



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 489 OF 2007

**DEL MONTE (K) LTD APPELLANT/ORIGINAL
DEFENDANT**

VERSUS

**JOSEPHINE SYOMBUA MUTINDA &
ROMAN MUTUA**

(suing as the administrators and personal representatives of

**JOHN MUTINDA KWINGA (DECEASED)RESPONDENTS/ORIGINAL
PLAINTIFFS**

***(Being an appeal arising from the Judgment of Hon. F Nyakundi Senior Resident Magistrate in Civil
Case No. 443 of 2002 dated 4th December 2007 at Thika)***

R U L I N G

Application for Stay of Execution
Pending appeal to the Court of Appeal
Notice of Motion 31st January 2012

I. INTRODUCTION

1. Judgment in favour of the respondent/original plaintiff was entered by the subordinate courts in an industrial accident case whereby the respondent, an employee, was to work on a night shift in his place of work. He began work at 7.30 pm and by 10.00 - 10.15 pm or thereabouts. He was found dead.
2. The Hon. Trial Magistrate found the employer liable for the deceased's death at 100%. An award was granted of Ksh. 190,430/- all inclusive, that included payments under the Law Reform Act.
3. The appellant/employer filed appeal to the High Court. This High Court upheld the decision of the Hon. Trial Magistrate.
4. Being aggrieved, the employer intends to appeal from the High Court to the Court of Appeal. In the meantime an application dated

31st January 2012 is filed seeking stay of execution pending the hearing of the said appeal.

II APPLICATION 31ST JANUARY 2012

5. The applicant/employer herein states that his High Court failed to distinguish between a workman's compensation and a claim of negligence.
6. That the appellant/defendant/employer had not been negligent and no proof of this had been shown.
7. That the cause of death was unknown yet the Hon. Judge stated this was not disputed.
8. There was therefore no proof of what caused the death of the deceased.
9. The appellant prayed that the decretal sum held in court be not released to the respondent pending the hearing of the appeal.
10. In reply the respondent stated that an appeal to the Court of Appeal should be on a pure point of law. This was not the case herein. That there was no pure point of law raised herein.

III FINDINGS

11. The application for stay of execution has been brought without inordinate delay. The issue before me is whether there would be a probable chance of success in the appeal that if per chance the applicant is successful and the decretal sum is paid to the respondent, the appeal would be rendered nugatory.
12. Whereas the issue in the Court of Appeal is on a pure point of law, the question as to whether the appeal would be successful or not on a point of law would be considered by that Court of Appeal.
13. The only fear would be that the respondent may be "a woman of straw" to her late husband's estate. The courts in the past have noted that being poor should not be a basis in which a decretal sum should not be released and paid to a litigant.
14. This court herein finds that the application for stay of execution is declined. The same is dismissed with costs to the respondent.

DATED THIS 14TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

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Advocates :

i) *K. McCourt instructed by M/s Kairu & McCourt & Co Advocates for
applicant/appellant*

ii) *C W Githae instructed by Githae Co Advocates for
respondent/respondent*