



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Civil Appeal 124 of 2008**

**EZEKIEL SIRMA .....1<sup>ST</sup> APPELLANT**

**BEN KEMBOI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARK LETTING.....RESPONDENT**

**RULING**

Before me is an application by way of Notice of Motion brought by the Appellant for orders:-

- (i) That there be stay of execution of the interim orders of stay issued on 12<sup>th</sup> March 2009.
- (ii) That there be stay of execution pending the hearing and determination of Appeal No. 124 of 2008.

The application is based on the grounds as stated in the body of the Notice of Motion and supported by an affidavit sworn by the Applicant.

The facts which gave rise to this application as gathered from the affidavit evidence as well as the pleadings briefly may be stated.

By a Plaint filed in Court in the Chief Magistrate's Court on 19<sup>th</sup> June 2006 Respondent sued the Applicant claiming damages both special and general arising out of a traffic road accident which occurred along Eldoret-Nakuru Road on 14<sup>th</sup> October 2004 involving the Applicant's motor vehicle registration No. KAP 029 P. Liability was agreed by consent and was entered in the ratio of 80:20 in favour of the Respondent against the Applicants.

The suit proceeded to hearing for the assessment of damages which was assessed at Shs. 400,000/= apportioned at 80:20. Immediately Judgment was delivered the Applicant the Applied for stay of execution pending appeal which was granted on condition that half the decretal sum to be paid out to the Respondent and the other half to await the outcome of the Appeal.

The Applicants were aggrieved by the terms of the stay and filed this instant application to stay the execution of the interim orders as well as stay of execution pending the hearing and determination of the appeal.

The application is opposed by the Respondent on the ground that the Applicants having applied for stay of execution pending appeal and having obtained the orders he sought subject to certain conditions they cannot come to this Court seeking a similar order and before they have complied with the order they had secured in the lower Court.

I agree with the Respondent that the Applicants having secured the orders they sought in the lower Court, they ought to have applied for review of the terms of stay in the same Court and only come to this Court by way of appeal against refusal to review the terms if they felt that the same were harsh.

The Appellants' application therefore fails and the same is dismissed with costs to the Respondent.

**DATED AT ELDORET THIS 27<sup>TH</sup> DAY OF OCTOBER, 2009.**

**J. L. A. OSIEMO**

**JUDGE**