



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. E332 OF 2020

RADHESHYAM TRANSPORT LTD.....1ST APPLICANT

IGNATIUS K. ODUYA2ND APPLICANT

VERSUS

JAMES KIARIE.....RESPONDENT

RULING

1. The application dated 27/11/2020 seeks orders: - **THAT pending the hearing and determination of this Appeal, the Honourable Court be pleased to stay and/or suspend the execution of the Judgment delivered on 30/10/2020 in Civil Case No. 6946 of 2018 by L. Gicheha (Chief Magistrate) at the Milimani Commercial Court.**

2. It is stated in the grounds set out in the application and the supporting affidavit that the Applicants have preferred an Appeal herein. The Applicants are apprehensive that if execution is levied, their Appeal which they state has high chances of success will be rendered nugatory and they will thereby suffer substantial loss. It is further asserted that the Applicants are willing to deposit half the decretal sum as security for the decretal sum or abide by the orders the court may grant.

3. It is averred in the replying affidavit in opposition to the application that the Applicants have not demonstrated that they stand to suffer any substantial loss. That the claim the subject of the suit is a material damage claim involving a motor vehicle and that the decree is for a quantified amount of money which ought to be paid unless the Applicants can demonstrate that the Respondent is not capable of refunding the decretal sum in the unlikely event that the Appeal is successful. It is contended that the Respondent's Insurer is a financially stable corporation which is capable of refunding the decretal sum. The court was urged not to prevent the Insurer from enjoying the fruits of the Judgment.

4. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

5. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.

6. The Judgment of the Lower Court was delivered on 30/10/2020. The application herein was filed on 01/12/2020. There was no unreasonable delay in the filing of the instant application.

7. The Applicants have argued that their Appeal stands to be rendered nugatory. There are no allegations that the Respondent is not capable of refunding the decretal sum. On the other hand, the Respondent makes reference to the financial stability of his Insurer. However, the contract of insurance is between the Respondent and his Insurance Company. It has not been demonstrated that the Respondent has already

been compensated by the Insurance Company nor stated anywhere that the Insurance Company is exercising its right herein under the doctrine of subrogation.

8. The Applicants have their undoubted right of Appeal while the Respondent is entitled to the enjoyment of the fruits of his Judgment. To balance the competing interests of the parties, I allow the application on condition that the Applicants do deposit the decretal sum in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date hereon. Costs in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021

B.THURANIRA JADEN

JUDGE