



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 45 OF 2008

MUTUA KALUKU APPELLANT/APPLICANT

VERSUS

PETER NJOROGE CHEGE RESPONDENT

(Being an appeal from the Ruling of Hon. P.N Gesora (S.P.M) in Machakos Chief Magistrate Civil Case No. 572 of 2005)

(Before B. Thurania Jaden J)

RULING

1. The application dated 4/5/2013 seeks orders that there be a stay of execution of the lower court's decree in **Machakos CMCC No. 572 of 2005** pending the hearing and determination of this Honourable Court's **Civil Appeal No. 45 of 2008**.
2. The Applicant further seeks an order that the Appellant/Applicant's Public Service Vehicle Registration **No. KAD 614 D** (mini Bus) which was impounded and held/kept at **Machakos Police Station** pursuant to the lower Court's orders made on 19/9/2005 at the instance of the Plaintiff/Respondent be treated as security for due performance of the decree.
3. The thrust of the application in support sworn by the Applicant, **Mutua Kaluku** on 4/5/2013 is that the judgment was entered in the lower court on 27/2/2007. On 31/3/2007, the Applicant applied for the review orders and/or the setting aside of the said judgment. The application dated 31/3/2007 was dismissed vide a ruling made on 31/1/2008. A memorandum of appeal was filed but the appeal is still pending. The Applicant's application for stay of execution pending appeal was dismissed by the lower court. That the Respondent has already applied for execution by way of arrest and committal to civil jail of the Applicant. The Applicant is apprehensive that if there is no stay of execution, his appeal will be rendered nugatory.
4. The Applicant is ready to furnish security for the performance of the decree. He has offered motor vehicle registration **No. KAD 614 D** which was the subject matter of the suit and which was impounded by the police during the trial before the lower court. In the alternative, the Appellant is ready to deposit in court the principal amount as per the judgment.
5. In opposition to the application, the Respondent, **Peter Njoroge Chege** swore a replying affidavit on 3/7/2013. The Respondent has averred that since the filing of the appeal herein on 29/2/2008, the Applicant went to sleep until the Respondent made a bid to execute the lower court decree in the year 2013. That to date no record of appeal has been compiled and that the Applicant has caused unnecessary delay in the finalization of this matter. The Respondent has urged the court to release Kshs.800,000/= to him and the balance of the decretal sum of Kshs.633,600/= deposited in court pending the hearing and determination of the appeal.

6. **Order 42 rule 6 (2)** states as follows:

“No order for stay of execution shall be made under subrule (1) unless –

- a. **The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
 - b. **Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**
7. The ruling the subject of this appeal was delivered on 31/1/2008 in **CMCC Mks 572 of 2005**. The Memorandum of appeal was filed on 29/2/2008. The appeal was filed within time.
8. An application for stay of execution was filed before the lower court on 14/1/2013. The said application was dismissed on 30/4/2013. Thereafter the Applicant filed the application at hand on 6/5/2013. This was done timeously.
9. The question that begs for answers is what action the Applicant took from the time of the filing of the memorandum of appeal on 29/2/2008 up to 14/1/2013 the date the Applicant moved the lower court for a stay of execution. I have gleaned through the Applicant’s affidavit and I have found no explanation for the delay in either filing the application for stay before the lower court or before this court. The Applicant only wrote to the Deputy Registrar (see annexure – **“MKD”**) on 3/4/2008 requesting for the lower court record. Another letter to the Deputy Registrar (annexture **“MKE”**) requesting for the original lower court record only cropped up in January 2013. The Applicant went on a five year slumber until he was woken up by the execution process. The delay was undoubtedly inordinate.
10. Although the Applicant’s fear for execution is real as execution would render the appeal nugatory, the court has to balance the interests of both parties. As stated by the Court of Appeal in **Kenya Shell Ltd. –Vs- Kibiri & Another (1986) KLR:-**

“In applications for stay the court should balance the parallel prepositions, first that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.”

11. I have noted that the Applicant is ready to offer security for the due performance of the decree. I will however not delve into the issue of the motor vehicle offered as security as the question why it was impounded and why it has continued to remain at the police is not clear and is not the subject of the present proceedings. The Applicant has however deponed that he is willing to deposit the principal amount of Kshs.415,000/= and ready to abide by any other orders made by this court on the issue of the deposit of security.
12. The ruling that is the subject of the appeal herein dismissed the Appellant’s/Applicant’s application for the review and/or the setting aside of the judgment dated 27/2/2007. While the court is yet to hear the arguments on the actual appeal, it is observed that the Appellant/Applicant as the seller of the motor vehicle in question still has the motor vehicle and a big percentage of the purchase price (Kshs.400,000/=) in his possession and is willing to deposit the principal sum of Kshs.415,000/= in court and use the motor vehicle as security for the balance of the decretal sum. The principal sum of Kshs.415,000/= includes an investigator’s fee of Kshs.15,000/=. The judgment was entered for the Respondent against the Applicant for the alternative prayer for Kshs.415,000/= with interest of Kshs.30% as prayed in the orally amended plaint.
13. Taking into account the inordinate delay which has not been sufficiently explained by the Applicant and having fully considered the circumstances of the case, I am persuaded that the interests of justice will be served by allowing the application on the following conditions:-
- a. **The Applicant to pay the principal sum of Kshs.415,000/= to the Respondent within 30 days from date hereof in default execution to issue.**
 - b. **The Applicant to deposit security for the balance of the decretal sum within 30 days from**

date hereof.

- c. In default execution to issue.**
- d. The Applicant to compile, file and serve the record of appeal within 60 days otherwise the appeal to stand dismissed.**
- e. Costs of the application to the Respondent.**

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **26th** day of **March 2014**.

B. THURANIRA JADEN

JUDGE