



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 104 OF 2009

BAKARI SAIDI FAKI.....PLAINTIFF/  
RESPONDENT

- VERSUS -

NANAK TRUCKING CO. LTD.....DEFENDANT/APPLICANT

**RULING**

The main cause, at the primary stage, ended with the Judgment delivered by this Court on **8<sup>th</sup> October, 2010**. Thereafter, the firm of M/s. Muraya & Wachira, Advocates which was acting for the defendant, filed an application by Notice of Motion, on **27<sup>th</sup> December, 2010** which now comes up, being conducted by M/s. Simani & Associates, Advocates.

The application carries one main prayer:

***“THAT the Honourable Court be pleased to grant an order of stay of execution against the defendant/applicant and/or removal and sale of the defendant’s/applicant’s proclaimed properties pending the hearing and determination of the appeal”.***

The application is founded on two grounds:

- (i) ***that, the Court has delivered “a hefty judgment against the defendant/applicant”;***
  
- (ii) ***that, the plaintiff has in execution of the decree, proclaimed the applicant’s properties and if the properties are removed for sale, “the operations of the defendant/applicant shall be grounded”.***

**Tajinder Singh Grewal**, the director of the defendant company, swore a supporting affidavit on **27<sup>th</sup> December, 2010** deposing, in substance, as follows:

**(i) that, the defendant was held liable to the plaintiff in the following amounts and under the indicated heads:**

- **general damages.....Shs. 5,000,000.00**
- **loss of earnings.....Shs. 2,970,791.00**
- **nursing care.....Shs. 1,437,480.00**
- **motorized wheelchair.....Shs. 600,000.00**
- **special damages.....Shs. 259,478.45**

**TOTAL.....Shs. 10,267,750.45**

**(ii) that, the defendant filed a notice of appeal immediately after the delivery of the judgment;**

**(iii) that, by the advice of the defendant's Advocate, Mr. Wachira, the appeal has "very high chances of success on the issue of quantum of damages awarded to the plaintiff";**

**(iv) that, the cost of the suit has not been agreed upon or taxed by the Court;**

**(v) that, the plaintiff's Advocates have instructed an auctioneer to proclaim and attach the defendant's properties;**

**(vi) that, the award in the Judgment "is huge and the attachment shall completely cripple the operations of the defendant/applicant";**

**(vii) that, the defendant/applicant has applied for certified copies of proceedings and judgment for purposes of lodging the appeal in the Court of Appeal;**

**(viii) that, the defendant is willing to secure an insurance bond or a bank guarantee as security for the sum of Kshs. 10,267,750/45 for the grant of stay of execution or removal and sale of the defendant's goods;**

**(ix) that, the defendant is not in a position to deposit the sum of Kshs. 10,267,750/45 in Court or in a bank account, as the same would mean tying-up a lot of money which could be committed to business;**

(x) *that, it is in the interest of justice and fair play to grant the orders sought, pending the hearing of the appeal.*

**Robert Mochache**, the plaintiff's Advocate, upon receiving service of the application and the supporting affidavit, swore a replying affidavit on **11<sup>th</sup> January, 2011**; and he avers, in summary, that –

(i) *the application is frivolous, mischievous, misconceived, bad in law, and an abuse of Court process aimed at delaying the decree-holder in reaping the fruits of his hard-earned Judgment;*

(ii) *the Court should take judicial notice of the fact that the plaintiff during the trial, sufficiently proved his case “beyond [the] balances of probability”;*

(iii) *the award of the Court “was merely aimed at compensating the plaintiff/respondent [for the] pain, injury and suffering [which] he has undergone and shall continue to undergo throughout his life.....”*

(iv) *the defendant having failed to file a memorandum of appeal in time, as from the time of filing the notice of appeal, is in breach of the rules of procedure and so, should not be granted stay of execution;*

(v) *if the Court should be inclined to grant orders of stay of execution pending appeal, then it will be fair and just to impose certain conditions, and such should include:*

· *judgment-debtor to liquidate at least one-half of the decretal sum and deposit the remaining half in an interest-earning account.*

**Tajinder Singh Grewal** swore a further affidavit in response to the respondent's affidavit, on **21<sup>st</sup> January, 2011**. The deponent averred that he was waiting for the certification of the proceedings and Judgment, before he could file a record of appeal. The deponent expresses his belief that the application to file an insurance bond, or to give a bank guarantee, is reasonable and should be accommodated by the Court; and he avers that the defendant's application is brought in good faith and will “not in any way prejudice the plaintiff/respondent”.

Learned counsel, **Mr. Simani** urged that the terms under which a Court may order stay of execution of its order pending appeal are expressly provided for under Order 42, rule 6 of the Civil Procedure Rules: the Court is to be satisfied that substantial loss may result to the applicant; adequate security can be provided, as the Court may order; the application is to be made without undue delay.

Counsel urged that the application had been made without undue delay, and that substantial loss may result to the applicant if an order of stay of execution is not granted.

Counsel urged that the applicant stood to suffer “the immediate loss of Kshs. 10,500,000.00 from its cash-flow”, and that this figure, for a private transport company, “represents a large monetary gap in its cash-flow” and could “ground the company”. Counsel submitted that the applicant stood to suffer loss if it wins in the appeal even partially, as “it has no chance of recovering any money paid to the respondent”.

