



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 200 OF 2013

1. ERUSTUS GITUMA

2. JAMES MURIITHI MUMBA APPELLANTS/APPLICANTS

VERSUS

1. MOHAMMED NOOR OSMAN

2. FATUMA YARO ADAN

(Suing as the administrator of the estate of the late

AISHA MOHAMMED NOOR – Deceased RESPONDENTS

(Being an appeal from the Judgment and Decree in Machakos Chief Magistrate Civil Case No. 1088 of 2010)

(Before B. Thurairajasingham J)

R U L I N G

1. The application dated 16/10/13 seeks orders that a stay of execution of the decree of the lower court in **C.M.C.C. No. 1088 of 2010 Machakos** pending the hearing and determination of this application.
2. The application is supported by the affidavit sworn by **Linda Mukami**, a legal officer at **APA Insurance Company Limited**, the Applicants' insurer. The Applicants' complaint against the lower court judgment is that the award on quantum of damages was excessive. That the Respondent has demanded payment and attempts made to reach an amicable settlement on the issue of stay pending appeal have failed. The Applicants are apprehensive that if the decree is executed, the appeal will be rendered nugatory. The Applicants have further deponed that the decretal sum of Kshs.723,327.50/= is high and the Respondent may not be able to refund the same in the event that the appeal is successful. The Applicants are ready and willing to deposit security for the due performance of the decree.
3. In opposition to the application, the Respondent, **Mohammed Noor Osman** swore a replying affidavit on 30/10/13. It is averred in the said affidavit that judgment on liability was by consent and that the court assessed the quantum of damages. That the appeal has no chances of success and no substantial loss would be suffered by the Applicants as the Respondent is capable of

refunding the decretal sum in the unlikely event that the appeal is successful. The Respondent has deponed that he is a businessman and annexed his bank statements and log books for two motor vehicles. The Respondent has expressed misgivings as to whether **APA Insurance Company Limited** is stable and solid or whether they are likely to fold up soon. The Respondent has also complained that the application herein has been made after inordinate delay.

4. **Order 42 rule 6 (2)** states 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.”**

5. Although the Respondent has raised the issue of delay, he has not denied the averments by the Applicants that the parties were engaged in negotiations in a bid to settle this matter. Judgment was delivered by the lower court on 4/10/13. The Memorandum of Appeal herein was filed on 4/10/13 and the application at hand filed on 16/10/13. The delay was not inordinate.

6. It is not in dispute that the judgment on liability was entered by the consent of the parties herein. The Applicant’s complaint is that the award of damages is excessive.

7. The Respondent has exhibited documents that show that he is not a man of straw. However, the court has to balance the interest of both parties. As stated by the Court of Appeal in the case of **Kenya Shell Ltd. 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.”

8. The Respondent has expressed his fear regarding the financial stability of **APA Insurance Company**. There is no re-assurance from the Applicants on whether these fears are unfounded or not.

9. With the foregoing, I allow the application on the following conditions:-

- v. **The Applicants to pay the Respondent 50% of the decretal sum within 30 days from date hereof.**
- v. **The Applicants to deposit security for the balance of the decretal sum within 30 days from date hereof.**
- v. **In default execution to issue.**

Orders accordingly.

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B. THURANIRA JADEN

JUDGE

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

B. THURANIRA JADEN

JUDGE