



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 140 OF 2018

PANIJ AUTOMOBILES LTD.....1st APPLICANT

TRINITY TRANSPORTERS.....2nd APPLICANT

CHARLES MATHEKA MUTUNGA.....3RD APPLICANT

VERSUS

SIMON MUTETI & GETRUDE MUTETI (Suing as administrators of

THE ESTATE OF GLORIA MUTHEU (deceased).....RESPONDENTS

RULING

1. This is an application by the Applicant dated 12.11.2018 seeking primarily stay of execution of judgement and decree in **Machakos CMCC No. 471 of 2017** pending the hearing and determination of the appeal from a judgement given on 28.09.2018. The Application is supported by Affidavit sworn by Kelvin Ngure, the claims manager of the insurers of the suit vehicle.

2. The Applicant deposes that the quantum of damages awarded was excessive and that they are aggrieved. The applicants annexed a Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates judgement. The applicants aver in the supporting affidavit that they are willing to furnish requisite security and the respondent will not suffer any prejudice if the application is allowed.

3. The Application is opposed vide replying affidavit sworn by Simon Muteti who averred that the appeal was filed out of time without seeking the requisite leave and that the applicant has failed to satisfy the grounds that warrant the issuance of stay orders and that the application is intended to delay and deny him from enjoying the fruits of his judgement. He averred that he is a man of means who is able to refund the decretal amount if the appeal succeeds.

4. The Application was canvassed by way of written submissions.

5. The issue for determination is whether the Applicant is entitled to orders for stay of execution. Order 42 Rule 6 of the Civil Procedure Rules is the law applicable in deciding whether the prayer is merited.

6. The case of **Antoine Ndiaye v African Virtual University [2015] eKLR** gave the guiding principles for stay orders, in semblance with Order 42 Rule 6 of the Civil Procedure Rules; to wit,

(a) The Application was brought without undue delay

(b) Substantial loss occasioned to the applicant if the order is not granted

(c) Security for performance

7. Looking at the Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable for all one is required to demonstrate is the arguability of the appeal. The Applicants have easily met that standard. I believe that the Applicants have discharged this burden.

8. I have looked at the application herein, and with regard to the condition of undue delay, the court has not been provided with tangible evidence of the date when the judgement was passed. The respondent averred that the application was filed out of time and has not annexed a copy of the judgement to demonstrate the same. Section 3(4) of the Law of Evidence Act provides that **A fact is not proved when it is**

neither proved nor disproved. Therefore I am not satisfied that the appeal was brought within or out of time and this issue shall be addressed at a later stage when dealing with the merits of the appeal. However the application has been brought a month after filing the appeal that is on record. Therefore the court finds that from the evidence available the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicants shall suffer save that their right to be heard on appeal will be extinguished if the order is not granted. I am also unable to see the loss that the respondent shall suffer if the order is granted. On the issue of security for performance, the applicants are not averse to the furnishing of requisite security for performance of the decree. I am alive to the apprehensions that the respondents have that the application shall delay them from benefiting from the judgement. However in light of the fact that the applicants have indicated willingness to furnish security to satisfy the decretal sum and they are not satisfied with the judgement of the trial court, there is some semblance of adverse effects that refusing the order have on them. On the other hand the respondent has shown their willingness or ability to refund the decretal sum if the appeal is decided against them; in these circumstances I am satisfied that on a balance of probabilities, the applicants have met the basic requirements for grant of this order.

9. In the result it is my finding that the Appellants application dated 12th November 2018 has merit. The same is allowed in the following terms:

(a) An order of stay of execution of the decree in Machakos CMCC No. 471 of 2017 pending the hearing and determination of the appeal on condition that the appellants deposit half of the decretal sums into a joint interest earning account in the names of the Advocates for the parties within thirty (30) days from this ruling failing which the stay shall lapse.

(b) The costs hereof shall abide in the appeal.

It is so ordered.

Dated and delivered at **Machakos** this **18th** day of **September, 2019**.

D.K KEMEI

JUDGE