Learned counsel, **Mr. Simani** submitted that the applicant, in this matter, has already filed **Civil Appeal No. 77 of 2011**, which was formally served upon the respondent on **7<sup>th</sup> May, 2011**; and that the respondent, having been served with the record of appeal, is not prejudiced by the prayer for stay of execution pending appeal-hearing.

Counsel urged that if the appeal is successful, then the Court of Appeal “*is likely to reduce substantially the award granted to the applicant*”; and the extent of such reduction “*is what will constitute the loss to the applicant, as it is unlikely to be recovered from the respondent*”.

**Mr. Simani** urged before this Court that, “*in granting the awards under the various heads the Superior Court was not guided by the correct principles on the award of damages*”; and he thought so, on the basis of the case of **Bhutt v. Khan** [1982-88]1KAR1, at p.5:

**“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principles, or that he misapprehended some material aspect and so arrived at a figure which was either inordinately high or low.....”**

Counsel urged that the trial Court had erred in its interpretation of what was to be awarded under **general damages** and what was to be awarded under **special damages**; and he submitted that this distinction was important because it related to what needed to be pleaded and proved.

Learned counsel made lengthy submissions, supported with authorities from judicial precedent and from the writings of scholars, attempting to demonstrate the fallacy under which this Court had operated, in arriving at its Judgment and decree; but I find these to be inapposite at this stage: they are clearly material to be urged before the Court of Appeal, for this Court heard them on the merits, and is now, in that regard, **functus officio**.

Counsel submitted that the applicant was ready to give security as a basis for grant of stay of execution pending appeal, if the Court would be so inclined. Within its package of offers, the applicant is ready, at this stage, to purchase for the respondent a motorized wheelchair. The applicant also offered to pay to the respondent cash, in the sum of Kshs. 2,000,000/= in respect of medical expenses, covering some two years henceforth.

Learned counsel **Mr. Mochache**, in his response, urged that there was perfect justification, on the facts of this case, for the Court to make the award of damages now being contested; for the medical doctor who prepared the second medical report had confirmed that the injury which flowed from the applicant’s negligence, had reduced the respondent to a 100% state of disability and had claimed both lower limbs. Just as I have observed earlier, learned counsel, **Mr. Mochache** submitted that “*the submissions filed by the applicant have largely concerned themselves with the merits of the appeal, now [committed to] the Court of Appeal;*” and that such, “*was like arguing the appeal before the Court which is appealed from*”.

**Mr. Mochache** urged that the applicant should have devoted his attention to the existence or not, of “*sufficient cause*” to sustain the prayers made. Counsel submitted that sufficient cause had not been shown: for, after judgment was delivered on **8<sup>th</sup> October, 2010** the applicant immediately obtained a 30-day stay period on execution, but then “*remained silent....until....the respondent commenced execution*”, two-and-a-half months later; so, there was undue delay, showing lack of sufficient cause. The applicant had, by his delay, occasioned extra costs, as the auctioneer is already asking for nearly Kshs. 300,000/= as his charges.

Counsel submitted that the applicant has failed to show he will suffer substantial loss if execution proceeds: “*They have not demonstrated by way of affidavit or records of business accounts or otherwise ... that [their] capital base or liquidity.....is [so] low....that they may.....suffer substantial loss if stay is not granted.*”

Counsel proposed that, as a condition for granting stay of execution of judgment, the applicant be required to pay to the respondent at least half of the decretal sum; to provide the respondent with a motorized wheel-chair; to pay the costs of the Advocate and of the auctioneer; and to deposit in an interest-earning account the balance of the decretal sum with interest.

There is no question that the most severe personal injuries afflicted the respondent herein, and the applicant has been judged to hold blame therefor; and all the applicant is contesting is **quantum of damages**. In the light of the grave injuries to the respondent – and this is a matter of record – this Court cannot very well continue to keep him out of the benefit of the award made. As, however, it is only fair that the applicant’s window of appeal be not unduly restricted, I will allow the application, but **on terms**. It is hereby ordered as follows:

**(1) Stay of execution of the Judgment-creditor’s decree is granted during the pendency of the appeal, but on the following terms:**

(a) *the applicant shall pay to the respondent, within 30 days of the date hereof, the sum of Kshs. five million (Kshs. 5,000,000/=);*

(b) *the applicant shall, within 30 days of the date hereof, purchase for the respondent a motorized wheel-chair;*

(c) *the applicant shall pay, according to scale, the outstanding Advocate’s and Auctioneer’s costs, within 30 days of the date of authentication and authorization of the claims if no consent is reached.*

**(2) The applicant shall diligently prosecute the pending appeal, failing which the respondent shall have the liberty to apply for a discharge of the stay orders granted herein.**

**(3) The applicant shall bear the costs of this application.**

**(4) This matter shall be listed for mention within 42 days of the date of delivery of this Ruling.**

**SIGNED at MOMBASA**

**J. B. OJWANG**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 15<sup>th</sup> day of July, 2011.**

**M. A. ODERO**

**JUDGE**