



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Appeal 169 of 2010

MUNZA INVESTMENT COMPANY LIMITED APPELLANT/APPLICANT

VERSUS

RHODA MWIKALI MAWEU alias RHODA NATHAN RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 5th October 2011 filed by the appellant who was defendant in the lower court. It was filed under certificate of urgency under Order 42 Rule 6 of the Civil Procedure Rules 2010. The main prayer is for stay of execution pending appeal. It is prayer 3 which reads as follows:-

THAT the Honourable court be pleased to grant a stay of execution of the judgment/decree given in the Machakos RMCC No. 417 of 2009 on 2nd November 2010 pending hearing and determination of this appeal.

The application has grounds on the face of the Notice of Motion. Among the grounds listed, was that the appellant had lodged an appeal. It is also a ground that the subordinate court granted a conditional stay of execution but the applicant's insurer inadvertently did not meet the conditions in time, and the stay lapsed and the subordinate court dismissed an application seeking to enlarge time. It is also a ground that, if execution proceedings are finalized, the applicant will suffer substantial and irreparable loss and damages.

The application was filed with a supporting affidavit sworn by Lilian Munyiri a Legal Officer of Gateway Insurance Company Limited the insurer of the appellant. It was deponed *inter alia* that judgment was entered on 2nd November 2010 for a sum of Kshs.300,000/= as general damages. Stay of execution was granted, provided the appellant deposited the decretal amount within 45 days. The insurer however, processed the cheque out of the time granted. When an application for extension of time to deposit the decretal amount was made, the lower court dismissed the same with costs on 21st September 2011.

The application is opposed. Both parties' counsel filed written submissions.

I have considered the application, and the submissions filed.

This application was filed under Order 42 Rule 6 of the Civil Procedure Rules. The considerations to be

taken by a court in such an application are listed in Rule 6 (2), which provides:-

6. (2) No order of 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.

The respondent has opposed the application on a number of grounds. Firstly, they have raised the issue of delays or laches. Secondly, that the applicant cannot be granted the same orders twice as they were granted stay by the trial court, but failed to comply with the set conditions. Thirdly, that because an extension of time was refused by the subordinate court, the only avenue available is to appeal and not to make a fresh application.

Lastly, that the applicant has not demonstrated that they will suffer substantial loss if stay is not granted.

On delays, in my view, this application was filed without undue delay, after the dismissal of the request for extension or enlargement of time.

With regard to the objection that an appeal should have been filed, Rule 6 (1) of Order 42 of the Civil Procedure Rules clearly shows that an applicant for stay of execution should make a fresh application to the appellate court, whether the application in the trial court was refused or not. There is therefore nothing wrong with the applicant making this fresh application in the appellate court. There is no law providing for filing an appeal from the trial court's decision.

I note that when this application was made, the applicant was granted two days to deposit the decretal amount. They did so on 7th October 2011. In my view therefore, they have demonstrated that they can honour their obligations in satisfying the award.

The court has discretion under Order 42 rule 6 to grant stay orders. In the present situation, I am persuaded to grant stay of execution mainly because the subordinate court ordered stay on condition of deposit of the decretal amount, and the applicant has so deposited the amount. That provides sufficient security for honouring the judgment. I find also that if stay is not granted the appellant is likely to suffer substantial loss, as they might find it difficult to recover the money if the appeal is allowed.

The upshot of the above is that I allow the application and grant prayer 3. The amount deposited in court will remain so deposited as security. The costs of the application will follow the determination of the appeal.

Dated and delivered this 7th day of **June** 2012.

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George Dulu
Judge

In the presence of:
Ms Amala for Respondent
Nyalo – Court clerk