



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: KWACH, SHAH & BOSIRE, J.J.A.**  
**CIVIL APPLICATION NO. NAI. 183 OF 1999**  
**BETWEEN**  
**KENYA CO-OPERATIVE CREAMERIES LTD.....APPLICANT**  
**AND**  
**JACOB MARIUNUS**  
**KIRIAMA.....RESPONDENT**  
**RULING OF THE COURT**

On 1st day of July, 1999 the superior court (Mbogholi Msagha, J) entered judgment against the defendant, who is the applicant here, in the sum of Shs.9,127,331/00 plus costs and interest. The respondent was the plaintiff in the superior court. He was at the material time an employee of the applicant and was shot by robbers whilst he was carrying out his duties as a salesman. His duties included selling of milk on behalf of the applicant. He had two loaders with him and the driver of the vehicle in question was in the employment of the owner of the vehicle. The cabin of the vehicle has a safe affixed on the floor thereof. The respondent would put the cash in that safe.

Whilst the respondent was seated in the vehicle robbers pretending to be buyers of milk approached him and demanded money at gun-point. He was shot in the neck as a result of which he sustained very serious injuries.

What we have now before us is an application under rule 5(2)(b) of the Rules of this Court for stay of execution pending appeal.

Although the learned judge entered judgment against the applicant in the sum of Shs.9,127,331/= the actual figure should, arithmetically, have been Shs.10,135,331/= as the learned judge has overlooked adding the sum of Shs.1,008,000/= awarded under the heading "loss of earning capacity" to the final total which should stand as follows:

(i) Damages for pain

suffering and

loss of amenities- Shs.2,215,744.00

(ii)Nursing care - Shs.2,736,000.00

(iii)Toiletries and

drugs- Shs.2,664,000.00

(iv)Wheel chair,

orthopaedic bed, toilet and bathroom- Shs.1,366,947.00

(v)Special Damages- Shs.144,640.00

(vi)Loss of earning

capacity- Shs.1,008,000.00 \_\_\_\_\_ TOTAL Shs.10,135,331.00 \_\_\_\_\_

Mr. Mbugua who appeared for the applicant, argued that

the applicant will be challenging in the intended appeal, both the liability of the applicant and the quantum of damages awarded against it. On the issue of liability he submitted that the applicant was obliged to provide only reasonable security which does not include armed security. He stated that he will also argue the question of the respondent's own negligence particulars whereof are set out in the defence.

The applicant takes issue with all the heads of damages awarded, in particular, nursing care, toiletries and drugs, wheel chair, orthopaedic bed and toilet and bathroom alteration costs. We note that items numbered (ii), (iii), (iv) and (vi) afore-mentioned were not specifically pleaded in the plaint.

We are satisfied that the applicant has an arguable appeal on both limbs, that is to say, on the issue of liability and quantum of damages. Contributory negligence will also, be in issue at the hearing of the appeal and we say no more on these points. There is however a judgment of the superior court in the respondent's favour in a sum exceeding

Shs.10,000,000/=. Considering the evidence in the case and the submissions of counsel before us, we agree that the appeal, if successful, may be rendered nugatory unless a stay is granted, we order that the decree issued by the superior court be stayed on condition that the applicant pays to the respondent a sum of Shs.1,000,000/= within 30 days from today, failing which its application will stand dismissed with costs.

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

**Dated and delivered at Nairobi this 4th day of**

**February,2000.**

**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.**