



**Abson Motors Limited v Nyongesa (Civil Appeal 106 of 2023)
[2023] KEHC 23643 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 106 OF 2023
DKN MAGARE, J
SEPTEMBER 19, 2023**

BETWEEN

ABSON MOTORS LIMITED APPELLANT

AND

FIBI OKUTOYI NYONGESA RESPONDENT

RULING

1. This is a Ruling of one of the run-off the mills Applications. It is an Application for stay pending Appeal dated 10th May 2023. This was as a result of stay pending Appeal from the decision given in by the Chief Magistrate's Court Decision in CMCC No. 1808 of 2021.
2. They asserted that they are willing to provide security. They stated that they have a good and arguable Appeal with high chances of success and that Respondent will not suffer any damage that cannot be compensated by costs.
3. I have perused the 4 paragraph Memorandum of Appeal dated 10th May 2023.
4. The Appeal does not appear idle. It raises issues both on quantum and liability.
5. The Appeal is opposed.
6. The Respondent filed a Replying Affidavit to the Notice of Motion dated 10th May 2023. It was sworn by the Advocate for the Respondent who averred that an amount of Ksh. 499,175 out of the award of Ksh. 998,350 be put to a fixed interest earning account and that the Respondent should be allowed to enjoy the fruits of the judgment.
7. They annexed a Notice they gave on 3rd May 2023.



Analysis

12. The condition for stay of execution pending Appeal as provided under order 42 rule 6(2) of the Civil Procedure Rules stipulates thus:

“No order for stay of execution shall be made under subrule (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.

13. The court, in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. Further, in the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

15. The test in the instant case is thus:

- (a) Whether there is an Appeal.
- (b) Whether there is security furnished for the due performance of the Decree.
- (c) Whether the Appeal is not idle.
- (d) Whether the Respondent cannot refund the Decretal sum.

16. The parties did not file submissions.



17. It is my considered view that the Applicant has made the prerequisite for the grant of stay pending Appeal.
18. The Respondent did not reply. It is the Advocate who did so. We shall never know her means of refunding the Decretal sum.
19. In the circumstances, I am satisfied that the Application dated 10th May 2023 should be allowed in terms of prayer 3.
20. The Applicant to provide security of Ksh. 800,000/= within 60 days.
21. The Appeal be listed for hearing forthwith.

Determination

22. The upshot of the foregoing is that I allow the Application dated 10th May 2023 in the following terms:
 - i) There be stay of execution of the Judgment and Decree of Court in Mombasa CMCC No. 1808 of 2021 pending the hearing and determination of the Appeal.
 - ii) The Applicant to deposit a sum of Ksh. 800,000 within 60 days in a joint interest earning Account in the name of the Advocates on record for the parties as security for the Appeal.
 - (iii) Costs of the Application to be in the Cause.
23. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Obar for the Appellant

C. Masinde for the Respondent.

Court Assistant - Brian

