



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

**CIVIL APPEAL NO. 473 OF 2014**

1. **SHARIF ALWY ABAR**  
2. **PHILIP MUBEA MWANGI.....APPELLANTS**

**VERSUS**

**C M (Minor suing through next friend and father G K K.....RESPONDENT**

**RULING**

1. The Respondents sued the Appellants in Kiambu CMCC No. 143 of 2012. In that suit, the Respondent sought recovery of damages arising from an alleged road traffic accident for which the trial court found the Appellants 90% liable. The Appellants felt aggrieved by the trial court's judgment and filed this appeal on 24<sup>th</sup> October, 2014. They have now filed a notice of motion dated 26<sup>th</sup> February, 2015 seeking the following orders:-
  - i. *That this court be pleased to order stay of execution of the judgment and decree entered against the Appellant on 29<sup>th</sup> September, 2014 pending the hearing and determination of this appeal.*
  - ii. *That in the alternative, this court does make such other further orders as it may deem just and expedient pending the hearing and determination of this appeal.*
2. The application is premised on the grounds set out on the body of the application and the facts averred in the Supporting Affidavit of Erastus Mwaniki. He stated that thirty (30) days stay of execution ordered by the trial court lapsed on 29<sup>th</sup> October, 2014 exposing the Appellant to danger of attachment. That the applicant filed an application dated 29<sup>th</sup> October, 2014 for stay of execution pending appeal before the trial court but that application was dismissed by a ruling delivered on 19<sup>th</sup> February, 2015. He stated that the Respondent's physical and financial means are unknown to the Appellants and are apprehensive that if the decretal amount, which is substantial, is paid to the Respondent, he would not be in a position to refund the same. He expressed the Appellants' willingness to furnish security and stated that this appeal will be rendered nugatory if the orders sought are not granted.
3. The Respondent filed a Replying Affidavit on 4<sup>th</sup> March, 2015 in response to the application. He contended that Mr. Mwaniki was not a party to this suit and that there was no nexus between the Appellants and Mr. Mwaniki either by way of a policy document or otherwise and that the allegation of subrogation is baseless and unsubstantiated. That the Appellants are not aggrieved with the judgment but a person who is not a party to the suit alleges to be aggrieved and that that flies in the face of the court and smacks unfair legal and professional practice which should be shunned by the court. He contended that the application is an afterthought having been filed several months after the judgment. It was contended that the Appellants have not deponed to what substantial loss they stand to suffer if the orders of stay is not granted. That he proposed to the Appellants to pay KShs. 600,000/= to the minor and the deposit be deposited in a joint account but

refused to consider the proposal since they had a temporary stay of execution and they now rush again to this court for assistance. He proposed that stay of execution be granted on terms that half the decretal sum be paid to the minor and the other half be deposited in court. It was further averred that there was no proof that this appeal will be rendered nugatory if the orders sought are not granted.

