



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION - MILIMANI**  
**CIVIL SUIT NO. 445 of 2008**

**SILVERSTAR AUTOMOBILES LIMITED.....PLAINTIFF**

**VERSUS**

**FIDELITY SHIELD INSURANCE COMPANY LIMITED.....DEFENDANT**

**RULING**

1. The underlying suit in this matter has been heard and adjudicated upon. Hon J. Havelock J delivered his Ruling on 15<sup>th</sup> May 2014. The suit was a claim for general and special damages for loss suffered by reason of a burglary at the Plaintiff's premises at Factory Road, City Stadium. The Defendant failed to settle the claim.. The suit was heard by Havelock J on various dates and dismissed with costs by his Ruling of 15<sup>th</sup> May 2014. Immediately following the Hearing, the Plaintiff, who is the Applicant here, made an oral application for leave to appeal. There was no application for a stay at that stage. The Defendant proceeded to tax its costs and a Bill of costs was filed on 25<sup>th</sup> July 2014.

2. The Plaintiff then filed this Application by Notice of Motion. The Application is dated 21<sup>st</sup> November 2014 and was filed on the same day. It is brought under Order 42 Rule 6 and Order 51 Rul 1 & 4 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Application seeks the following Orders:

1. That the Application be certified as urgent and heard ex-parte in the first instance
2. That this Honourable Court be pleased to grant an order for stay of proceedings herein pending the hearing and determination of the intended appeal agaisnt the decision of the Court made on 14<sup>th</sup> May 2014;
3. That the costs of the application be in the Cause.

The Application is said to be based on the following grounds:

1. this Honourable Court dismissed the suit on 14<sup>th</sup> May 2014
2. That the Plaintiff/Applicant being dissatisfied with the pronounced judgment has lodged an appeal in the Court of Appeal
3. That the Appeal has a high probability of success and unless the stay of proceedings is granted, the said appeal will be rendered nugatory

4. That it is only fair and just that the taxation of the Party and Party Bill of Costs dated 25<sup>th</sup> July 2014 await the outcome of the appeal

3. The Application is supported by the Affidavit of Mohammed Abdala who is the Managing Director of the Plaintiff/Applicant. The Affidavit relates the history in that a Judgment was delivered and the Plaintiff was dissatisfied and lodged a Notice of Appeal. There is no reference at all to a Memorandum of Appeal or any further steps. On 26<sup>th</sup> September the Defendant/Respondent filed its Bill of Costs. On 20<sup>th</sup> October 2014 it was stood over to 10<sup>th</sup> December 2014 supposedly until this “Court grants an order for stay of proceedings.”. That is an interesting statement to make on oath as 20<sup>th</sup> October is a public holiday in this Country and therefore it is neigh on impossible that any Court would be making such an order on such a mundane matter. On the issue of reason or prejudice the deponent states that “I have been advised by our Advocates on record which advice I verily believe to be true, that the Plaintiff’s appeal will be rendered nugatory should the Bill of Costs be taxed.” The deponent also received advice that the Defendant would suffer no prejudice.. Legal advice is not fact but opinion. It is also the Deponent’s opinion “that it is only fair and just that taxation herein await the outcome of the appeal and proceedings be stayed. The Application was not served on the Defendant/Respondent until 24 days later (insert date). Paragraph 11 of the Supporting Affidavit states that the Appeal will be rendered nugatory. The Application was filed under a Certificate of Urgency certified by an Advocate called Jason Ondabu. He is of the view that the Defendant lodged its Bill of Costs notwithstanding that the Plaintiff has lodged an appeal in the Court of Appeal”. The Affidavit contains no evidence of the lodging of an appeal at the Court of Appeal. It is also said that unless the application is heard and orders sought granted the Plaintiff stands to suffer irreparable loss and damage. That loss and damage has not been set out at all. The Judge who heard the matter in the first instance did not certify urgency. He also expressed the view that there a legal and procedural safeguards which permit a stay of execution once a bill is taxed so taxation is not an emergency. (Gikonyo J) .

