



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.199 OF 2010

**SAVANNA INTERNATIONAL
LIMITED..... APPLICANT/APPELLANT**

VERSUS

DENNIS WEKESA NYONGESA.....RESPONDENT

RULING

The respondent in this application was awarded by the court below Kshs.1.3m in general damages for the injuries sustained by him in the course of his employment with the applicant.

The applicant was aggrieved by the award and has preferred this appeal. In the mean time he has brought the instant application for stay of execution arguing, among other grounds that the appeal has a high chance of success; that the applicant will suffer irreparable loss should execution proceed as the respondent has no known means to refund the decretal sum; and that the applicant is ready to provide appropriate security.

The respondent on his part has deposed that this appeal and application are intended to delay the respondent's realization of the fruits of the judgment made in his favour by the lower court.

I must point out that an application for stay of execution under either **order 41 rule 4** of the revoked **Civil Procedure Rules** or **Order 42 rule 6** of the **2010 Civil Procedure Rules** does not require such elaborate depositions as was made in the affidavits in this application. For instance, the applicant is relying on a total of 37 grounds while the respondent relies on 30. The grounds are largely on the merit or lack of merit of the appeal.

The jurisdiction of this court in matters of stay of execution is confined to the following consideration:

- i) the court must be satisfied that substantial loss may result to the applicant unless the order of stay of execution is made and that;
- ii) the application for stay of execution has been made without unreasonable delay and
- iii) that the applicant is ready to provide security as may be ordered.

The applicant has deposed that the sum of 1.3m if paid over to the respondent may never be recovered should the appeal succeed. This is the loss that must be avoided. The respondent has not rebutted the claim that he is not capable of refunding the decretal sum. It is now settled that where the applicant raises

doubt over the respondent's ability to retribute, the evidential burden is shifted to the respondent to demonstrate that indeed he has the means to retribute if called upon. The respondent has failed to discharge this burden confirming the applicant's fears.

This application was brought within one month of the lower court's judgment. There has been no delay. The applicant has also offered to give security as may be required.

For these reasons, this application succeeds. An order of a temporary stay of execution in terms of paragraph 3 of the application is granted pending the hearing and determination of this appeal subject to the following conditions:

- i) the decretal sum be deposited in an interest earning account in a reputable bank in the names of counsel for both parties within twenty one (21) days
- ii) execution shall issue without further orders should the applicant fail to comply with i) above

Costs will be costs in the appeal.

Dated, Signed and Delivered at Nakuru this 3rd day of March, 2011.

**W. OUKO
JUDGE**