



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
Civil Appeal 98 of 2004**

**STEPHENMUTISYA MUUMBI ..... APPELLANT**

***VERSUS***

**PETER MUTUKU KATULI ..... RESPONDENT**

**RULING**

By the Chamber Summons dated 20/4/05, the appellant/applicant prays for an order of Stay of Execution in SPMCC No. 508/03, Machakos pending the hearing of this appeal.

The application is brought under Order 21 Rule 22, Order 41 Rule 4 (1) (3) Civil Procedure Rules and Sections 3 A, 63 (e) 65 (1) Civil Procedure Act. The application is premised on grounds found on the face of application and an affidavit sworn by Joseph Nzioki, counsel in the firm of B.M. Mutie, who act on behalf of the appellant/applicant, and annexures thereto. The application was opposed and a replying affidavit filed by the Respondent, Peter Mutuku Katuli.

The appellant/applicant has filed an appeal No.98/04 against the judgment of Chief Magistrate, Machakos in CMCC 508/03 where an award of Kshs.650,000/= in General Damages payable to the Respondent was made. The parties had entered into a consent judgment on liability. The magistrate only assessed the quantum and the appellant contends that the award is inordinately high and that their appeal has high chances of success and is arguable; that the application was brought without delay and that the applicant has shown his seriousness to prosecute the appeal by depositing the decretal sum in court. Counsel for the applicant also argues that there is no evidence that if the decretal sum is paid to the Respondent, he will be in a position to refund the said money in the event of the appeal succeeding.

The application was opposed, the first ground being that this application is before the wrong forum as it should have been made before the Chief Magistrate's Court, which gave Judgment. The second argument is that there was Judgment on liability in the Chief Magistrate's Court and all the court did was to assess damages and that there is no doubt that the Respondent was seriously injured and needs medication and an order of stay is therefore prejudicial to the Respondent. That the appellant does not have an arguable appeal because the applicant has not demonstrated that the trial magistrate exercised her discretion wrongly or applied the wrong principles in arriving at the award now challenged. Counsel annexed the two medical reports prepared by the doctors who examined the plaintiff. He urges that the figure awarded is reasonable as he had suggested an award of 600,000/= during negotiations and submitted an award of Kshs.750,000/= as damages but the court gave Kshs.650,000/=. He submits further that if stay is to be granted a substantial amount of the decretal sum be released to the Respondent for his immediate medical needs as depositing the decretal sum with court will not assist the Respondent in any way.

I have considered all the affidavits, annexures and submissions by counsels. Under Order 41 Rule (4), Civil Procedure Rules, the onus is upon the applicant to satisfy the court that there is sufficient cause for issuance of an order for stay pending appeal. Under Sub Rule 2 of that Rules, even where such cause is

shown, the applicant has to show that substantial loss may result if the order of stay is not granted; that the application was filed without unreasonable delay and that security for the due performance of the order is given.

The Judgment in the lower court was entered on 28/10/04. The applicant annexed the decree from court as JJN 1. This appeal was filed on 26/11/04 and an amended Memorandum of Appeal filed on 30/11/04. No application of stay was made to the lower court or this court soon after the Judgment. It is not until 20/4/05 that the applicant filed this application before this court, about five months after the Judgment. There has been no explanation why such a delay. There being no explanation given in the circumstances, I find five months of inaction by the applicant to be inordinate delay only prompted by the attachment of the applicant's goods. I find this application to be an afterthought to try and stall the execution process. Even if there had been negotiations, of which there is no evidence, they would not have been a bar to an application for stay.

As regards Mr Makau's contention that the application for stay is improperly before this court because it should have been first filed in the lower court, I find that not to be correct position because Order 41 Rule (4) (1), Civil Procedure Rules provides that the applicant 'may' apply to the court that made the order appealed for stay. The operative word here is 'may'. Such application may also be made to the High Court; one has an option as to which court to go to.

Applicant's counsel claims that the magistrate who made the order was absent and that is why they did not seek an order of stay in that court. That is no good reason as any magistrate with jurisdiction and who presides over that court can hear the application. By going to the High Court, what the applicant did is to deny either one of them a chance on appeal to this court in the event that the order given by this court is not favourable.

There is no dispute that the parties negotiated and recorded a consent Judgment on liability. All that the Chief Magistrate did was to assess the quantum. It is therefore up to the applicant to demonstrate to this court that there is sufficient cause to have the said award interfered with or in other words to demonstrate that the applicant has an arguable appeal. Apart from stating that the award was inordinately high, counsel for applicant never attempted to demonstrate that the award was too high in comparison with the injuries sustained by the plaintiff/Respondent. In support of the award, counsel for the plaintiff cited the case of **ALLAN NJUGUNA versus VERONICA NYAMBURA KARUGA & OTHERS Civil Appeal 165/93** where the Court of Appeal held that the court will not normally interfere with the exercise of the court's discretion in determining general damages to be awarded in a case, unless that court failed to take into account a matter that it ought to have and where it is alleged that damages were high or low, they should be so high or so low as to be a wholly erroneous estimate. The Respondent's counsel submitted that the court considered the two medical reports by the doctors who examined the Respondent and made the award which was fair. The applicant did not attempt to satisfy either of the above tests. It is not enough for the applicant to allege that the award was inordinately high.

On whether the applicant will suffer substantial loss, all that the applicant said is that the Respondent being a tailor, earning about Kshs.15,000/= per month, cannot be able to repay the decretal sum if he is paid the whole decretal sum. As earlier pointed out, the Respondent is entitled to some damages, the issue of liability having been agreed upon. In their submissions in the lower court, the applicants had submitted an award of kshs.250,000/= in General Damages, so in the event of an appeal succeeding, the Respondent will not be called upon to pay the whole sum but only apart of it. In such an application, the court takes into consideration the competing rights of both the applicant and the Respondent which have to be balanced. Whereas the Respondent has the right to enjoy the fruits of his judgment, the applicant has a right to pursue his appeal. That is why the court considers the stringent measures considered above. The court appreciates the fact the security in form of the whole decretal sum has been deposited with the court, and it is an assurance that the Respondent will get his award some day, but the Respondent cannot have access to it now. He has medical expenses to meet and other costs. The court does not lose sight of the fact that this is a discretionary remedy and though the applicant has not fulfilled all the requirements under Order 41 Rule 4, yet considering the application in its totality, and the fact that applicants should not be locked out on appeal and balancing the above mentioned rights, the court orders

as follows:

1. There be Stay of Execution pending appeal upon the payment to the Respondent of Kshs.350,000/= for his immediate use.
2. The said payment be made from the deposit made by the applicant in court and the balance be held as security.
3. Costs of this application to the Respondent.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 17<sup>th</sup> day of August 2005.

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**