



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: KWACH, SHAH & BOSIRE, JJ.A.  
CIVIL APPLICATION NO. NAI. 313 OF 2000**

**BETWEEN**

**CHANDARIA INDUSTRIES LIMITED .....APPLICANT**

**AND**

**MATHEW AGWINGI .....RESPONDENT**

(An application for stay of execution in an intended  
appeal from a judgment & decree of the High Court of  
Kenya at Nairobi (Hon. Mr. Justice Mulwa) dated 5th  
November, 2000

in

H.C.C.C. NO. 1871 OF 1999)

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**RULING OF THE COURT**

This is an application by *Chandaria Industries Limited (the applicant)* under **rule 5(2)(b)** of the Court of Appeal Rules for a stay of execution of the judgment and decree of *Kasanga Mulwa J* given on 5th October, 2000.

*Mathew Agwingi , (the respondent)* sued the applicant in the superior court claiming damages for personal injuries he sustained on 11th August, 1994 while feeding paper into a machine in a factory owned by the applicant. The respondent lost his right hand in the accident. The Judge found as a fact that the applicant knew that the machine in question was dangerous. Witnesses called by the applicant testified that the respondent had not been assigned to work on the machine and that his duty was only to collect papers which fell on the ground. The learned Judge rejected this evidence, and he may well have been right, because whatever the position was, the respondent may have been operating the machine for the benefit of the applicant.

The learned Judge gave judgment for the respondent for Shs 1,642,000/- which included (1) Shs 500,000/- for pain and suffering; (2) Shs 200,000/- for the cost of artificial arm; (3) Shs 100,000/- vocational therapy; (4) Shs 492,000/- for the loss of future earning; and (5) Shs 150,000/- for domestic help. Mr Mbugua , for the applicant, submitted that the award of Shs 500,000/- for pain and suffering is excessive and way out of line with awards usually made under that item, but taking into account that the respondent lost his right hand in the accident the amount may well be sustained. As for the sums awarded under items (2) to (5), he said these had not been pleaded although the learned Judge allowed evidence to be led in support of the claims. He submitted that being claims for special damages the law requires not

only that they be proved, but also that they must be pleaded. Counsel for the respondent conceded that the plaint was never amended to include these claims. In respect of this part of the award therefore, there can be no doubt that the applicant has an arguable appeal. But we can detect no error of principle in respect of the sum of Shs 500,000/- awarded for pain and suffering.

In the result, we allow this application and grant a stay of execution of the decree to the extent of Shs 1,142,000/- (items 2-5) only, pending the hearing and determination of the intended appeal. But for Shs 500,000/- awarded for pain and suffering, execution may proceed. Costs of the application to be in the intended appeal.

**Dated and delivered at Nairobi this 30th day of March, 2001.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original.

**DEPUTY REGISTRAR**