



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 483 OF 2011

**JOSEPHAT OMWITAKHO 1ST
APPELLANT**

**JOSEPH MWANDERI KARIUKI 2ND APPELLANT/ORIGINAL
DEFENDANTS**

VERSUS

**MUTUA KATUMO RESPONDENT/ ORIGINAL
PLAINTIFF**

(Being an appeal arising from the Judgment of Hon. A. Ndungu Senior Principal Magistrate in Civil Case No. 6703 of 2008 dated 9th September 2011 at Milimani Commercial Courts)

R U L I N G

Application for Stay of Execution

Dated 27th February 2012

INTRODUCTION

1. A suit was heard in the subordinate court touching on TORT. In the said running down cause, the respondent/original plaintiff, a cyclist was allegedly run down by a motor vehicle owned by the appellant original defendant on 21st April 2008.
2. The Hon. Trial Magistrate awarded damages for injuries sustained to the cyclist of Ksh. 425,890/50 all inclusive on the 9th September 2011.
3. Being dissatisfied with this award, the appellant filed appeal on the 28th September 2011. By an application of 27th February 2012, the appellant prayed for orders of stay of execution from this High Court.

II APPLICATION FOR STAY OF EXECUTION

DATED 27TH FEBRUARY 2012

4. The appellant/applicant stated in their submissions that they had applied for orders of stay of

execution in the subordinate court case. This was subsequently refused and therefore the brought application before this High Court.

5. The application, they stated had been brought without inordinate delay. If execution is carried out there may be substantial loss occasioned. That the appeal had a substantial likelihood of success.

6. In reply the respondent stated that they did not oppose the application but on condition that a sum of Ksh. 200,000/- be paid to him to cater for the medical treatment.

III OPINION

7. Under Order 46 r 6 Civil Procedure Rules, as a rule, stay of execution would not normally be given, unless it can be shown that there was substantial loss that may be occasioned to the applicant. Unless the order is made and that the application was made without unreasonable delay.

8. The applicant states that there is a likelihood of success in their appeal. If the question of locus of the respondent is upheld to the original case and the issue of ownership of the vehicle is determined in their favour, their substantial loss would occasion if the funds are paid over to the respondents.

9. The delay in bringing the application to court has been reasonable and correctly done by first applying to the subordinate court first for stay of execution, if rejected, it is applied for to the appellate court.

10. As to security, the other ingredient required to be shown whether a stay may be granted, the applicant wishes to deposit the said decretal sum to court and or in a joint interest earning account as to the security for "due performance of such decree or orders as being ultimately be binding on them."

11. I would grant the application for stay of execution and make orders that the decretal sum in full, be deposited in an interest earning account of both advocates, within 14 days, failure to, the applicant be at liberty to deposit the same in court.

12. The costs of this application be in the appeal. There be liberty to apply.

DATED THIS 12TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) L M Njuguna instructed by M/s L M Njuguna & Co Advocates for applicant

ii) D M Wambua holding brief for L M Wambua instructed by L M Wambua & Co Advocates for respondent