



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Appeal 398 of 2003**

**ASSOCIATED MOTORS LIMITED..... APPLICANT/APPELLANT**

**VERSUS**

**HARRISON KING'OO KALEI T/A HURRY INSURANCE AGENCIES.....RESPONDENT**

**RULING**

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The application before the court is the Notice of Motion dated 27<sup>th</sup> September, 2012 and filed by the Appellant. It seeks stay of execution of the orders of this court in its judgment dated 16<sup>th</sup> May 2011. The stay of execution sought is to pend the hearing and final determination of an appeal represented by a Notice of Appeal to the Court of Appeal filed on 23<sup>rd</sup> May, 2011 against said judgment of this court. In the said judgment, this court dismissed with costs, an appeal from the lower court thereby upholding the finding of the lower court, the Appellant's suit claiming special damages of Kshs.424,000/-

I have carefully perused the records of the lower court and this court. The Appellant in his lengthy Memorandum of Appeal raised matters of fact and law. Maraga J, as he then was, dismissed the appeal, concurring with the findings of the trial court on those matters of facts and law.

It is clear to this court in this application therefore, that neither the lower court in its judgment, nor this court in its appeal judgment, made any substantive order involving any decretal amount to be paid by either party. Only an order of costs was made, first by the trial magistrate when dismissing the suit and later by this court when dismissing the appeal.

The records show that the costs in favour of the Respondent were taxed at Ksh.66,483/- on 25<sup>th</sup> September, 2012. It is not denied by the Applicant/Appellant, that those costs is the only issue before the court. The stay of execution sought by the Appellant, therefore, is only aimed at staying the settlement of the costs and there is no other substantive order of this court that is capable of being stayed. The issue before this court, therefore, is whether or not a stay of execution is issuable against orders for costs?

It was further brought to the attention of this court that although the Appellant filed a Notice of Appeal to the Court of Appeal, it never filed any substantive appeal within the 60 days prescribed by the rules of that court, otherwise the notice shall be presumed as having been withdrawn. The relevant rule of that court provide that if no substantive appeal is filed within 60 days of the filing of the Notice of Appeal, the whole appeal is presumed to have been withdrawn.

The Appellant in this application did not deny the fact that it has never filed a substantive appeal. It never even stated that it has filed an application to file an appeal out of time. It simply wanted this court to assume that there is a pending appeal by virtue of the mere filing of the Notice of Appeal.

Looking at the two issues discussed above, it is first, the view of this court that there is no substantive decree in this court's judgment that can be capable of being executed by the Respondent. A certificate of costs granted in this case does not, in my view, amount to a decree.

Secondly, there is no prima facie evidence on the record that there is an appeal pending against the Respondent at this moment. The Notice of Appeal filed was not followed by the filing of a substantive appeal. The Notice many therefore be regarded in law as having been withdrawn at the expiry of 60 days

after it was filed. Which appeal then is the Applicant stating has high chances of success?

Thirdly, the Applicant was not heard to say that the Respondent who will have been paid its costs of Ksh.66,483/- will have no capacity of refunding it if the Respondent lost any such appeal. Indeed the Respondent confirmed that it will quickly refund the sum, thus eliminating any chances of substantial loss on the part of the Applicant/Appellant.

In these circumstances, this application demonstrates no merit. It is dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 17<sup>th</sup> day of December, 2012.

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**D A ONYANCHA**