

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. APP. NO. 55 OF 2015

ONESMUS MACHARIA

KIMANI.....
APPLICANT

VERSUS

**TUMA KATANA (MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND
LAWRENCE KATANAT KAZUNGU.....1ST RESPONDENT**

HAMISI JUMA KOMBO

..... 2ND
RESPONDENT

(Being an application for extension of time to file a memorandum of appeal and record of appeal out of time against the judgment of Hon Mrs. Nzibe, RM in Malindi CMCC No. 116 of 2012 delivered on 29th April 2015)

R U L I N G

The respondent herein was involved in a road traffic accident on 30th April 2011 along the Malindi-Mombasa road. He filed Malindi CMCC No. 111 of 2012 against the appellant. The trial court delivered its judgment on 29th April 2015 and awarded the respondent Kshs.152,000/= as general damage plus costs and interests.

By a notice of motion dated 14th September 2015, the applicant seeks to stay execution of the decree as well as leave to appeal out of time. The application is supported by the affidavit of Sandra Nyakweba sworn on the same date. The respondent filed a replying affidavit sworn on 10th November 2015. Parties agreed to determine the application by way of written submissions.

The main contention by the applicant is that initially the firm of Menezes, Oloo and Chatur Advocates were on record on his behalf. The said advocates were corresponding with the internal advocate of the insurer (Direct-line Assurance Co. Ltd) by the name Grace Kiroko. The internal advocate left employment in July 2015 and the judgment delivered on 29th April 2015 came to the insurer knowledge in August 2015. The current advocates were instructed to file an appeal.

It is further submitted that the damages awarded are quite excessive and the applicant will suffer irreparable loss. The appeal has high chances of success as the trial court erred by holding that both defendants were jointly and severally liable. The apportionment of damage is erroneous and misguided.

On his part, counsel for the respondent submitted that the application for stay of execution was filed after a period of four (4) months. This is inordinate delay. No appeal is yet to be filed. There is no correspondence between the previous advocates and the insurer to prove that there was instructions to file an appeal. The application is only meant to frustrate the the execution and is an abuse of the court process.

Where the appellant is entitled to exercise his right to pursue an appeal, the respondent equally has the right to benefit from the fruits of his judgment. The application for stay of execution was brought after the expiry of four months. The explanation is quite reasonable. It appears no execution proceedings were done during the four month period. I do find that the explanation of the delay to file the application herein is excusable. The applicant is entitled to pursue his appeal. The proceedings of the trial court were not annexed to assist this court understand the correct background of the dispute.

The applicant will suffer irreparable damage if the decretal sum is paid to the respondent and the appeal turns out in his favour.

As indicated herein, the respondent is equally anxious to benefit from the favourable judgment. I do order that the application deposit the decretal sum of Kshs.152,500/= either in court or joint account of counsels for both parties within sixty (60) days hereof.

In the end, the application dated 14th September 2015 is allowed on the above terms. The applicant to file the Memorandum of Appeal within 14 days hereof. Costs shall follow the outcome of the appeal.

Dated, signed and delivered at Malindi this 10th day of March 2016.

SAID J. CHITEMBWE

JUDGE