



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 507 OF 2011**

**NAOMI W. MUCHAI ..... APPELLANT/RESPONDENT**

**- V E R S U S -**

**ACME STEEL KENYA LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. **Acme Steel Kenya Ltd**, the respondent/applicant herein, took out the motion dated 4/9/2015 in which it sought for inter alia an order for stay of execution of the judgment and decree herein pending the hearing and determination of the appeal. The motion is supported by the affidavit of Purav Patel. When served, Naomi W. Muchai, the appellant/respondent filed the replying affidavit of Jenipher Catherine Ombonya to oppose the motion. When the motion came up for interpartes hearing learned counsels made oral submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submissions. The history behind this motion is short and straightforward. The appellant/respondent filed a material claim in the sum of ksh.392,036/= against the respondent/applicant before the Chief Magistrate's Court, Milimani Commercial Courts. The claim was heard and dismissed by Hon. M. N. Kiema, learned Resident Magistrate.

3. Being aggrieved, the appellant/respondent challenged the dismissal order on appeal before this court. This court heard the appeal and in its judgment delivered on 16.8.2018, the trial court's dismissal order was set aside and was substituted with an order entering judgment in favour of the appellant/ respondent in the sum of ksh.392,036/= with costs and interest. The appellant being dissatisfied has now filed a notice of appeal with the intention to challenge this court's decision on appeal.

4. It is the submission of the respondent/applicant that it would suffer substantial loss if the orders for stay is denied. It is argued that the appellant/respondent is not in a position to refund the decretal sum if the appeal turns successful. The applicant further stated that the application for stay was timeously filed and that it is ready to provide security for the due performance of the decree if directed by this court.

5. The appellant/respondent stated that the paltry decretal sum of ksh.392,036/= cannot cause the respondent/applicant substantial loss. The appellant/respondent suggested in the circumstances that the entire decretal sum plus ksh.56,515/= be deposited as security for the due performance of the decree.

6. The appellant/respondent submitted that her motor vehicle registration no. KAJ 513U was valued at ksh.488,000/= as at 6/10/2002 therefore she is in a position to refund the decretal sum.

7. The principles to be considered in an application for stay of execution of a decree or order are well settled. **First**, an applicant must show that the application for stay was filed without an unreasonable delay. In this case, this court delivered its judgment on 16.8.2018. The Notice of appeal was filed on 29.8.2018 while the application for stay was filed on 4.9.2018. I am satisfied that the application was filed timeously.

8. The **second** principle is that the applicant must show the substantial loss it would suffer if the order for stay is denied. In this case the applicant has stated that the appellant/respondent may not be in a position to refund the decretal sum if the same is paid to her should the appeal turn successful. The appellant/ respondent did not indicate that she is in a position to make a refund but instead she stated that she is in possession of a car which was valued at ksh.488,000/= in the year 2002. It is obvious that the value of the foresaid motor vehicle must have significantly depreciated for the last 16 years. It cannot therefore be said that the appellant/respondent has the financial capacity to refund the decretal sum should the appeal turn successful.

9. The **third** and final principle is the provision for security. The parties are in agreement that there is need to provide security. I think the fair order on security is to direct the respondent/ applicant to have the principal decretal sum deposited as security.

10. In the end, I allow the motion dated 4/9/2018. Consequently, an order for stay of execution of the judgment/decrece is given pending appeal on condition that the Respondent/Applicant deposits the sum of ksh.392,036/= in an interest earning account in the joint names of learned advocates and or firms of advocates appearing in this appeal within 30 days from the date hereof. In default the motion will be treated as having been dismissed.

11. Costs of the motion to abide the outcome of the appeal.

**Dated, Signed and Delivered in open court this 14<sup>th</sup> day of December, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondents