



Car & General (Trading) Limited v Njenga & another (Civil Appeal 150 of 2023) [2024] KEHC 1364 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 150 OF 2023
TA ODERA, J
JANUARY 24, 2024**

BETWEEN

CAR & GENERAL (TRADING) LIMITED APPELLANT

AND

JOHN NJENGA 1ST RESPONDENT

WALTER MARUBE NYAGAKA 2ND RESPONDENT

RULING

1. The Appellant /applicant filed the notice of motion dated 18.12.23 under sections 1a,1b ,3a, 79 G seeking:
 1. Spent.
 2. spent
 3. That this Honorable court be pleased to grant stay of execution pending the hearing and determination of the appeal
 4. Costs be in the cause.
2. The application is based on the grounds that there is judgment entered against it as a third party in the lower court on 21.11.23 for Kshs. 408,250/= and liability was entered against it at 90%, further that applicant is apprehensive that execution by 1st respondent may commence at any time, that the appellant is not aware of the assets of respondent and so the respondent may not be able to refund the decretal sum incase the appeal succeeds and that the appeal is against quantum and damages.
3. The application is supported by the annexed affidavit of Joseph Mulwa Mwambi, the logistics officer of the applicant who deponed that judgment was delivered against applicant in the lower court on 21.11.23 and that they wish to appeal against the same. He annexed a copy of the said judgment



(“JMM1”). Further that they applied for proceedings on as per the letter (“JMM2”) and copy of memorandum of Appeal – “JMM3”.

Order 42 of the [Civil Procedure Rules](#) provides for stay pending appeal.

1. Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010 provides as follows: -

Stay in case of appeal

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule [2], the court shall have power without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the [Rules](#) of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule [1] of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

4. It is clear that order 42 (2) (b) of the [civil procedure rules](#) provides for deposit of security as on of the grounds for granting stay pending appeal. The application is not opposed and the applicant has already complied with the condition of depositing half of the decretal sum in court as ordered on 19.12.23. I find merit in the application and I allow it in terms of prayer 3.

5. The record of appeal be filed and served within 45 days from today. Mention on 21.3.24 before the Deputy registrar for compliance.

T.A ODERA

JUDGE

