



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1824 OF 2000**  
**CONSOLIDATED WITH**  
**CIVIL CASE NO. 1042 OF 1999**

**MOTREX LIMITED.....PLAINTIFF**

**VERSUS**

**AKAMBA PUBLIC ROAD SERVICES LTD.....1ST DEFENDANT**

**JOHN NTHEU NDUNDA.....2ND DEFENDANT**

**R U L I N G**

1. Before me is an Application dated 7th November 2003 by the Plaintiff seeking an order that the decree herein be stayed pending the hearing and determination of *Civil Appeal No. 203 of 2003 – Motrex Limited vs. Akamba Public Road Services Ltd. & Another*.

2. The grounds in support of the Application brought under Order XLI Rule 4(1) are that: -

i) The Plaintiff has a good appeal with high chances of success

ii) The Plaintiff is bound to suffer irreparable loss unless the stay of execution is not granted and the appeal may then be rendered nugatory.

iii) The Plaintiff is ready to abide by such reasonable terms as the court may order.

3. In the Supporting Affidavit of Zachariah Ngome Advocate, sworn on 12th November 2003 it is deponed that Ang'awa J. delivered judgment on 2nd July 2003 and thereafter, and being dissatisfied with the said judgment, the Applicant filed Civil Appeal No. 203 of 2003 in the Court of Appeal. It is further deponed that no prejudice would be occasioned to the Respondent if the orders are granted.

4. In opposition, the Respondent raises two issues which in their view disentitles the Applicant to the orders of stay of execution; -

a) No loss that the Applicant will suffer has been shown and

b) There has been delay in bringing forth the instant Application.

5. There are other issues raised by counsel in submissions before me but I found them peripheral to the issue at hand.

6. Order 41 Rule 4(2) which gives the basis for grant of stay under Order 41 Rule 4(1) provides as follows: -

“No order of stay of execution shall be made under sub -rule (1) unless –

a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

b) 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 test that the Applicant must have passed is that there is no unreasonable delay in bringing forth the Application and that substantial loss may result if the orders are not granted. The court may thereafter at its discretion order the deposit of such security as it may deem fit.

8. The present Applicant has already filed an appeal against the judgment and has therefore not come to court with the now common excuse that proceedings and judgment have not been filed. It filed the instant Application on 12th November 2003. Whereas judgment was delivered on 2nd July 2003, the Bill of Costs was only taxed on 15th October 2003. Taking all these dates and the circumstances around them, it cannot be said that there is unreasonable delay on the Applicant’s part.

9. On the question of substantial loss, I have noted that the judgment is for a sum of Kshs.832,816.35 and costs of Kshs.212,135.00. The total amount is therefore, in excess of one million Kenya shillings. That is by all standards substantial amount but I note further that the Respondents are confident that they can repay that amount if it is found that they were to blame for the accident.

I also note that the judgment came as a result of two suits in which the parties separately sued each for the same accident.

10. The Applicant is agreeable to this court setting conditions that are reasonable. I think so.

11. I hereby grant stay of execution pending appeal. The Applicant is to deposit the sum of Kshs. One Million in court or in the alternative a bankers guarantee to be held as security pending finalization of the Appeal. That amount or guarantee to be so deposited within the next 14 days.

12. The costs of the Application such abide the Appeal.

Dated and delivered at Nairobi this 17th day of February 2004.

**I. LENAOLA**

**Ag. JUDGE**

17.2.2004

Before Lenaola Ag. J.

Amos CC

Ruling read in the presence of:

Mr. Ongoto for Mr. Omondi for Respondent

No appearance for Applicant

**I. LENAOLA**

**Ag. JUDGE**

