



REPUBLIC OF KENYA



KENYA LAW
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**Mwaniki & another v Jonathan (Civil Appeal 34 of 2023)
[2023] KEHC 22697 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 34 OF 2023
TM MATHEKA, J
SEPTEMBER 25, 2023**

BETWEEN

M MWANIKI 1ST APPELLANT

JOHN MAINA KIMANI 2ND APPELLANT

AND

MUSENYA JONATHAN RESPONDENT

*(Application for stay of execution of the judgment of
Hon. J.D Karani in Makindu SPM CC 371 /2019.)*

RULING

1. Before me is the Notice of Motion dated 18/4/2023 brought under, inter alia order 42 rule 6 of the [Civil Procedure Rules](#). It essentially seeks stay of execution of the judgment of Hon JD Karani in Makindu SPM CC 371 /2019 - in which the learned trial magistrate awarded judgment against the appellant at 100% liability , General Damage of Kshs 300,000 and Special Damages of 12,500 on 29/3/2023.
2. The appellants were aggrieved and lodged an appeal against the award of liability and general damages.
3. The only issue is whether the applicant has complied with the conditions of order 42 rule 6 of the [Civil Procedure Rules](#).
4. It is argued for the respondent that the applicant does not even had an arguable appeal in that the respondent was a fare paying passenger in the accident m/v so liability is not in issue - that quantum of damages awarded was reasonable - and the appellant did not present any evidence to controvert that of the respondent.



5. In the circumstances it is argued that they do not deserve the prayer for stay of execution of judgment - and if granted they should pay $\frac{3}{4}$ of decretal sum to the respondent and deposit the balance in an interest earning account.
6. That the applicant has not provided there is no adequate security for the performance of the decree - yet the respondent is entitled to the fruits of her judgment. See *Ms Shariff and Co Advocate v Omari Mbwana Zonga* (2021) eKLR.
7. That the bank guarantee is not sufficient - see *Lucy Nyanchoka Nyarieko v Nancy Corris* [2022] eKLR as there is the possibility of the bank not honouring the bank guarantee. That the applicant is not a party to the guarantee which is not specifically for this appeal see *Nobel Trading Co Ltd & 2 others V Peter Odhiambo Maraga* [2022] eKLR ; *Amoke Otieno Pascal V Melvin Anyango Owuor* [2022] eKLR
8. Finally, that there is no risk of substantial loss.
9. The respondent urges that the application be dismissed with costs.
10. However on the basis that the applicant does have the right of appeal - and the appeal is not being argued now, it is in order that the application be allowed . See *Nancy Nduta Korie & Another v Rosline Kimunzoi* [2019] eKLR.
11. In the circumstances I allow the application for stay of execution of the judgment on condition that part of the decretal sum in the sum of Ksh 200,000 be paid to the appellant within 30 days hereof.
 - a. Kshs 200,000 be paid to the respondent and the balance be deposited in an interest earning account in the joint names of the advocates of the parties within 30 days hereof
 - b. In default of (a) above the application will stand dismissed and the respondent will be at liberty to execute.
 - c. The Appeal be filed and served within 30 days hereof.
 - d. The respondent will have costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH SEPTEMBER 2023

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MUMBUA T MATHEKA

JUDGE

Ms Owino for respondent

Kimondo for appellant no appearance

Mutuku Wambua & Associates Advocate

Respondent's Counsel

Kimondo Gachoka Advocate

