



STEPHEN NDELEVA MUASYA & OTHERSPLAINTIFF/APPLICANT

VERSUS

PETER MWANGI WAITITU.....DEFENDANT/RESPONDENT

RULING

1.The Application before the Court is Notice of Motion dated **02/09/2009** (“Application”). In it, the applicant, who was the second Defendant in Machakos SRM CC No. 56 of 2008 (*Leonard Kyalo Mutisya v John Kamau Ngugi & Philip Musyoka Mutua*)(“Applicant”) prays for a stay of execution pending the hearing of the appeal herein. In the lower court, judgment was entered against the defendants. General damages were assessed in the amount of **Kshs. 400,000/=** (according to the Applicant’s documents; the Respondent herein disputes that figure and says judgment was actually entered for **Kshs. 360,000/=** in general damages). The Applicant is aggrieved by that assessment and challenges it on appeal.

2.The Application is supported by the affidavit of **Philip Musyoka**.

3. The Application is opposed by the Respondent, **Leonard Kyalo Mutisya**, who was the prevailing plaintiff in the lower court (“Respondent”). He filed a Replying Affidavit whose main purpose is to demonstrate that the assessment of damages by the lower court was eminently reasonable and unassailable, and that, consequently, the appeal filed herein is frivolous and without any realistic chances of succeeding. Further, both in his Replying Affidavit and in his counsel’s written submissions, the Respondent argues that the appeal will not, in any way, be rendered nugatory by execution.

4. The Application was expressed to be brought under **Order XLI, Rule 4(2)** of the **(Old) Civil Procedure Rules**. That Rule is exactly the same as **Order 42, rule 6(1)** of the **New Rules**. It provides:

(2) No order for stay of execution shall be made under sub-rule (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.

5.The various cases applying this legal provision, some of which have been cited by the advocates for both parties (see, for example, *Lalji Bhimji Sanghani Builders & Contractors v Nairobi Golf Hotels Kenya Ltd* Nairobi HCCC No. 1900 of 1995 which was cited for me by the Applicant’s counsel) are unanimous on the conditions for grant of a stay of execution pending appeal:

a. There must be sufficient cause for the grant of the order for stay;

b. That substantial loss may result to the judgment-debtor unless the order is made;

c. That the application for stay was made without unreasonable delay;

d. That any security ordered by the court for the due performance of such decree or order must be supplied by the judgment-debtor.

6. The Applicant argues that it has an arguable appeal and has already filed a Memorandum of Appeal in that regard. His written submissions also make the argument that substantial loss will result if the execution is not stayed especially because he is unsure that the Respondent would be able to refund the decretal amount if the appeal succeeds. He points out that the Respondent has not addressed this issue in his Replying Affidavit, and has not demonstrated his ability to refund the decretal sums in the event that the Applicant prevails on appeal. To this extent, the appeal might be rendered nugatory; and this represents a substantial loss to the Applicant. The Applicant also avers that he made the Application without unreasonable delay. He further argues that he has already furnished security for the due performance of the decree as ordered by *Justice Warsame* on **11/09/2009**.

7. Applying the above principles to the case at hand, I find that the Applicant has satisfied the four conditions established by our case law on grant of stay of execution. First, I am of the view that the appeal is arguable, and therefore there is sufficient cause for the grant of the order for stay. To be sure, an "arguable" appeal is one which raises a serious question; it is not one which is sure or even likely to succeed.

8. Second, the Applicant might suffer substantial loss if the order is not made. This is on account of the fact that he is apprehensive that if the decretal sum is paid to the Respondent, he might not be able to recover it if he prevails on appeal. He is uncertain about the Respondent's financial status. Yet, the Respondent has done little to assuage that fear. His Replying Affidavit remained silent on his ability to refund the decretal sum. Since the Applicant raised the concern, it was incumbent upon the Respondent to place on the record evidence of his ability to refund the decretal sum if he does not prevail on appeal. As the Court of Appeal has stated in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (CA No. NAI 238 OF 2005 (UR 144/2005) in elaborating analogous legal principle:

The Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has.

Hence the burden shifted to the Respondent to demonstrate that the Applicant would not suffer substantial loss if the order for stay is not granted. He failed to do so.

9. Third, it seems obvious that the Application was filed without any undue delay: judgment was entered on **10/08/2009**; Memorandum of Appeal was filed on **02/09/2009** as was this Application.

10. Lastly, the Applicant has already furnished security for the due performance of the decree. He has already paid the sum of **Kshs. 400,000/=** into court pursuant to the order of *Justice Warsame*.

11. The upshot is that I will allow the Application since it meets the requirements set under the law. The orders of the Court, are as follows:

a. That this Court does hereby grant the stay of execution pending appeal of the judgment entered on **10/08/2009**;

b. That the security for due performance deposited in Court by the Applicant in the sum of **Kshs. 400,000/=** remains lodged in Court until the Appeal is heard and determined.

c. The costs of this Application shall abide by the pending appeal.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE