



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 367 OF 2016**

**BLUE NILE E.A. LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**EDWIN OSOYA KENNEDY.....RESPONDENT**

**RULING**

The proposed Appellant/Applicant has moved the court by way of a Notice of Motion dated the 26<sup>th</sup> day of June 2018 seeking for orders that there be a stay of execution of judgment delivered on 15<sup>th</sup> May 2018 in CMCC 4247/2016 pending the hearing and determination of an intended Appeal and that leave be granted to the applicant to file Appeal out of time.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Lidia Gode Yussuf on 26<sup>th</sup> June, 2018. The deponent who is a director of the Appellant, depones that she was not around when the judgment was delivered on the 14<sup>th</sup> day of May 2018 as she had travelled to her rural home in Marsabit County and due to family challenges she took long to travel back to Nairobi.

That, the Applicant is dissatisfied with the judgment of the Lower Court as the damages awarded to the Respondent are excessive and that, according to her, the Respondent was to blame for the accident. She contends that the learned magistrate ignored the witness statements by the applicant's witnesses and ignored the evidence adduced in support of the applicant's case thus, arriving at the wrong decision.

It is averred that the decision to Appeal could not be made by any other person as they did not have authority. That, no prejudice will be suffered by the Respondent and that the Appeal has high chances of success. The applicant is ready to abide by any conditions this court may impose, in the interest of justice.

In a replying affidavit sworn by Edwin Osoya Kennedy on 23<sup>rd</sup> July 2018, the Respondent avers that the applicant does not want him to enjoy the fruits of his judgment which was legally obtained. He contends that the applicant has not satisfied that he has a good and sufficient cause for not filing the Appeal on time as there is no evidence to show that the director had travelled and that it has not been shown that the deponent was the only person who could have given instructions on Appeal.

The Respondent argued that the Applicant has not demonstrated that the Appeal has high chances of success and therefore, the application and the intended Appeal are an abuse of the court process and the application ought to be dismissed. It was deponed that the Respondent is a person of means and will be able to refund the decretal sum if it is paid to him and the Appeal succeeds, but in the event that the court grants the orders sought, the decretal sum be deposited in a joint interest earning account, pending the hearing of the Appeal.

The court has considered the application and the submissions made by the parties herein.

The application is brought under Order 42 rule 6 of the Civil Procedure Rules.

The applicant must satisfy three conditions if a stay of execution is to be granted which are that;

- a) substantial loss may result to the applicant unless the order is made.
- b) the application has been made without undue delay.
- c) such security as the court orders for due performance as may ultimately be binding on him has been given by the applicant.

On substantial loss, it is averred that, if stay is not granted the applicant shall suffer irreparable loss as the appeal shall be rendered nugatory. It is deponed that it has a good appeal that has high chances of success.

As the court held in the case of **James Wangalwa & Another Vs. Agnes Naliaka Cheseto Misc. 42/2011 (BUNGOMA)**, substantial loss is the corner stone in an application for stay of execution pending Appeal. It has not been alleged that the Respondent shall not be able to refund the decretal sum if the same is paid to him and in the event that the Appeal succeeds but he avers that the Appeal has high chances of success.

On security, the applicant is ready and willing to abide by any conditions that this court may impose.

On the delay, judgment was delivered on the 14<sup>th</sup> May 2018 and the application herein was filed on 26<sup>th</sup> June 2018. There was a delay of 42 days which is long but the same has been explained. The deponent to the supporting affidavit stated that she was the only director who was authorized to give instructions on Appeal and having travelled to Marsabit County, it took her time before she could travel back to give instructions.

I find that the application has merits. The court has to consider and balance the interest of both parties as was held in the case of **Portreiz Maternity Vs. James Karanja Kabia (Civil Suit 63/97)** In so doing, I grant a stay of execution pending the hearing and determination of the intended Appeal on condition that, the decretal is deposited in an interest earning account to be operated by Advocates for both parties. The money to be deposited within 30 days from the date of this ruling. The Applicant is hereby granted leave to file Appeal out of time and the attached memorandum of Appeal shall be deemed as duly filed upon payment of the requisite filing fees.

Costs of the application shall abide the outcome of the Appeal.

**Dated, Signed and Delivered at Nairobi this 11<sup>th</sup> day of October, 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....**For the Appellant**

.....**For the Respondent**