



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 26 OF 2013**

**KENNETH OTIENO**

**JAMES ONGERA OBOBE**

**HELLEN N. GISIORA .....APPELLANTS**

**VERSUS**

**NZIRU NGANDA .....RESPONDENT**

**RULING**

The Notice of Motion Application dated the 27th day of March, 2013 and brought under Section 3A of the Civil Procedure Act order 42 rules 6 order 51 rules 1 and 3 seeks for an order for stay of execution of the Judgment delivered on 7th February, 2013 pending the hearing and determination of the applicants appeal against the Judgment delivered on 7th February, 2013.

The grounds are that the appeal has high chances of success.

If the stay is not granted the appeal if successful would be rendered nugatory or the applicant would suffer irreparable **loss and damage**.

The Respondent in his replying affidavit depones that he obtained a valid and good Judgment.

Further its not true that he will not suffer prejudice if the application for stay is allowed as he has already incurred financial loss and trauma. That he is a businessman and therefore in a position to repay the Decretal amount if the appeal succeeds.

It is submitted by his counsel that the principles in a case for stay of execution were held down in the authority of **AMIN LADAK ALIAS AMIN JAFFER GULAM HUSSEIN -VS- ROTHMANS HOLDINGS LTD. & ANOR. HCCA No. 458 OF 2000 eKLR** where Waki, Judge held, the following ought to be determined

- “(a) Whether the appeal has high chances of success.**
- (b) Whether the appellant shall suffer loss if the application is dismissed.**
- (c) Whether the application has been brought without delay”.**

As to whether the appeal has high chances of success, it is submitted that the award of Ksh. 509,520/= in respect of injuries which were both multiple bone and tissue was reasonable going by the current Court awards for similar injuries **on loss and prejudice if the application is dismissed**. It is contended that the appeal has no high chances of success. It is the Respondent who continues to suffer. That he is capable and able to pay the amount awarded in the event the appeal succeeds.

**Whether application has been brought without delay;**

Judgment was delivered on 7th February, 2013. The application was filed on 4th April, 2013.

It is noted that the Respondent maintains that he is in a position to pay the whole of the decretal amount if the appeal succeeds. However, apart from stating that he is a businessman nothing else is indicative of his capacity to pay to allege or state that one is a businessman is not enough.

As to whether the appeal has high chances of success. It is argued that the sum awarded was manifestly excessive. I find that this is an issue which may require re-assessment. To that end therefore the appeal is not frivolous.

I do find that the application has merit. I will grant a stay of execution of the Judgment of the lower Court but on the condition that the Appellant do deposit the whole of the decretal amount in an interest earning account in the joint names of both Advocates within thirty (30) days from the date of this ruling.

Ruling delivered dated and signed this **14th** day of **November, 2013**.

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**M. MUYA**

**JUDGE**

**14TH NOVEMBER, 2013**

**In the presence of:-**

Learner Counsel for the appellant Miss Andagi holding brief

Miss Kinyanjui

Learned Counsel for the Respondent Ajibo

Court clerk Musundi