



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 576 OF 2007

RUTH WANGECHI GICHUHI (Suing as legal representative of
PETER KIRONYO NJOROGI, Deceased).....**PLAINTIFF**

VERSUS

ANDREW MANGENI LUANDE.....**DEFENDANT**

R U L I N G

The suit herein is a claim for damages in respect to the death of the Deceased who died from injuries received in a road accident.

Judgment on liability was **entered by consent** on 23rd June 2010 at the ratio of 50% to 50%. Upon hearing the case on quantum, judgment was entered for the Plaintiff on 8th July 2011 as follows: -

- a) General damages KShs 3,987,500/00.
- b) Special damages KShs 8,700/00.

Interest on general damages was awarded at court rates from the date of judgment until payment in full and on special damages from the date of filing suit until payment in full. The Plaintiff was also awarded costs of the suit plus interest thereon at court rates from the date of filing suit until payment in full.

The court was informed that on 21st August 2011 that the Defendant filed a notice of appeal indicating an intention to lodge appeal to the Court of Appeal against quantum only. But I cannot find on the court record any notice of appeal duly filed under the Court of Appeal Rules. This is significant in light of the fact that the application under consideration in this ruling contains a prayer for leave to file appeal out of time.

However, it was not disputed by counsel for the Plaintiff that notice of appeal was filed on the 21st of July 2011. For purposes of the present ruling therefore I will take that the notice of appeal was duly filed on 21st July 2011.

At any rate, the prayer for leave to appeal out of time was not canvassed. This may be just as well: whereas this court has jurisdiction under **section 7** of the **Appellate Jurisdiction Act, Cap 8** to grant **leave to lodge notice of appeal out of time**, I doubt that it has jurisdiction to grant **leave to file such appeal out of time**. Filing the appeal denotes lodging the necessary memorandum and record of appeal as

stipulated in the Court of Appeal Rules.

This ruling relates to the Defendant's application by **notice of motion dated 10th August 2011** in which he seeks stay of execution of decree pending hearing and determination of the intended appeal. The application is brought under **Order 42, rule 6** of the **Civil Procedure Rules** (the **Rules**).

An applicant for stay of execution of decree must demonstrate, under Order 42, rule 6(2) the following:-

1. That the application has been made without unreasonable delay.
2. That substantial loss may result to him unless the order for stay is made.
3. That he is prepared to give such security as the court may order for the due performance by him of such decree or order as may ultimately be binding on him after the appeal is heard and determined.

Regarding delay, the application was filed just over one month and eight days after delivery of judgment. When judgment was delivered stay of execution was sought and granted for 14 days pending formal application.

The application was thus filed about three weeks after expiry of the 14 day temporary stay. This delay is explained in the supporting affidavit. The sum total of the explanation is that the instructions to appeal were given by the Defendant's insurers, and that it took some time for them to be availed a copy of the judgment for the insurers to peruse the same and make an informed decision whether or not to appeal.

I accept that explanation and hold that the application was filed without unreasonable delay.

Regarding substantial loss, the supporting affidavit states merely that the decretal sum is "high" and the Plaintiff "may not be financially able to refund (it) immediately". No basis is given for this apprehension.

Such basis was necessary in order to shift the burden to the Plaintiff to disclose her ways and means. As it is, the bare assertion that the Plaintiff may not be financially able to refund the decretal sum is not evidence.

The Defendant therefore has not placed before court any evidence of substantial loss that he may suffer unless the stay sought is granted.

In money decrees the court will not lightly grant stay of execution. That is the general rule. The judgment-debtor is obligated to lay a proper basis for exercise of the court's discretion to grant stay of execution pending appeal. He must place before the court evidence of substantial loss that he may suffer.

It is to be noted also in the present case that judgment on liability was entered by consent. The intended appeal is against quantum only, which means that the Plaintiff will at the end of the day, and in any event, be paid at least a proportion of the decretal sum awarded, if not the entire sum.

Having found no evidence of substantial loss, I find no merit in the application and the same is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2011.