



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 274 OF 2009

CHARLES MBAGAYA AMIRA APPELLANT/ ORIGINAL DEFENDANT

VERSUS

PERMOD MALHORTA RESPONDENT/ ORIGINAL PLAINTIFFS

(Being an appeal from the judgment of Hon. W. Mokaya Senior Principal Magistrate in Civil Case No. 12746 of 2006 dated 26th day of January 2009 at Milimani Commercial courts, Nairobi)

RULING

Application for Stay of Execution

Pending appeal to the Court of Appeal

Notice of Motion 22nd December 2011

I. INTRODUCTION

1. On the 14th November 2011, this High Court gave judgment in favour of the respondent against the appellant. The parties began their case in the subordinate court. The subject involved the sale of land whereby the issue as to whether the “rates” had been paid or not. The trial magistrate held in favour of the respondent, that there was no triable issues and entered summary judgment against the appellants/original defendants.
2. Upon appeal to this High Court, the decision of the trial magistrate was upheld. The appeal was accordingly dismissed.
3. Being dissatisfied with this High Court’s decision, the respondent filed an appeal to the Court of Appeal by way of notice. By an application dated 22nd December 2011, he asked there be a stay of execution pending that appeal.

II APPLICATION DATED 22ND DECEMBER 2011

4. The respondent/applicant stated that his appeal has high chance of success in the Court of Appeal. If the decretal sum now deposited in a joint account of the advocates is released to the appellant/respondent in this application, then the appeal will be rendered nugatory.

5. The applicant had taken a loan and used his savings to finance the security deposited to court. He would lose all and suffer “substantial damage.”

6. In reply, the appellant/respondent in this application stated the key to the application is found in para 14. That states:

“In the event of my succeeding in the Court of Appeal, I would not be able to get the moneys from the respondent as he has no known assets and the appeal shall be rendered nugatory.”

7. The appellant/respondent states that he is able to make good and refund the decretal sum if called upon. That he is a man of means.

III FINDINGS

8. The application herein for stay of execution was brought without inordinate delay. The decretal sum had been deposited in a joint account and had all along acted as security which appears that the applicant wishes that this continue to so act and be used as security.

9. From the background of this case and reasoning contained in this court’s judgment, I hereby find that there is no cause to permit the security to continue to be held in court. I would decline to grant the application for stay of execution. The appeal to the Court of Appeal is one of pure point of law.

10. The application is dismissed with costs to the appellant/respondent in this application.

DATED THIS 14TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG’AWA
JUDGE

Advocates :

i) *P. Simani instructed by M/s Simani & Co Advocates for appellant/
original defendant*

ii) *V. Goswami instructed by Sobhag H Shah & Co Advocates for respondent/ original plaintiff*