

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 646 OF 2016

MBURU RASHID..... APPELLANT/APPLICANT

- V E R S U S -

BILLY LUBANGA NAMAYIRESPONDENT

RULING

1) Billy Lubanga Namayi, the respondent herein, filed a compensatory suit before the Chief Magistrate's Court, Nairobi against Mburu Bashir, the appellant herein, for the injuries he sustained as a result of a road traffic accident involving motor vehicle registration no. KAK 037V. It is said that the aforesaid motor vehicle knocked the respondent who was walking on a pedestrian crossing along Ngong Road. Hon. Usui, learned Senior Principal Magistrate delivered judgment in favour of the respondent in the sum of kshs.773,152. Being dissatisfied with the aforesaid decision, the appellant preferred this appeal pending the hearing and determination of the appeal, the appellant took out the motion dated 21.10.2016, the subject matter of this ruling.

2) The main prayer sought is for issuance of an order for a temporary stay of execution pending appeal. It is the argument of the appellant that if the order for stay is not given, the appellant will suffer substantial loss since his property may be attached in execution of the decree. It is argued by the appellant that he has an appeal with arguable issues and that the motion was timeously filed. The Appellant also promised to abide by any conditions imposed by the court. The respondent filed a replying affidavit he swore to oppose the motion arguing that the application is intended to delay the respondent from enjoying the fruits of his judgement. It is pointed out that even the decree has not been extracted therefore there is no judgement capable of being executed. The respondent argued that he is capable of refunding the decretal sum if the appeal succeeds.

3) Having considered the rival written submissions and the material placed before this court, the principles to be considered in determining applications for stay are well settled. First an applicant must show that he would suffer substantial loss if he is denied the order. In this motion, the appellant argued that he may not recover the decretal sum if he is paid. The respondent has said that he is employed by Lavidia Pharmaceuticals as a pharmaceutical technologist therefore he is capable of refunding the decretal sum. I have looked at the annexures attached to the affidavit of the respondent and it is clear that the respondent has not stated on oath nor has he attached as an exhibit evidence of the monthly salary. I am convinced that it is possible that he is not in a position to refund the money. I am satisfied that the applicant has shown that he may suffer substantial loss if the order for stay is denied.

4) The second principle is that the application for stay must be timeously filed. I am satisfied that the motion was filed without undue delay.

5) The third and final principle is that the court should consider the type of security to order to be provided for the due performance of the decree. I think in the circumstances of this case the decretal sum should be deposited in an interest earning account in the joint names of the advocates.

6) In the end, I grant the order for stay of execution pending appeal on condition that the appellant deposits the decretal sum i.e. ksh.618,521/60 in an interest earning account in the joint names of learned advocates or firms of advocates within 30 days. In default the motion dated 21.10.2016 shall be treated as having been dismissed. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 2nd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent