



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

Civil Appeal 44 of 2005

EXPRESS KENYA LIMITED.....
...1ST APPELLANT

WILSON CHAZIMA.....
.....2ND APPELLANT

VERSUS

CHARLES KIPKOECH
LETING.....RESPONDENT

RULING

This is an application for stay of execution pending appeal brought under **Order XLI Rule 4** of the **Civil Procedure Rules**. The applicants were the defendants in Principal Magistrate's Civil Suit No. 617 of 2002 at Kericho. In that matter, the trial court entered judgment for the plaintiff (now the respondent herein) in the sum of Kshs.600,000/- as general damages, Kshs.164,680/- as special damages and medical expenses of Kshs.124,885/- all totaling to Kshs.769,565/-. The appellant was aggrieved by that decision and preferred an appeal to this court. He also made an application for stay of execution in the Principal Magistrate's Court and the application was granted on the following conditions:-

1. That Kshs.164,680/- being special damages be paid to the plaintiff.
2. That Kshs.124,885/- being outstanding medical expenses be paid to the plaintiff.
3. That Kshs.300,000/- being one-half of the sum of Kshs.600,000/- awarded as general damages be deposited in a joint interest earning account in the names of the advocates for the parties herein.
4. That interest on the judgment sum not to accrue thereon pending the hearing and determination of the appeal.
5. That the above orders be complied with within 30 days from 12th January 2006.

The applicants made their application before this court on the grounds that the aforesaid terms of stay of execution were incapable of being complied with and that if the terms were complied with the appeal would be rendered nugatory. They further stated that they would suffer loss if the conditions set by the subordinate were complied with as they would not be able to recover any monies that they would have paid the to respondent.

Mr. Gekonga for the respondent opposed the said application and submitted that the applicants had failed to comply with the conditions that were made by the court appealed from. He further submitted that the issue of liability was not in dispute before the trial court and that it was only the quantum of damages awarded that was being appealed against. The respondents were therefore obliged to pay part of the decretal sum as ordered by the lower court, he stated. He further submitted that the respondent had filed a cross appeal as he was not satisfied with the amounts that were awarded by the trial court and added that the respondent had a stake in the outcome of the appeal. Mr. Gekonga also submitted that the applicant's application for stay of execution before this court was supported by an affidavit sworn by Mr. Joash Nyagwencha Advocate and Mr. Nyagwencha had deponed to issues which he had no personal knowledge of and which ordinarily ought to have been deponed to by the applicants themselves. He submitted that the affidavit was drawn contrary to the provisions of **Order XVIII rule 3(1)** of the **Civil Procedure Rules** which required that affidavits be confined to such facts as the deponent was able of his own knowledge to prove. He urged the court to strike out the affidavit.

I agree with Mr. Gekonga that it was not proper for Mr. Nyagwencha Advocate to depone that the applicants will suffer substantial loss if they complied with the conditional orders of stay of execution as stated hereinabove. The same can also be said of Mr. Nyagwencha's deposition that the applicants will not be able to recover any money that may be paid to the respondent. He did not state the basis of those depositions and I agree that the depositions breached the requirements of **Order XVIII rule 3(1)**. The affidavit in support of the appellant's application is incompetent and inadmissible and I strike it out.

Even if Mr. Nyagwencha's affidavit had not been struck out, I do not think that the orders sought by the applicants can be granted, having failed to comply with the conditional orders of stay that were set out by the trial court. The learned trial magistrate exercised his discretion in setting out the aforesaid conditions and no sufficient reasons were advanced by the applicants to warrant this court's interference with the learned magistrate's discretion. In *MBOGO V SHAH [1968]EA 93* it was held that:-

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted upon or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

The conditions that were imposed by the trial court are, in my view, very reasonable considering that there was no dispute as to the fact that the appellants were liable for the injuries that the respondent had suffered. What was in dispute was the quantum of damages payable for the respondent's injuries. I see no reason why the applicants could not have complied with the said conditions.

The applicants did not show that they were incapable of paying the amounts as ordered by the trial court. I am also not satisfied that the applicants' appeal would be rendered nugatory if the order of stay of execution pending appeal was not granted. It has also not been demonstrated that the applicants will suffer substantial loss unless the orders sought are granted. The applicants' application is incompetent and lacks merit and I dismiss it with costs to the respondent.

DATED, SIGNED and DELIVERED at Nakuru this 28th day of June, 2006.

D MUSINGA

JUDGE

28/6/2006

Ruling delivered in open in the presence of Mr. Gekonga for the respondent and N/A for the applicant.

D MUSINGA

JUDGE

28/6/2006