4. This application was canvassed by way of written submissions. On whether there is an arguable appeal, it was submitted that the trial court disregarded the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013 Schedule, Cap 405 Laws of Kenya as a guide in the award of general damages which provide the degree of disablement for lacerations and bruises as two percent of KShs. 3 Million which is equivalent to KShs. 60,000/=. To buttress their argument in that regard, the Appellant relied on **Peter Obande Ndeke v. Mumias Sugar Co. Ltd & Another (2014) eKLR** and **Tabro Transporters Ltd v. Absalom Dova Lumbasi (2012) eKLR**. On substantial loss, it was submitted that the appeal has been filed and is yet to be heard and determined and that if stay orders are not granted, the appeal shall be rendered nugatory and the Appellants shall suffer loss and damage such that even if the appeal is successful, the Appellants will be unable to recover the decretal amount since the Respondent's financial standing is unknown to the Appellants. On the issue of security, the Appellants stated that they had fulfilled the requirements of Order 42 Rule 6 (2)(b) which calls for an applicant to furnish security. On that point they cited this court's decision in **Kenya Commercial Bank Limited v. Sun City Properties Limited & 5 Others (2012) eKLR** wherein the court expressed the need to balance the competing interests of the parties in an application such as this.
5. It was argued that this application was brought timeously considering that a ruling dismissing the Appellant's application for stay of execution was delivered on 19<sup>th</sup> February, 2015 and the application herein filed on 26<sup>th</sup> February, 2015. On whether there was a nexus between the Appellants and Mr. Mwaniki, it was submitted that the suit motor vehicle registration number KBB 166 F was insured by Directline Assurance Company Limited (*the company*) which has rights of subrogation under the relevant policy of insurance and at common law, the right to defend, settle prosecute any claims in the insured's name. That the said company instructed Kairu and Mc Court Advocates to defend the suit. That by virtue of the company being the instructing party, its legal officer, Mr. Mwaniki who is well conversant with the issues relating to this suit is duly authorised and competent to swear an affidavit in this matter. With this regard the Appellants cited **Abdul Razak Khalfan (suing on behalf of the International Air Transport Association-IATA & Another v. Pinnacle Tours & Travel Limited & Another (2005) eKLR** where the court held that an insurance company is entitled to file a suit against a third party on behalf of its insured under the doctrine of subrogation.
6. The Respondent's submission was essentially a reiteration of the averments in the Replying Affidavit. In response to the issue of whether or not Mr. Mwaniki can authoritatively make depositions with regard to the issues in this appeal, it was argued that he cannot authoritatively depone to the substantial loss that shall be suffered by the Appellants.
7. I have considered the depositions and submissions tendered in respect of the application. This being an application for stay of execution three conditions set out under Order 42 Rule 6 of the Civil Procedure Rules, 2010 have to be met by an applicant thus:-
  - i. that the application has been brought timeously;
  - ii. that if the stay orders are not granted the applicant will suffer substantial loss; and
  - iii. security must be provided.
8. An application for stay should be filed within the statutory time given for lodging an appeal in the High Court, that is, within thirty (30) days from the date of delivery of judgment. The judgment that the Appellant intends to appeal against was delivered on 29<sup>th</sup> September, 2014. It has however been explained that the stay of execution granted by the trial court lapsed on 29<sup>th</sup> October, 2014. Subsequently, an application dated 29<sup>th</sup> October, 2014 was filed before the said court but was dismissed by a ruling which was delivered on 19<sup>th</sup> February, 2015. The Appellant thereafter filed this application on 26<sup>th</sup> February, 2015. In my view the delay in filing this application is excusable and not inordinate considering that the Appellant moved with speed from

the date of the delivery of the ruling of 19<sup>th</sup> February, 2015. I find that this application was filed timeously.

9. On substantial loss, the Appellants stated that they may not be able to recover the decretal amount from the Respondent in the event the appeal succeeds. In money decrees to prove substantial loss, an applicant ought to establish that the Respondent will be unable to refund the decretal sum. When an allegation as to financial incapability is alleged against a Respondent, the burden of proving otherwise shift to such a Respondent. The Court of Appeal had this to say while dealing with such an issue in **ILRAD v. Kinyua(1990) KLR 403 at Page 406:-**

***“We have considered what Mr. Sehimi has said. However, we must “observe that the onus was upon the respondent to rebut by evidence that the claim that the intended appeal if successful would be rendered nugatory on account of his(respondent’s) alleged impecunity”.***

10. With regard to the Respondent's contention that Mr. Mwaniki has no nexus to the Defendant, I agree with the Appellant's submissions that being a legal officer with the Defendant's insurer, he is authorised and competent to swear the said affidavit considering that it is the insurer who is under duty to settle the claim in the event the Respondent succeeds. The Respondent did not swear or state his ability to repay money if paid to him.

11. The Appellant expressed willingness to furnish security and has satisfied the third condition. In the circumstances, I find and hold that the Appellant has satisfied the essentials for grant of stay of execution pending appeal.

12. Accordingly, the application is allowed in the following terms:-

- a. The Appellant is hereby granted stay of execution of the judgment and decree entered against the Appellant on 29<sup>th</sup> September, 2014 pending the hearing and determination of this appeal.
- b. The Appellant to deposit the decretal sum of KShs. 1,076,736/= in a joint interest earning account in the names of the parties' firm of advocates within the next thirty (30) days from the date of this ruling failure to which the orders herein shall stand vacated.
- c. The appeal should be filed and be prosecuted within 12 months from the date of this ruling failing of which the stay granted shall automatically lapse and execution to issue.
- d. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**