



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 997 of 1999**

**LUCAS MUNYWORI ..... PLAINTIFF**

**VERSUS**

**KENYA WILDLIFE SERVICE ..... DEFENDANT**

**RULING**

**A) APPLICATION FOR SAY OF EXECUTION**

1) I have before me an application for stay of execution pending appeal to the court of appeal from the decision of this courts judgments dated 22 February 2006.

2) The application dated 27.3.06 brought under a certificate of urgency states that the plaintiffs/respondents being a man of strain may not able to repay back the money if the application is successful. That the appeal so lodged as a “notice of appeal” is “arguable and has reasonable prospects of success.”

3) The plaintiff/respondent filed a replying affidavit and case law opposing the application on grounds that there are no serious grounds and or question raised to be appealed from.

**B) PROCEDURE**

4) On the day set down for hearing of the application 5.12.06, whose dates were taken by consent of the parties on 30.10.06 the plaintiff/respondent and or his advocate failed to attend court.

5) Under order 9(b) r 3 (a) Civil Procedure Rules this hearing proceeded ex parte.

**C) BACKGROUND OF CASE**

6. The plaintiff/respondent, an employee of the defendant/applicant in 1997 was aged 26 years old. He was then employed as a game ranger. Whilst at the Mt. Elgon National Park on 24 October 1997 on duty a shoot out battle with poachers occurred. As a result the plaintiff respondent sustained gun shot injuries to the left side of his face and ear with deafness to his left ear.

7. The court delivered judgment after trial on 22 February 2006 and held the defendants owed a duty of case and liable in tort. An award of Ksh.400,000/- for pain and suffering was awarded.

8. Not being satisfied with the decision of this court the defendants/applicant filed notice to appeal

to the court of appeal on 2 March 2006. Thereafter they filed this present application by way of notice of motion dated 27.3.06 seeking for stay of execution.

D) ARGUMENTS BY THE DEFENDANT/APPLICANT

9. The notice of motion is supported by an affidavit of Mburu Mutuga the defendant cooperation secretary who stated that if the stay is granted the appeal would be redeemed nugatory. That the decretal sum be placed in an income earning account in the names of both parties.

10. It seems that the defendant/applicant relied on two case law in support of their application

i) Butt v Rent Restriction Tribunal (1982) KLR 417

An application was made to the High Court for stay of execution. The High court refused the application on grounds that an appeal would be faster to be heard. The applicant appealed to the court of appeal who held that the court had discretionary powers to grant the stay of execution.

ii) Githunguri v Jimba Credit Corporation Ltd.

The High Court declined to issue an injunction to the applicant. The applicant appealed to the court of appeal and the application was duly granted on November 8, 1988 for an injunction.

The particular decision actually outlined the general principles in which the court would base its unfettered discretion.

i) That the appeal should not be frivolous or that there is an arguable appeal

ii) The court should ensure that the appeal if successful, should not be nugatory.”

E: FINDINGS

12. That there be an arguable appeal and or that the appeal should not be frivolous. I do not see any where deponed by the applicant that they have an arguable appeal. The advocate did not demonstrate this and consequently I am unable to determine weather there would be chances of success from this court decision on appeal.

13. I accordingly reject this application. The defendant will not pay costs to the plaintiff/respondent as he was absent.

Dated this 6<sup>th</sup> day of December 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

M.S. Osundwa for Lutta & Co. Advocates for the defendant/applicant

No appearance for advocate for the plaintiff/respondent