



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISCELLANEOUS CIVIL APPLICATION NO 68 OF 2016**

**1. NGERE TEA FACTORY LIMITED**

**2. SAMUEL KIBE MUNGAI.....APPLICANTS**

**VERSUS**

**1. DAVID MUSYOKA MUNINI**

**2. PATRICK WAINAINA .....RESPONDENTS**

**R U L I N G**

**1.** This ruling concerns two applications –

(i) **Notice of motion dated 01/12/2016** by the Applicants for leave to appeal out of time and stay of execution of decree pending disposal of such appeal.

(ii) **Notice of motion dated 08/02/2017** by the 1<sup>st</sup> Respondent for release to him of half of the decretal sum deposited in court by the Applicants.

I have read the affidavits sworn in support of and in opposition to the two applications. I have also considered the submissions of the learned counsels appearing.

**2.** As for the application for leave to appeal out of time, learned counsel for the Respondents conceded that the delay in filing appeal was only (7) days. He stated further that leave to appeal out of time would not be resisted.

**3.** In the event I will allow prayer 2 of the notice of motion dated 01/12/2016. The Applicants shall file their memorandum of appeal within fourteen (14) days of delivery of this ruling. Prayer 4 shall abide the decision in this ruling on the 1<sup>st</sup> Respondent's application by notice of motion dated 08/02/2017.

**4.** As for that application, it is to be noted that the accident in which the 1<sup>st</sup> Respondent sustained his injuries involved two motor vehicles. He was a passenger in one of them. The trial court found that it was the driver of the other motor vehicle that left his lane and drove into the lane of the vehicle in which the 1<sup>st</sup> Respondent was a passenger, thereby causing the collision. It assigned liability to that other vehicle at 100%.

**5.** I have perused the draft memorandum of appeal annexed to the Applicant's application. One would have expected that if the trial court's finding on liability was to be challenged outright, that would be the first ground of appeal. However, the first ground of appeal in the draft memorandum is that the trial court failed to apportion liability fairly between the parties. By that complaint the Applicants obviously accept a measure of liability to the accident. The rest of the grounds of appeal are on quantum. There is thus no outright challenge to the trial court's finding on liability, only on apportionment thereof.

**6.** In the particular circumstances of this case therefore, I deem it fair and just that a portion of the judgment sum ought to be paid to the 1<sup>st</sup> Respondent forthwith. That portion will be KShs 3,500,000/00, and the same shall be paid through his advocates on record from the sum of KShs.7,618,256/00 already deposited in court by the Applicant on 24/01/2017 pursuant to the order of this court of 01/12/2016. The balance of the deposit shall be the security for stay of execution of decree, now hereby granted, pending disposal of the appeal to be filed. Prayer 3 of the Respondent's application by notice of motion dated

08/02/2017 is therefore allowed in the above terms.

7. As for prayer 4 of the application, the same is hereby refused. However, the Applicants will have to settle the auctioneer's charges in order to have any of their properties already attached before service of the order of 01/12/2016 to be released to them. It is so ordered.

8. Costs of the two applications shall be in the appeal. In the event that no appeal is filed after all, the costs shall go to the Respondents. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 29<sup>TH</sup> DAY OF JUNE 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JUNE 2017**