



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL 59 OF 2016**

**METRO LOGISTICS LIMITED ..... APPELLANT**

**VERSUS**

**AGNES MUENI DAVID ..... 1<sup>ST</sup> RESPONDENT**

**ALIOS FINANCE KENYA LIMITED .....2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment & Decree of Hon. J. Wanjala – Senior Principal Magistrate-  
Nyahururu in Nyahururu PMCC No. 34 of 2015 dated 27<sup>th</sup> April, 2016)*

**RULING**

Before Court is the Notice of Motion dated 26/5/2016 brought under Certificate of Urgency. The Applicant seeks inter alia the following orders:-

***“THAT this Honourable Court do grant a stay of Execution of the decree passed on the 27<sup>th</sup> April, 2016 pending the hearing and determination of appeal being Nakuru HCC No. 59 of 2016 preferred against the decree”***

The application was supported by Affidavit of **GEORGE KIRUMBA MBIYU**, sworn on 26/5/2016. The Respondent by way of a Replying Affidavit sworn by **AGNES MUENI DAVID MUYA** on 9/6/2016 opposed the application.

This application arises from a decision of the Magistrate’s Court **in Nyahururu PMCC No. 34 of 2015**, in which the trial court found in favour of the Respondent and entered judgment in her favour in the sum of Ksh 1,500,000/= plus Ksh 69,000/= awarded as Special Damages. The judgment was delivered on 27/4/2016 and being aggrieved the Appellant filed this appeal on 26/5/2016.

The Application was disposed of by way of written submissions. I have carefully perused the submissions made by both counsel as well as the authorities cited therein. Order 42 rule 6(2) of the Civil Procedure Rules authorize a court to make an order for stay of Execution.

The court here has to consider two main questions.

1. Has the application been filed without undue delay
2. Would the intended appeal be rendered nugatory if the orders sought are not granted?

On the first question I note that the trial magistrate delivered her judgment on 27/4/2016. The appeal was filed about one month later on 26/5/2016. This present application was filed the same day. I find that the application was brought in a timeous manner without any delay at all.

It has been submitted for the applicant that if the decree is executed in full or in part, then should the appeal succeed the Respondent may not be in a position to reimburse the appellant. The Respondent has denied this and stated that she has sufficient resources to reimburse the appellant should the appeal succeed. However the Respondent has not demonstrated that she does have this capacity to pay. In the case of **NAIROBI CIVIL APPLICATION NO. 238 OF 2015, NATIONAL INDUSTRIAL CREDIT BANK LTD Vs AQUINAS FRANCIS WASIKE & ANOTHER** (Unreported) the Court of Appeal held:-

***“..... once an applicant expresses reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must shift the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.....”***

The Respondent has not discharged this evidential burden.

On the whole I find it prudent to maintain the status quo in this matter pending the finalization of the appeal. As such I do grant a stay of execution in terms of prayer (a) of the Notice of Motion dated 26/5/2016. I further direct that the Appellant deposit the sum of Ksh 1.0 million by way of guarantee in joint interest earning account in the names of both counsels by end of business on the Wednesday 7<sup>th</sup> September 2016. Failure to comply means the stay will automatically lapse. Cost to be met by the applicant.

Dated in Nakuru this 2<sup>nd</sup> day of September, 2016.

Ms Yebei holding brief for Mr. Mutonyi for Applicant

No Appearance for Respondent

**Maureen Odera**

**Judge**

**2/9/2016**