4. The matter came before this Court for an interpartes hearing. On that day it was recorded that the Memorandum of Appeal had not been filed. The Court ordered by Consent that:

*1. The Taxation to proceed but execution be stayed pending the outcome of this Application*

*2. The Respondent to file its Replying Affidavit by 14<sup>th</sup> January 2015 ...”*

The Court also gave directions for the filing of Written Submissions but the Plaintiff did not comply at first. The taxation went ahead and the Certificate of Taxation which was dated 11<sup>th</sup> March 2015 certified costs in the sum of KShs600,672.00. The Defendant also filed, on 14<sup>th</sup> January 2015, a Replying Affidavit of Ms Caren Jagua. Unfortunately, a copy does not appear on the Court file

5. In the meantime the Defendant filed Grounds of Opposition (16<sup>th</sup> December 2014) and a Replying Affidavit. Also shortly after the Application was filed the Decree was issued on 27<sup>th</sup> November 2014. The timing suggests that there had been some steps towards obtaining a decree before the Notice of Motion was filed.

6. The Application is opposed on the following grounds:

1. The Court should not exercise its discretion in favour of the plaintiff as the application has been unduly delayed both in filing and service...

2. The filing of a Notice of Appeal does not automatically stay the taxation

3. There is no reason why the taxation should not proceed

4. There is no basis for staying recovery of the taxed costs. If the appeal is successful the defendant as a registered insurance company is well able to refund any sum that may have been paid and there is no prejudice to the plaintiff as the appeal will not be rendered nugatory.

7. Notwithstanding the Defendant's reluctance the Parties did file their Written Submissions although the Plaintiff did so only after a considerable delay of 7 months and only on the day of the Hearing. The Court has read and taken into account the submissions. Both Parties rely on the Ruling of Aburilii J in **Civil Appeal No 411 of 2014**. In it she sets out the criteria for the application of Order 46 Rule 6(2) Provides:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order.....

(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....”

8. From the Rule and the aforesaid authority as well as the authorities referred to therein, the Plaintiff has to satisfy the Court of the following:

1. That the Applicant will suffer substantial loss unless a stay is granted

2. That the Application was made without unreasonable delay

3. The Application is not being used to delay justice

4. That without a stay the appeal will be rendered nugatory, and

5. The Applicant can provide security in the event a stay is ordered (**Equity Bank Limited vs West Link MBO Ltd 2013 eKLR.**)

9. Starting with the question of whether or not the Application was made without unreasonable delay. The Application was filed about 6 months after the Judgment was delivered. By all accounts that is a significant delay. Even after filing the Applicant did not comply with the timelines set out in directions thereby delaying the consideration of the matter by a further 6 months, at least. During that time the Applicant was enjoying the benefits of a stay of execution. In the circumstances the cumulative delay is unreasonable. The Application suggests that the Plaintiff will suffer substantial loss or any success at Appeal will be rendered nugatory.

10. The Plaintiff has not filed any evidence or explanation as to why that should be so. What is said is simply an expression of an opinion expressed by the Plaintiffs' Advocates. If the Plaintiff were to succeed at appeal, it would receive payment from the Defendant. Why would that be effected by whether or not an order for costs was met at this stage. In the final analysis there would be an accounting exercise and what was due would be paid. In the circumstances, that criteria is not made out. Further, the Plaintiff has not filed its grounds of appeal so the court cannot assess whether or not the appeal would be rendered nugatory or there is good reason to await the outcome of the appeal, whether because it has merit or otherwise.

11. On the question of an order for security. There is no evidence whatsoever before the Court to suggest that the Defendant would not be in a position to satisfy any order made by the Court of Appeal. The Plaintiff complains that execution takes time. That is neither substantial loss nor prejudice, it is simply an exercise that must be undertaken to execute a judgment.

12. The Court also takes into account that the passage of time since hearing this Application and delivering this Ruling. The delay and any inconvenience is regretted. However, it raises the substantive issue that had there been an appeal the outcome would have been known by now. The Plaintiff has

benefitted from a stay of execution for more than 12 months. If the Appeal for which Notice was filed more than 2 years ago has not come to a conclusion, there is no reason before this Court to extend that stay. If the Appeal has concluded again there is no reason for any further stay. In the circumstances, the Application is dismissed with Costs.

**Dated: 7<sup>th</sup> April 2017**

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Delivered and Signed at NAIROBI this 15<sup>th</sup> day of June 2017**

In The Presence of :

Court Clerk: Patrick Mwangi

Plaintiff: N/A

Defendant: Miss Wataka