

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 118 OF 2005

DENIS OUMA SIMOLO.....PLAINTIFF

VERSUS

A.A. TRANSPORTERS LIMITED.....DEFENDANT

RULING

In this case the plaintiff had sued the defendant company, his former employer, and was awarded in judgment Ksh. 6,955,832. That judgment was delivered on 21st April 2011. The defendant company filed a notice of appeal on 4th May, 2011. The plaintiff's costs awarded in that judgment were taxed by consent on 12th May 2011. The defendant did not thereafter take any action on this matter until they filed a notice of motion dated 3rd October 2011. It is the application being considered in this ruling. The defendant by that Notice of Motion, seeks for stay of execution pending appeal. The defendant has moved under Order 42 Rule 6 (1) (2) of the Civil Procedure Rules 2010. In discussing order 41 Rule 4 of the now repealed Civil Procedure Rules and replaced by Order 42 Rule 6 the court of appeal in the case **TERESIA KIMANI VS GITHERE INVESTMENT LTD HCC NRB C.A 944 OF 2003:**

“In an application for stay under Order 41 Rule 4, the applicant will succeed if he/she demonstrates to the satisfaction of this court that substantial loss will ensue if the order of stay is not granted; that he has filed the application without undue delay; and that he has offered such security as may be ordered. The onus is on the applicant to discharge the above through at their position. A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused.”

The defendant in support of the application relied on an affidavit sworn by its managing director. It was deponed that the auctioneers went to the defendant's premises on 3rd of October 2011 with a view to attach the defendant's motor vehicles. On the defendant challenging the service of the proclamation on the defendant's watchman, the auctioneers left the premises with a promise of fresh service of the proclamation. The defendants' managing director deponed that if the execution does proceed against the defendant's movable properties the defendant's business would come to a stand still. The defendant instructed its then advocate to file an application of stay of execution and also notice of appeal against the judgment of 21st April, 2011. The defendant also instructed that advocate to file an application for stay of execution pending the appeal. The defendant's Managing director deponed that the advocate failed to file the application as instructed. The managing director of the defendant in his affidavit stated that the defendant company would abide with whatever order the court would make on security.

The plaintiff although in his written submissions relied on grounds of opposition previously filed, I was unable to see those grounds in this file. That as it may be, the plaintiff submitted that the defendant had not fulfilled one of the conditions of granting stay of execution pending appeal under Order 42. The plaintiff submitted that the defendant had failed to show that it would suffer substantial loss if stay of execution was not granted. The plaintiff also faulted the defendant's attempt to rely on the alleged mistake of its former advocate. Bearing in mind the conditions set out in the case **TERESIA KIMANI VS GITHERE INVESTMENT LTD (supra)** I am of the view that the defendant's application cannot succeed. It cannot succeed because as rightly submitted by the plaintiff, the defendant failed to elaborate

what loss if any it would suffer if stay of execution was not granted.

In my view, it was not enough to say that if execution did proceed the defendant's business would be at a stand still. The defendant needed to state what would be at a stand still or how execution would affect its business. The submissions made by the defendant in its written submissions, where it was stated that the defendant runs a transport business, was a statement from the bar. It was not supported by the affidavit sworn by the Managing director. That, as correctly stated by the plaintiff, cannot be taken into account as this court considers this ruling. The defendant also relied on what it termed as the mistake of its counsel having failed to file the application of stay of execution. Order 42 Rule 6 (2) requires an applicant to an application for stay of execution to file such an application without unreasonable delay as a condition to obtaining stay of execution. Judgment was entered for the plaintiff on 21st April, 2011. The costs were taxed as stated before on 12th May 2011 by consent. The defendant was required to give sufficient reason why the application for stay of execution was not filed within reasonable time.

The defendant did not even inform the court, which of its former advocate, if at all, failed to follow its instructions to file the application. When judgment was delivered, the defendant was then represented by the firm of advocates Godfrey Mutubia & Co. Advocates. When the bill of costs was taxed the defendant was represented by the firm of advocates Mogaka Omwegeni & Mabeya Advocates. The defendant did not specify which of these two firms failed to act on its instructions. More than that, it was incumbent upon the defendant to follow up its case and to inquire of the progress being made by its advocate. Had it done so, it would have discovered that its instructions had not been followed, if any.

It follows therefore that the defendant failed to explain the delay in filling the application for stay of execution. On the whole, the defendant failed to meet the requirements under Order 42 Rule 6 which conditions are necessary before stay of execution can be granted. The defendant having failed to meet those conditions the application must fail. Accordingly, the application dated 3rd October 2011 is dismissed with costs to the plaintiff.

DATED and DELIVERED at MOMBASA this 15th day of March, 2012.

MARY KASANGO

JUDGE