



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Appeal 131 of 2007**

**LOCHAB BROTHERS LIMITED ..... APPELLANT**

**VERSUS**

**JOSEPH WEKESA WAFULA ..... RESPONDENT**

**JUDGEMENT**

This is an application by the Appellant under Order 41, Rule 44 (1), (2) and (6) of the Civil Procedure Rules for an order of stay of execution of the Judgement of the Resident Magistrate in Eldoret in CMCC No. 144 of 2006 delivered on the 17<sup>th</sup> September, 2007.

In the said suit the trial Court awarded the Plaintiff a sum of Kshs. 481,500/= in general and special damages for injuries sustained by the Plaintiff in the course of performing his duties as an employee of the Defendant. From the said sum was deducted 20% on basis of contributory negligence leaving a balance of Kshs. 385,200/=.

The Applicant claims that it is likely to suffer substantial loss and damage in the event execution takes place. It says that the Appeal has good chances of success.

The Respondent says that he should be paid at least one half of the decretal sum pending the hearing of the appeal and the balance deposited in a joint interest earning account.

I have considered the application and the rival affidavits. I have also considered the submissions by counsel. None of the parties have placed any information or material as to the financial position of the Respondent. Counsel for the Respondent stated from the bar that the Respondent is a mechanic and not a man of straw.

The onus is on the applicant to demonstrate that it will suffer substantial loss if the awarded sum is paid out. It is not for the Court to assume that the Respondent will not be in a financial position to refund the decretal sum if the appeal is successful.

Be that as it may, there ought to be some reasonable information or material for the Court to reach a fair and reasonable finding. In this case there is no such evidence from either side. The Appellant is willing to provide security for the decretal sum while the Respondent has offered to accept one half of the amount pending the hearing of the appeal.

In the light of the foregoing and considering the issues raised in the Memorandum of Appeal, I do hereby order that Appellant pays and releases a sum of Kshs. 150,000/= to the Respondent and issues a bank guarantee for the balance including costs in the sum of Kshs. 278,030/= within the next 21 days.

Costs of the application shall be in the appeal.

**DATED AND DELIVERED AT ELDORET ON THIS 10<sup>TH</sup> DAY OF MARCH, 2008.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Cheluget for the Respondent

Mr. Gichana for the Applicant/Appellant