



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Civil Appeal 644 A of 2004**

**BARRY KULICK ..... APPELLANT**

**VERSUS**

**PAYLESS CAR HIRE AND TOURS LIMITED ..... RESPONDENT**

**RULING**

This is an application for stay of execution pending appeal, under Order 41 Rule 4 of the Civil Procedure Rules.

The lower court awarded the Respondent the sum of Kshs.76,320/= plus interest at 4.5% per day (instead of 4.5% per month) from the due date to the date of Judgment. That in itself is a ground of appeal, as is the basis of the principal amount awarded. At this time, the Applicant seeks stay of execution. The only issue is the “security” to be deposited by the Applicant as a condition to the grant of stay. Both parties have made submissions on this issue based on their respective understanding of the lower court’s Judgment. They have also filed reports from their respective financial consultants who have calculated interest in different ways using 4.5% per day, and 4.5% per month. This has resulted in two extreme positions – the Applicant arguing that the interest should not exceed Kshs.150,370/= as per the report filed on his behalf by Ernst & Young; while the Respondent says it should be in the region of Kshs.1.6 million as per the decree of the lower court.

The principles and requirements outlined in Order 41 Rule 4 of the Civil Procedure Rules governing the grant of stay of execution are intended, in my view, to balance the interests of both the parties. The security ordered by the court is not intended to be punitive of the Applicant, rather it is to secure, as reasonably as is possible, the decree holder in the event of an unsuccessful appeal. Accordingly, it would not be just to ask the applicant to deposit the sum of Kshs.1.6 million as security when there is a major issue about the validity of that part of the Judgment as it relates to interest. To do so would be highly punitive and unjust. I am of the view that the fair sum to order as security is the one suggested in the Ernst and Young report – Kshs.300,000/= which comprises both principal and interest. A substantial portion of this amount has already been deposited in court by the Applicant. I order that the balance be deposited in Court within the next 21 days, and provided that is done, I order stay of execution pending the final determination of the appeal herein. Those are the Orders of this Court.

Dated and delivered at Nairobi this 14th day of July, 2005.

**ALNASHIR VISRAM**

**JUDGE**