



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**CIVIL APPEAL 141 OF 2007**

**TIMSALES LIMITED.....APPELLANT**

**VERSUS**

**JACKSON ANYOLO OWINO..... RESPONDENT**

**RULING**

The appellant, Timsales Ltd brought on Notice of Motion under the provisions of Order XLI rules 4 and 6 of the Civil Procedure Rules seeking an order of this court to stay execution of the judgment and decree of the subordinate court in Nakuru SRMCC.No.2411 of 2002 Jackson Anyolo Owino vs Timsales Ltd, pending the hearing and determination of the appeal. The grounds in support of the application are on the face of the application. The applicant stated, *inter alia*, that it was aggrieved by the decision of the subordinate court and had appealed to this court. The subordinate court had granted conditional stay of execution of its judgment on terms that were unacceptable to it. The appellant stated that it was aggrieved by the ruling of the subordinate court that required it to pay part of the decretal sum to the respondent pending the hearing and determination of the appeal. The appellant stated that it was challenging the finding of the subordinate court on liability, and it would be prejudiced and suffer irreparable damage if it is ordered to pay part of the decretal sum to the respondent. The appellant stated that if the respondent was paid part of the said decretal sum, and then in the event that the appellant would be successful in its appeal, it would be unable to recover the said sum. The appellant stated that it was willing to provide security on terms that would not be prejudicial to its interests. The application is supported by the annexed affidavit of Patricia Njuguna, the Senior Legal Manager of the insurers of the appellant, Mssrs. Heritage Insurance Company Ltd.

The application is opposed. The respondent filed grounds in opposition to the application. Mark Githiru, the advocate for the respondent, further swore a replying affidavit in opposition to the application. In the said pleadings, the respondent stated that judgment on liability was agreed by consent of the parties whereby the respondent agreed to shoulder contributory negligence of 25%. The appellant was to bear 75% liability. The respondent stated that whereas the appellant was within its right to file an appeal, it should not do so at the expense of the respondent. The respondent stated that the decision by the trial magistrate to order the appellant to pay the respondent half of the decretal sum pending the hearing of the appeal was reasonable in the circumstances. The respondent further stated that the court should be slow to interfere with consents of the parties. The respondent was of the view that the appellant had filed the present application to frustrate him and consequently deny him the fruits of his judgment. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard the submission made by Mr. Gachuna on behalf of the appellant and by Mr. Githiru on behalf of the respondent. The two counsel basically reiterated the contents of the application and the grounds of opposition filed. The issue for determination by this court is whether the appellant established sufficient grounds to enable this court grant it an order of stay of execution of the decree of the subordinate court sought. The principles to be considered by this court is determining whether or not to grant an application for stay of execution are well settled in **Butt vs Rent Restriction Tribunal [1982] KLR 417** at page 419, Madan JA, held that;

***“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being rendered nugatory...”***

In the present application, the appellant was dissatisfied with the conditional stay of execution granted by the subordinate court. The appellant is allowed by **Order XLI Rule 4(1) of the Civil Procedure Rules** to apply to this court to review the decision of the subordinate court to grant or refuse an application for stay of execution. The appellant was aggrieved that the trial magistrate had ordered it to pay half of the decretal sum to the respondent pending the hearing and determination of the appeal. It appeared that the trial magistrate based her decision on the fact that the parties herein had agreed by consent to compromise the suit on liability. The appellant is however raising questions on the said consent entered on liability. I have perused the same. The said consent is dated the 11<sup>th</sup> February, 2004. It was however filed in court on the 3<sup>rd</sup> May 2007. I think the appellant is justified in complaining that the said consent appears to have been suspiciously obtained and filed in court. Since questions have been raised concerning the consent which formed the basis upon which the subordinate court ordered half the decretal sum to be paid, it is only fair and just that the appellant be allowed to have its day in court on appeal without fear that it would be unable to secure its interest during the pendency of the appeal.

In the premises therefore, I will grant the application by the appellant. The order of the subordinate court granting conditional stay of execution of its decree is hereby set aside. This court grants stay of execution of the subordinate courts judgment and decree pending the hearing and determination of the appeal. The appellant is ordered to deposit the entire decretal sum in a joint interest earning accounts in a reputable bank in the names of the counsel for the appellant and counsel for the respondent as security. The said amount shall be deposited in the said account within thirty (30) days of today’s date. The costs of this application shall be in the cause.

**DATED at NAKURU this 23<sup>rd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**