



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 51 OF 2013

PATRICIA KIMUYU PLAINTIFF/RESPONDENT

VERSUS

- 1. BERNARD MUTUA MUNYA**
- 2. KATHI NO KAKOKA SUCCESS LIMITED**
- 3. MAKINDU MOTORS LIMITED DEFENDANTS/APPELLANTS**

RULING

1. The application dated 27/3/2013 is brought under the **Judicature Act Cap, 8 of the Laws of Kenya, the High Court (Practice and Procedure Rules (Part 1 Rule 3), section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 1 and 6 and Order 51 Rule 1 of the Civil Procedure Rules)**.
2. The application seeks an order that pending the hearing and determination of the appeal there be a stay of execution of the judgment entered on 26/2/2013 by the **Senior Resident Magistrate's Court at Tawa, Civil Suit No. Court 22 of 2012** against the Appellant/2nd Defendant.
3. The Appellant also seeks a stay of proceedings in the following related matters:-
 - i. Senior Resident Magistrates Court at Tawa, Civil Suit No. 24 of 2012, Janet Nthenya Martin –vs- Kathi No Kakoka Success Limited and 2 Others.
 - ii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 25 of 2012, Benedetta Katula Philip – vs- Kathi No Kakoka Success Limited and 2 Others.
 - iii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 26 of 2012, Christine Mwangeli alias Kasusu Mutuva Mutuve –vs- Kathi No Kakoka Success Limited and 2 Others.
 - iv. Senior Resident Magistrates Court at Tawa, Civil Suit No. 27 of 2012, Michael Nzioka –vs- Kathi No Kakoka Success Limited and 2 Others.
 - v. Senior Resident Magistrates Court at Tawa, Civil Suit No. 28 of 2012, Patricia Nthule Mwanja – vs- Kathi No Kakoka Success Limited and 2 Others.
 - vi. Senior Resident Magistrates Court at Tawa, Civil Suit No. 30 of 2012, Beth Sila Nthenge –vs- Kathi No Kakoka Success Limited and 2 Others.
 - vii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 31 of 2012, Mukula Mutio Mukula – vs- Kathi No Kakoka Success Limited and 2 Others.
 - viii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 32 of 2012, Mutheu Sila Nthenge (Minor suing through mother and next friend BETH SILA NTHENGE) –vs- Kathi No Kakoka Success Limited and 2 Others.
 - ix. Senior Resident Magistrates Court at Tawa, Civil Suit No. 33 of 2012, James Musango Mutiso – vs- Kathi No Kakoka Success Limited and 2 Others.
 - x. Senior Resident Magistrates Court at Tawa, Civil Suit No. 34 of 2012, Susan Ndanu Mutisya –vs- Kathi No Kakoka Success Limited and 2 Others.
 - xi. Senior Resident Magistrates Court at Tawa, Civil Suit No. 35 of 2012, timothy Muthama Mutuva

- vs- Kathi No Kakoka Success Limited and 2 Others.
- xii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 36 of 2012, Samuel Sila Nthenge –vs- Kathi No Kakoka Success Limited and 2 Others.
- xiii. Senior Resident Magistrates Court at Tawa, Civil Suit No. 63 of 2012, Willy K. Kioko –vs- Kathi No Kakoka Success Limited and 2 Others.
- xiv. Senior Resident Magistrates Court at Tawa, Civil Suit No. 179 of 2012, Boniface Ngengo –vs- Kathi No Kakoka Success Limited and 2 Others.

pending the hearing and determination of the Appellant’s appeal.

4. The application is supported by the grounds set out in the affidavit of **Ruth Atambo**, the Legal Officer of **Ms Madison Insurance Company Limited**, the Appellant’s insurer. According to the said affidavit, the lower court determined liability at 70% against the Applicant and 30% against the 2nd Respondent and General Damages at 120,000/= on 100% basis. The Applicant is dissatisfied with the whole judgment hence the appeal herein.
5. The Applicants’ fear is that since the said judgment was entered in the agreed test suit, other related 16 matters that had been awaiting the said judgment will be fixed for assessment of damages. The Applicant is also apprehensive that the 1st Respondent will proceed with execution thereby rendering the appeal nugatory and the Applicant will suffer irreparably. The Applicants are ready to comply with orders on provision of security for the grant of stay orders.
6. In opposition to the application, a replying affidavit was sworn on 3/4/13 by **S.M. Makau**, counsel for the Plaintiff/Respondent. It is averred that the application has no merits and the appeal is not arguable as the Appellant failed to call any eye witness to explain to the court how the accident occurred. It is denied that the Respondent has taken any steps in a bid to execute. According to the Respondent, this application is meant to delay the finalization of this matter and the other related matters.
7. The application was canvassed by way of written submissions which I have duly considered.
8. **Order 42 rule 6 (2)** spells out the condition for a grant of execution as follows:-

“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.”**

9. The application herein was filed on 28/3/13. Judgment was entered on 26/2/2013. I am satisfied that there was no delay.
10. The decretal sum against the Appellant is for Kshs.84,700/=. The Applicants’ appeal is on both liability and the quantum of General Damages. The appeal is arguable. This favours a grant of stay in order not to render the appeal nugatory. As stated by the Court of Appeal in Kenya Shell Limited –vs- Kibiri & Another (1986) KLR:-

“In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

11. I have considered the replying affidavit. The same has not demonstrated any ability to repay the decretal sum in the event that the appeal is successful. In the event that the appeal is successful and the Respondent fails to refund the same, this would translate to substantial loss to the Applicants.
12. As stated by the Court of Appeal in **Civil Application Nai 238 of 2005 (UR.144/2005) – National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR:-**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

13. On the issue of the proceedings in the other related matters, it is apparent from the Applicants’ annexures that **RMCC Tawa 94/12 Vivian Vamula Alugaya –vs- Kathi No Kakoka Success & 2 Others** has also been treated as a test suit. There is no basis for staying the proceedings in the other matters.

14. With the foregoing, I make the following orders:-

- i. The application for stay of execution in **RMCC Tawa 22/2012** is allowed on condition that the Applicant do deposit in court or in a joint interest earning account of the counsels for both parties 50% of the total decretal sum (i.e. 50% of Kshs.121,000/= plus costs) within 30 days from date hereof. In default execution to issue.
- ii. The application for a stay of proceedings in the other related (**SRMCC Tawa 23-36** and **SRMCC Tawa 63 of 2012** and **179 of 2012** fails.
- iii. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **13th** day of **February** 2014.

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B. THURANIRA JADEN

JUDGE