



Editorial Summary

1. *Civil Appeal*

2. *Civil Procedure and Practice*

3. *Subject of Subordinate Court Case*

TORT

- 3.1 *Running down cause.*

- 3.2 *Collision between motor vehicles.*

- 3.3 *Male adult – driver*

Fatal injuries.

- 3.4 *Award by subordinate court*

- Ksh. 1,673,261/-

(22nd November 2011)

4. *Appeal filed 30th November 2011.*

5. *Application Notice of Motion 13th December 2011*

a) *Stay of execution pending appeal.*

b) *Estate may not be able to refund
decretal sum.*

c) *Security available to be offered.*

6. *In reply:*

i) *Insurance companies are collapsing.*

ii) *Security not sufficient*

iii) *No substantial loss has been
disclosed.*

7. *Held:*

Application granted.

8. *Case Law:*

9. *Advocates :*

i) *E. Masika instructed by M/s Ochieng, Onyango,
Kibet & Ohaga & Co Advocates for appellant/original defendants*

ii) *O.N. Ongeru instructed by M/s Gicheha Kamau & Co
Advocates for respondent/original plaintiffs*

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 613 OF 2011

CHELI & PEACOCK MANAGEMENT LITD

**NOAH MUYA ADIRA APPELLANTS/
ORIGINAL DEFENDANTS**

VERSUS

**ALICE WAKIURU NDUNGU MAU & ESTHER MWERIYA MAU (Suing as the administrators
of the Estate of
PETER NDUNGU MAU (DECEASED) RESPONDENTS/
ORIGINAL PLAINTIFFS**

*(Being an appeal from the Judgment of Hon. Stephen Riechi Esq, Chief Magistrate on 22nd
November 2011 in Civil Case No. 4365 of 2003 at Milimani Commercial Courts at Nairobi)*

RULING

(Application For Stay of Execution)

I. BACKGROUND

1. The subordinate courts at Nairobi heard and finalized a case in TORT that involved a motor vehicle collision between two vehicles. The driver of one of the vehicles sustained fatal injuries. His estate filed suit and the said courts gave an award of Ksh. 1,673,261/-. Liability was established at 80% against the applicant/original defendants and 20% against the deceased's estate.

2. Being dissatisfied with this award the appellant filed appeal on the 30th November 2011. By an application dated 13th December 2011 the applicant prayed for a stay of execution.

II APPLICATION

13TH DECEMBER 2011

3. The applicant/appellant argued that a stay of execution be granted on grounds that that in the event the respondent be paid they would not be able to refund the sum due if the appeal is successful. There would be substantive loss occasioned.

4. The respondent stated that the applicant is ready the insurance company. It is a well known fact that the insurance companies are collapsing. The security offered by way of a guarantee is questioned by them as being inadequate.

5. The respondent prayed that the application be dismissed.

III FINDINGS

6. It is trite law that as a rule no orders of stay of execution is to be made unless the following conditions are met:-

i) The court is satisfied that substantive loss may result to the appellant unless the order is made and that the application has been made without unreasonable delay and

ii) 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.

7. The application herein has been brought without undue delay. Security has been offered and provided. The issue arises is that security is inadequate and as such there ought to be a cash deposit to court. Further no substantial loss would be occasioned.

8. The security by way of a bank guarantee is not an insurance company guarantee. This of course would not be preferred by an insurance company who insured the actual respondent's vehicle but may be an independent company.

From the annexure, the security is from the bank guarantee and not the insurance company. I would accept this as proper security provided.

9. As to the substantial loss, the probability of the sums not being refunded would amount to substantial loss, if the appeal would be successful and was allowed.

10. I would accordingly allow this application for stay of execution. I would further order that the bank guarantee be filed to court by a reputable bank within 14 days.

11. Costs in the appeal.

DATED THIS 1ST DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) E. Masika instructed by M/s Ochieng, Onyango, Kibet & Ohaga & Co Advocates for appellant/original defendants

ii) O.N. Ongeru instructed by M/s Gicheha Kamau & Co Advocates for respondent/original plaintiffs