



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 63 OF 2011

JOSEPH KITHINJI M'MBOROKI APPELLANT

VERSUS

FREDRICK KIMATHI NJERU 1ST DEFENDANT
STANLEY KINOTI MUTURA 2ND DEFENDANT
JOSHUA MWENDA MUTIGA 3RD DEFENDANT

RULING

The appellant was sued by the 1st respondent in CMCC Meru No. 782 of 2002 alongside the 2nd and 3rd respondent. The 1st respondent was travelling as a fare paying passenger on 19th August 2002 in motor vehicle registration number KAA 848M Toyota Hillux Matatu. That vehicle was on that day involved in a violent accident with another motor vehicle. The matatu was being driven by the 2nd respondent. Paragraph 3 (a) of the 1st respondent plaint in the Meru Magistrate Court is worth to reproduce in this ruling which is as follows:-

“The 3rd defendant (appellant) is an adult male of sound mind residing in Meru Central District and was at all material times the 1st registered owner of motor vehicle registration number KAA 848M Toyota Hillux Matatu which he sold to the 2nd defendant (3rd respondent) who was at all material times the insured owner of motor vehicle registration number KAA 848M Toyota Hillux Matatu as he was in physical possession of the motor vehicle.”

The lower court by its judgment of 28th April 2011 found the appellant reliable for that accident and awarded the 1st respondent damages of Kshs. 253,100/=. The appellant has filed this appeal challenging the judgment by that court. The appellant has filed a Notice of Motion dated 26th May 2011. By that application, he seeks stay of execution pending appeal. The appellant contends in his affidavit in support of that application that when the aforesaid accident occurred he had sold the subject motor vehicle to the 3rd respondent. He faulted the lower court's judgment for having found him liable for the accident even though he produced before that court sale agreement between him and the 3rd respondent. He deponed that if stay of execution is not granted he would suffer substantial loss. The 1st respondent in his replying affidavit stated that the appellant had not paid him any sum since the judgment was entered in his favour by the lower court. He further deponed that he is a civil servant and a farmer and would therefore be capable of refunding the decretal amount to the appellant if the appeal succeeded. Order 42 rule 6 (2) provides as follows:-

“(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.***
- c) notwithstanding anything contained in subrule (2).....”***

The appellants stated that if stay was not granted and he eventually succeeds in his appeal, he would suffer substantial

loss. The moment the appellant stated so the evidential burden of proof shifted to the 1st respondent to prove that he would be capable of refunding the decretal amount. The 1st respondent apart from making a bare statement in his affidavit that he was a civil servant and a farmer did not produce evidence of his capability to refund the decretal amount. I also find that the appeal preferred by the appellant is not without merit. For that reason, I find that this is not a suitable matter for me to order the appellant to provide security. The orders of the court is as follows:-

1. That stay of execution is hereby issued against the CMCC Meru 782 of 2002 pending the hearing and the determination of this appeal.

2. The costs of the Notice of Motion dated 26th May 2011 shall be in the cause.

Dated, signed and delivered at Meru this 30th day of June 2011.

**MARY KASANGO
JUDGE**