



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO.E024 OF 2021**

**PARAXIDESE KHATEMBI IMONJE.....1<sup>ST</sup> APPLICANT/APPELLANT**

**PRAKIGON TRANSPORT SERVICE LTD... 2<sup>ND</sup> APPLICANT/APPELLANT**

**JOSHUA NYASYA NYAMAI ..... 3<sup>RD</sup> APPLICANT/APPELLANT**

**-VERSUS-**

**JOSHUA MINOO PETER ..... RESPONDENT**

**RULING**

1. Before me is an application brought by way of Notice of Motion dated 4<sup>th</sup> May 2021 under section 3A, 79G, 95 of the Civil Procedure Act, and Order 22 Rule 22, Order 42 Rule 4, 6 and 7, and Order 50 Rule 6 as well as Order 51 Rules 1 and 3 of the Civil Procedure Rules.
2. The application seeks five orders, three (3) of which have been spent as follows –
  - 1) *(spent)*
  - 2) *(spent)*
  - 3) *That this honourable court be pleased to order stay of execution of the judgment delivered by the trial court on 15<sup>th</sup> April 2021 in civil suit No. 275 of 2019 Kilungu between the parties herein pending the hearing and determination of the appeal herein.*
  - 4) *(spent)*
  - 5) *That the costs of this application abide the outcome of the appeal.*
3. The application has grounds on the face of the Notice of Motion that judgment had already been delivered and an award on 100% liability made, that the applicants are apprehensive that the respondent will execute the judgment, and that the respondent is a person of unknown means and that the decretal amount if paid might not be recovered, and finally that the applicants are ready to provide security in the form of a bank guarantee.
4. The application is supported by an affidavit sworn on 4<sup>th</sup> May 2021 by Paraxidese Khatembi Imonje, one of the applicants, which amplifies the grounds.
5. The application is opposed through a replying affidavit sworn on 18<sup>th</sup> May 2021 by Jeniffer Mino Peter the respondent in which it is deponed that the amount of award of Kshs.259,100/= is not excessive, and that the intention of the application is to deny the respondent enjoyment of the fruits of his lawfully obtained judgment.
6. The application proceeded by way of filing written submissions. The respondent's counsel M/s Sila & company filed written submissions on 23<sup>rd</sup> June 2021 while the applicants' counsel M/s Kimondo Gachoka & company filed submissions on 16<sup>th</sup> July 2021.
7. This court has discretion to grant orders of stay of execution pending appeal, which discretionary power is meant to enable the court do justice – see **Patel –vs- E.A Cargo Handling Services Ltd (1974) E.A 75**.
8. In exercising such discretion of power, the court has to be guided by the considerations set out Order 42 Rule 6 of the Civil Procedure

Rules, especially Rule 6(2), which states as follows –

**6(2) 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.***

9. Though the file herein is an appeal file, I have combed through the documents in the file and have not seen the memorandum of appeal; even though the said memorandum of appeal is referred to in paragraph 4 of the supporting affidavit as “PH 11”. I have also not been availed a copy of the trial court judgment.

10. I however, also that execution process had commenced, and interim stay orders were granted by this court, pending determination of this application.

11. That said, the judgment of the trial court is said to have been delivered on 15<sup>th</sup> April 2021 and this application was filed on 10<sup>th</sup> May 2021. I find that there was no inordinate delay in filing the application. Thus one of the three requirements under Order 42 Rule 6(2) of the Civil Procedure Rules has been satisfied by the applicants.

12. Will the applicant suffer substantial loss if the stay orders sought herein are not granted? Since I have no doubt that an appeal has been filed challenging both liability and quantum of damages, I am of the view that the applicant is likely to suffer substantial loss if execution proceeds; and they ultimately succeed on appeal. Since the applicants have not provided either a copy of the judgment or memorandum of appeal and execution has commenced, I will grant stay but subject to the applicants paying part of the decretal sum, that is Kshs.80,000/= to the respondent.

13. With regard to provision of security in my view, the amount of decree above, to be paid by the applicants to the respondent will satisfy the requirement of the security to be provided by the applicant.

14. Consequently, I order as follows –

***1) Stay of execution of decree or judgment herein is granted pending appeal subject to the applicants paying to the respondent through counsel, part of the decretal sum that is Kshs.80,000/= within 30 days from today.***

***2) In default of (1) above, the stay orders herein granted will automatically lapse.***

***3) Costs of the application will abide the decision in the appeal.***

**DELIVERED, SIGNED & DATED THIS 11TH DAY OF NOVEMBER, 2021, IN OPEN COURT  
AT MAKUENI**

**GEORGE DULU**

**JUDGE**