



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CASE 383 OF 2007

BATA SHOE CO. LTDPLAINTIFF

V E R S U S

RAYMOND WAWERUDEFENDANT

R U L I N G

This is an application (by notice of motion dated 19th June, 2007) seeking the main orders that, in essence, the Applicant be granted leave to appeal out of time against the decree of the lower court passed on 6th of March, 2007 in **Limuru SRM CC NO. 544 of 2006**; and that there be stay of execution of the decree pending disposal of the appeal. The application is supported by the affidavit of one DINAH OGULLA, the legal manager of the Applicant's insurers, **Jubilee Insurance Company Limited**. The claim by the Respondent (who was the plaintiff in the lower court) was for damages for personal injuries arising out of an industrial accident. It appears that judgment on liability was entered by consent, with the Plaintiff to shoulder 15% and the Defendant 85%. All the court was required to do was to assess the damages due to the plaintiff. The court assessed these damages as follows:-

(i) General damages..... KShs. 11,000/00.

(ii) Special damages.... KShs. 5,705/00.

The court also assessed the party and party costs at KShs. 42,000/00.

In assessing the damages the lower court appears to have relied only upon the written submissions of the parties; no evidence appears to have been tendered. This of course is not a satisfactory practice. The basis for any award of damages must be proper evidence duly placed before the court. Submissions, oral or written, are not evidence. I do not have before me the record of the lower court or a copy of its proceedings. I therefore do not know if any evidence, like medical reports, was placed before the lower court. The lower court should have taken proper evidence in order to assess damages payable to the Plaintiff. This is one of the points taken by the Applicant in the draft memorandum of appeal annexed to the application. The award of general damages is also challenged as being manifestly high.

Regarding leave to appeal out of time, the present application was filed on 19th June, 2007. The decree sought to be appealed against was passed on 6th March, 2007. Under section 79G of the Civil Procedure Act, Cap. 21, every appeal from a subordinate court to the High Court must be filed within a period of thirty days (30) from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the

appellant of a copy of decree or order. No such certificate is exhibited. Under the proviso to that section, an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The Applicant was late in filing appeal by about two and half months. What is its explanation for this delay? It is that there were negotiations between the parties towards settlement of the matter out of court. It has been denied by the Respondent that there were any such negotiations. No evidence has been exhibited by the Applicant of such negotiations. I am inclined to believe that there were no such negotiations and that the Applicant was merely indolent and woke up when the Respondent moved to execute the decree. But I have already intimated that the judgment as far as assessment of damages is concerned has no proper foundation in law in that there does not appear to have been any proper evidence placed before the court upon which the court could have assessed the damages. I will therefore permit the Respondent to challenge the assessment of damages. I will thus grant the leave to appeal sought.

Having so decided, it is in the interests of justice to grant stay of execution of decree pending disposal of the appeal. The Respondent has already provided appropriate security by way of deposit of the decretal sum in court. The interests of the Respondent are thus safeguarded as some money will be available to him when his damages are properly assessed in law. There is no doubt that he will be entitled to some damages; those damages may well be the same as those awarded by the lower court.

I will therefore make the following orders:-

1. The Applicant is hereby granted leave to appeal out of time. He may, within seven days of delivery of this ruling, file his memorandum of appeal.
2. There shall be stay of execution of the decree of the lower court pending disposal of the appeal.
3. Costs on this application shall be in the appeal.
4. If ultimately no appeal is filed the Respondent shall have costs of the application, and the stay of execution now granted shall also lapse.

Those shall be the orders of the court.

DATED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 20TH DAY OF DECEMBER, 2007