



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 433 OF 2012**

**MINI BAKERS LIMITED.....APPELLANT**

**VERSUS**

**ERICK NZIVO KIMENYE.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 2<sup>nd</sup> November, 2017 for the substantive order that there be a stay of execution of the judgment of the lower court delivered on 28<sup>th</sup> July, 2017 in favour of the respondent. In that judgment, the lower court made an award of the total sum of Kshs. 603,000/= following the determination of a claim against the appellant based on the tort of negligence.

The application is brought under Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act. The grounds are set out on the face of the application alongside an affidavit sworn by Lilian Simiyu.

The appellant was aggrieved by the said judgment and has filed a Memorandum of Appeal raising several grounds. The application is opposed and there is a replying affidavit sworn by the respondent. The parties filed submissions herein which I have considered.

The thrust of the appeal going by the Memorandum of Appeal is that, the respondent did not prove his case on a balance of probabilities and that a second medical report was required before the final determination of the suit. Liability placed at 100% on the part of the appellant is also disputed, so is the award of general and special damages.

The principles of granting of the orders sought are now established. The decision of the lower court was made on 28<sup>th</sup> July, 2017 and the Memorandum of Appeal was filed on 21<sup>st</sup> August, 2017. The appellant filed an application for stay of execution in the lower court, but in a ruling made on 13<sup>th</sup> October, 2017 that application was dismissed. This application was filed on 2<sup>nd</sup> November, 2017 which by any standards was timeous.

The appellant has proposed to deposit the entire sum in an interest earning account while the respondent has not shown any prejudice that may befall him if the order of stay is not granted. I am inclined to allow this application on the following terms; there shall be a stay of execution of the judgment of the lower court provided that the appellant shall cause the sum of Kshs. 603,000/= to be deposited in an interest earning account in the joint names of the advocates for the parties. This shall be effected within 30 days from the date of this ruling. In default execution shall issue. The costs shall be on appeal.

***Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of October, 2018***

**A. MBOGHOLI MSAGHA**

**JUDGE**