

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 192 OF 2008

ROADTAINERS (MOMBASA) LIMITED.....APPELLANT

VERSUS

HENRY MWIKYA MUNYAO.....RESPONDENT

R U L I N G

Henry Muikya Munyao who is the respondent to this appeal, has moved the court under Section 3A and 63)(e) of the Civil Procedure Act for an order that half the decretal sum currently deposited in a joint interest earning account be released to the respondent on the grounds that the respondent requires the money for urgent medical treatment of injuries arising from the accident subject of the suit. The respondent has sworn an affidavit in support of the application wherein he depones *inter alia* that he requires amputation of his left leg as a result of the injuries suffered in the accident.

It is contended on behalf of the appellant that the application is improperly before this court as it seeks to vary an order made in the magistrate's court. It is further contended that the application is based on a misapprehension of the issues raised in the appeal as it does not appear to take into account that liability is in dispute.

I have considered the application. Although the order for stay of execution pending appeal was issued by the lower court, this court being seized of the appeal, it has inherent powers to make orders in the interest of justice including varying orders made by the lower court. The application is therefore properly before this court.

I have taken note of the fact that the issues raised in the appeal which includes the apportionment of liability, and assessment of damages still remain unresolved. Nonetheless, given the urgent need of the respondent for funds for the medical operation, I find it necessary to vary the order for stay of execution and do order that 25% of the decretal sum currently deposited in an interest earning account in the joint names of the parties' advocates shall be released forthwith to the respondent.

Costs of this application shall be in the appeal.

Orders accordingly.

Dated and delivered this 24th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Maluki for the respondent/applicant