



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 308 OF 2015**  
**MOHAMED FARAH BARDAD.....APPELLANT/APPLICANT**  
**VERSUS**  
**ALI MOHMED IBRAHIM**  
*(suing as a personal representative of the estate of*  
*Mohamed Ibrahim Ada (deceased )*  
**MOHAMED CMC MOTORS GROUP LTD.....RESPONDENT**

**RULING**

1. The applicant filed an application dated 26th June 2015 under Order 42 Rule 6(1) (2) (3) Order 43 rule 1 (1)(g), Order 51 rule 1 of the Civil Procedure Rules , Section 3, 3A,63 (e) and 79G of the Civil Procedure Act seeking orders inter alia that: The court orders stay of execution of the decree arising from CMCC no. 166 of 2012 pending the determination of the application and stay of proceedings in CMCC no. 166 of 2012 pending the appeal.
2. The motion is supported by the affidavits of **Dr. George Gitamo Onsombi** sworn on 26<sup>th</sup> June 2015 .When served with the motion the Respondent filed a replying affidavit he swore to oppose the motion. Learned counsels appearing in this appeal filed their written submissions.
3. I have considered the grounds outlined on the face of the motion plus the facts deponed in the affidavits filed in support and against the application together with the rival written submissions. The applicant claims that he filed the application dated 25th March 2015 where he sought to set aside the exparte judgment in Milimani CMCC number 166 of 2012. In the ruling delivered on 12th June 2015 the trial court dismissing the application. Subsequently, the applicant filed an appeal and a stay of execution application. According to the applicant, the interlocutory judgment entered condemned the applicant to 100% liability yet his defence seeks to dispute liability.
4. The respondents opposed the motion arguing that the judgment against the applicant was entered on 28th September 2012 against the applicant having been served with summons to enter appearance and he failed to enter an appearance. The judgment was entered after formal proof on 17th September 2013. The respondents' stated that the matter was brought in bad faith as the applicant wants to delay the matter further and deny the respondent an opportunity to enjoy the fruits of the judgment. He argues further that the affidavit by the advocate **George Gitamo** appearing for the applicant is misleading as he has not attached any letter of instructions to appeal in the matter and cannot therefore swear an affidavit on facts

that are not within his knowledge.

5. The parties filed their submission. The respondent submitted on key issues which included: The application should have been supported by the applicant's affidavit to deny service and not his advocate. The date referred to by the applicant as the date of the judgment was defective. The application is also not accompanied by the order appealed from which is contrary to the law. There is no security provided as a condition for stay.

6. The Applicant submitted that the appeal raises triable issues as he was condemned unheard yet there was a draft statement of defence that raised triable issues of law and facts. The trial magistrate erred in the manner she exercised her judicial discretion. Though there is no security provided, the court do allow the application on terms that are just since the applicant is appealing against the ruling not judgment. It is the submission of the applicant that unless the order is granted to him the respondent is likely to execute the decree

7. In deciding such applications, the principles to be considered are well settled. First, the applicant should show the substantial loss he would suffer if the order is denied. Secondly, whether the application was made without undue delay. Thirdly, the issue regarding the provision security must be addressed.

8. Before addressing this matter on whether a stay should be granted or not. It is apparent that the applicant has not attached the ruling which he is appealing. The proceedings have also not been attached, only the decree has been attached by the respondent. There is no record of appeal save for decree. Order 42 Rule 2(2) of the Civil Procedure Rules provides for the filing of a certified copy or order being appealed from. The order/decreed must not only be filed but it must be a certified copy. In the case of **Lumbasi Khisa Simiyu V Jane Atahi [2007] eKLR, Ochieng J.** addressed himself thus: "**In this instance, the appeal is incompetent because the decree was not filed with the memorandum of appeal. That incompetence cannot have been cured by the respondent's earlier confirmation, that all the documents are in order.**"

9. Though there is a decree, the ruling by the trial court is important so as to establish the mind of the magistrate that prompted him to dismiss the application. The proceedings of that court are also just as important for this court to grant orders sought. If the pleadings, proceedings and ruling which comprise the record of appeal are not annexed to the memorandum of appeal, then this court will not be in position to come up with a comprehensive and just ruling. These documents are essential despite the fact that this is an application of stay. In any case, the reasons advanced by the appellant for grant of stay arise from the proceedings and ruling of trial court. The record of appeal is paramount, ultimately once the stay is granted the appeal will have to be heard and this documents will be just as essential. See the Supreme court case of **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR: where the judges addressed themselves thus:**

***"The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it. If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine "the appeal" on the basis of these two, such an appeal would be incomplete and hence incompetent."***

10. Even if I was to go into the issues to be considered before a grant of stay as I stated earlier, on the first issue, the applicant stated that he is apprehensive that the respondent is not a person of means and may not be able to reconstitute the applicant. The Respondent did not specifically address his mind over this issue. This can be easily resolved by the respondent depositing the money in court.

11. The other issue which came up is the question as to whether or not the application was filed without unreasonable delay. None of the parties addressed this issue. Due to lack of the trial court ruling to refer to, it is not clear which date the ruling was delivered. The respondent refers to 28th September 2012 while the applicant erroneously states that the same was delivered on 17th September 2015 which cannot be the

case since the memorandum of appeal was filed on 25th June 2015. If the respondents date is anything to go by, then it means that the ruling was delivered on 28th September 2012 and the application for stay was filed on 30th June 2015 which is 2 years 9 months. That is an inordinate delay.

The applicant should have brought the application soon after the ruling was delivered. It is unjust and prejudicial to the respondent to grant an order of stay at this juncture. See the case of **Eri Limited V Southern Credit Baniing Corporation (Formerly known as Bullion Bank) (2005) eklr**, where Ochieng J. held that:

***“In this case, the Plaintiff’s delay was for over two years. That period of time is undoubtedly long.”***

12. The final issue which came up during the arguments is that the appellants have not made an offer to deposit security for the due performance of the decree. I think that assertion is correct. However, the law does not enjoin the applicant to make an offer to deposit security but it is the court’s sole discretion to make a determination.

13. In the end and on the basis that there was inordinate delay I find no merit in the application. The same is dismissed with costs to the applicant.

Dated and delivered in open court this 9<sup>th</sup> day of October, 2015

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent