obtaining the interim orders and finally that the appeal has no likelihood of success. This is a money decree and it can always be refunded.

The main issue for determination is whether execution of the decree of the trial court should be stayed pending the hearing and determination of the appeal. The decree is for Kshs. 792,520. The intended appeal as per the annexed memorandum of appeal intends to challenge the amount of damages awarded to the Respondent. It is clear that the damages were awarded as a result of a road traffic accident. The Appellant is contesting the award of damages under both the Law Reform Act and the Fatal Accident Act.

From the memorandum of appeal, I do find that the appeal is arguable and is not meant to delay the payment of the decretal sum. The court has to weigh the right of the Respondent to enjoy the fruits of his decree against the rights of the Applicants to pursue their appeal. The Applicant contends that the Respondent is not capable of repaying the decretal sum should the appeal succeed. On his part, Counsel for the Respondent maintains that his is a money decree that can be refunded at any time. If the Respondent is in a position to refund the Applicant, I do find that the Respondent is a person of means and can wait until the appeal is determined for the decree to be satisfied. If one is in a position to refund a monetary decree, the question is, why then ask for payment before the appeal is heard only for one to refund it later. This appears like a loan to be repaid later. It is true the Respondent is already holding a favourable decree, however, he should allow the Applicant to pursue his appeal before the decree is settled. This is more so as the Respondent is capable of refunding the decretal amount as contended by his counsel meaning he is not a pauper.

Given the pleadings herein, I do find that the application is not meant to delay the payment of the decretal sum. Although the sum of Kshs. 300,000.00 was intended to act as security for the grant of the interim orders, I do find that it provides enough security in this matter. I do not find any need to increase this amount. The judgment was delivered on 20th August, 2014 and the application for stay of execution was filed on 22nd September, 2014. I do find that the application was filed without inordinate delay.

It is clear that this is a matter arising from a road accident. Ordinarily it is the insurance company that would be called upon to satisfy the decretal sum. The insurers of the accident vehicle were served with a statutory notice and although the insurance company is not a party to the suit, it is interested in the outcome of the dispute. It is therefore, in order for one of the officers of the insurance company to swear an affidavit in support of the application. The legal officer of the insurance company cannot be held to be a stranger to the dispute.

Further, I do find that payment of the entire decree would lead to a substantial loss if by the end of the appeal the amount is reduced or the entire appeal is allowed. The Appellant is seeking to have the judgment set aside.

In the end, I do find that the application dated 22nd September, 2014 is merited and the same is allowed. The Applicant to ensure that the proceedings are typed and the record of appeal is filed within ninety (90) days hereof. Costs shall follow the outcome of the appeal.

**Delivered and Dated in Malindi this 16th day of December, 2014 in the presence of:**

**Said J. Chitembwe**

**JUDGE**