



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 219 OF 2018**

**TAWAKAL AIRBUS LIMITED.....APPELLANT**

**VERSUS**

**MARY NYAGUTHI MBURU.....RESPONDENT**

**AND**

**MARYAM ABULREHMAN T/A PWANI TAWAKALMINI**

**COACH & INSURED AS PWANI TAWAKAL.....JUDGMENT DEBTOR**

**RULING**

1. The appellant has approached the court through an application by Notice of Motion dated 26/10/2018 and prayed for stay of execution on the following terms:-

- i. “That the Honourable Court do certify this Application as Urgent and hear this Application ex-parte in the first instance.**
- ii. That pending the hearing and determination of this Application, the Honourable Court be pleased to grant a temporary stay of execution.**
- iii. That pending the hearing and determination of this Application, this Honourable Court be pleased to stay the Ruling delivered on 23/10/2018 in Mombasa and any other order that may be issued pursuant thereto, pending the hearing of the Appeal.**
- iv. That the costs of this Application be provided for”.**

2. Difficulty with drafting notwithstanding, the only prayer that remains outstanding for determination by the court is prayer 3 which I read to seek stay of execution pending the hearing and determination of this appeal. This court certainly cannot stay an order that has not been made but may be made by the trial court in the future. It is important, for ease of litigation, that parties and counsel craft their prayers to court in a practical and candid manner so that the intention is clear and not to invite minute and difficult scrutiny.

3. The considerations a court takes into account on whether to order stay are now settled and need no repetition. For this matter, to start with, I have in the file a memorandum of appeal duly filed hence there is indeed an appeal pending. That being the case, I only need to consider whether there was an undue delay in making the application; whether there is a potential of a substantial loss being visited upon the appellant and further what kind of security need to be given for the due performance of the decree should the appeal fail. I am convinced that there was never undue delay in making the application because the application was simultaneously filed with the Appeal on the same day.

4. On substantial loss and security to be imposed, I have noted the contention by the applicant that the basis of dismissal of the appellant’s objection proceedings at trial was the finding by the trial court that that the appellant and the judgment debtor shared a common postal address and that the transfer was a phony designed to defeat execution. I have also taken note of the sentiments expressed by the decree-holder /respondent bordering on frustration by conduct of the Appellant portrayed to border on pervasion or outright circumvention of the court process. In fact the replying affidavit does not openly oppose the application but rather pleads that the applicant be ordered to provide security as the only way to meet the ends of justice. The summary of the respondent’s position on the application is disclosed at paragraphs 4,5,8,9 and 10 of the Replying affidavit in which the Respondent says:-

**“Paragraph 4: THAT pursuant to those warrants, the appellant’s bus was attached on 26<sup>th</sup> October 2018 but released**

illegally upon pressure of the appellant herein and the OCPD Kilifi South. Attached hereto and marked "MNM 2" is a true copy of Jakimu Auctioneers Proclamation dated 26<sup>th</sup> October 2018 at 5.30pm.

**Paragraph 5: THAT I also attach hereto and mark "MNM 3" a copy of the said auctioneers complaints to the office of the Director of Public Prosecution which is self-explanatory.**

**Paragraph 8: THAT due to the appellant's machinations, I have been left holding a mere paper judgment and the appellant has not provided any security in the likely events that its appeal fails.**

**Paragraph 9: THAT there is nothing to stop the appellant from further transferring the buses that belonged to the judgment debtor to yet another company and thereby completely defeat the respondent's interests herein.**

**Paragraph 10. THAT to balance the interest of the parties herein, I call upon the honourable court to have the appellant provide security for the decretal sum herein pending the determination of its appeal to avoid my judgment being rendered nugatory as a condition for stay".**

4. Having taken note of that position by the Respondent and being cognizant of the need to balance the parties competing interest I do invoke my inherent powers to do justice and achieve the overriding objections of the court and grant stay to preserve the appeal as I seek to secure the Respondent interests in the decree.

5. Those paragraphs, which have not been rebutted, to me paint a picture of a litigant who has sought to combine judicial and extra judicial manouvres to have his way and at all costs. If true this court trusts that the persons to whom the complaints have been raised will faithfully undertake their legal duty.

8. Accordingly and to push the appeal forward, I direct and order that there be stay of execution by sale of the attached motor disclosed to court as Registration No. KCK 037C on terms that:-

**i. The Appellant deposits into a joint interest bearing account the full decretal sum within 30 days for today. In default the motor vehicle, wherever it shall be, shall be liable to seizure by the auctioneer from whose custody its was taken unlawfully.**

**ii. The Appellant shall within 45 days from today compile and file a Record of Appeal and have the file placed before a judge for perusal. In default to so comply the appeal itself shall stand dismissed.**

**iii. Cost be costs in the appeal.**

**Dated and delivered at Mombasa this 02nd day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**