



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: AKIWUMI, TUNOI & O'KUBASU, JJ.A.)  
CIVIL APPLICATION NO. NAI. 12 OF 2000 (UR4/2000)  
BETWEEN  
JOGINDER AUTO SERVICE LIMITED .....APPLICANT  
AND  
MOHAMMED SHAFFIQUE .....RESPONDENT

RULING OF THE COURT

This application is brought under **rule 5(2)(b)** of the Rules of this Court seeking a stay of execution pending the hearing and determination of Civil Appeal No. 221 of 1999 lodged in the Central Registry at Nairobi on 26th October, 1999.

For the application to succeed, the applicant must show to the Court two things;

- (i) that the intended appeal is an arguable one or one which is not frivolous; and
- (ii) that unless a stay or an injunction is not granted, the intended appeal, if successful, will be rendered nugatory.

The respondent, the successful plaintiff in the suit before the superior court, was the owner of an elegant **limousine, Mercedes Benz 260 E Saloon, 1986 model**, which he had bought in London and later shipped it to Nairobi. In July, 1993, the respondent delivered it to the applicant's garage on Butere Road, Industrial Area, Nairobi, for service and repairs. Unfortunately, the car was stolen from the applicant's custody and within its premises. Consequently, the respondent sued for Shs. 3,600,000.00 being the value of the car.

The applicant opposed the claim on several grounds, but, during trial two issues fell for consideration. These were whether the exclusionary clause to the effect that the car was kept in the applicant's garage at the owner's risk defeated the claim; and, the true value of the car.

In a terse judgment which he delivered on 28th May, 1999, the learned Judge Ole Keiwua, J. (as he then was) held that the exclusion clause did not defeat the respondent's claim. He fixed the value of the car at Shs.3,300,000.00. He awarded the respondent this sum less the repair charges. He then entered judgment for the respondent in the sum of Shs.3,110,000.00 with costs and interest.

The evidence on record stands out clearly that the respondent was unable to tell the Court what price he paid for the car in 1986 and yet it was manifestly plain that it was not a present nor a gift. He produced no document whatsoever to show the cost or value of the car. Moreover, the respondent, when taking out

a policy of insurance on it on 12th June, 1991, gave its estimated value including accessories and spare parts as only Shs.1,000,000.00. Also, there was no valuation of any nature for the car before the theft. Again; the so-called expert witness upon whose evidence the learned Judge placed much reliance only drove the car within Nairobi several years back before the trial. He never valued it. Moreover, if as he said in his evidence that:

"the condition of the vehicle was exceptionally good ..."

then what was the vehicle doing at the garage? His testimony on the value of the car would appear to be worthless.

The main ground of appeal is that the learned Judge erred in awarding special damages which were not proved and which are inordinately high. We are satisfied on the evidence on record that this is clearly an arguable point and cannot in any way be described as frivolous.

Will the appeal be rendered nugatory if we do not grant a stay to the applicant? The real claimant in the suit lives outside the jurisdiction of this Court. He is rarely in Kenya. Though this is a monetary decree, we think, we ought to secure the position of the applicant in the event of a successful appeal. No doubt, the amount involved is rather large.

The upshot of this is that the application is granted. A stay of execution is granted until the hearing and determination of the appeal.

The applicant shall, however, within 15 days hereof, provide a bank guarantee or an insurance bond guaranteeing the payment of the decretal sum.

The costs of this application will be costs in the intended appeal.

**Dated and delivered at Nairobi this 11th day of February, 2000.**

**A.M. AKIWUMI**

**JUDGE OF APPEAL**

**P.K. TUNOI**

**JUDGE OF APPEAL**

**E. O'KUBASU**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**