



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MACHAKOS**  
**CIVIL CASE 9 OF 2011**

**MULWA KAVUO ..... APPELLANT/APPLICANT**

**VERSUS**

**DAVISON NTHENGE ..... RESPONDENT**

**RULING**

Before me is an application by way of Notice of Motion dated 11<sup>th</sup> April 2011, filed by the Appellant/applicant, Mulwa Kavuo. It was brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, as well as Section 63 (e) and 3A of the Civil Procedure Act (Cap 21). The application has four prayers, two of which have been spent as follows:-

1. (Spent).
2. (Spent).
3. **That there be a stay of execution of the decree emanating from the judgment delivered in this matter on 14<sup>th</sup> January, 2011 by Hon. Mungai (SPM) pending the hearing and determination of the appeal lodged against the said judgment by the defendant/applicant herein being Machakos HCCA No. 9 of 2011.**
4. **That the costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. Among the grounds is that the learned magistrate erred in awarding damages that were inordinately high and that the appeal was arguable and not frivolous, as well as that the applicant was ready to abide by any orders imposed by this court.

The application was filed with a supporting affidavit sworn by the appellant/applicant on 11<sup>th</sup> April 2011.

The application is opposed. A replying affidavit sworn on 17<sup>th</sup> May 2011 by the respondent was filed. It was deponed *inter alia*, that the applicant had not satisfied the requirements for grant of stay under Order 42 of the Civil Procedure Rules, and that the application was meant to deny him the fruits of his judgment.

Both the applicant and respondent filed their written submissions through their counsel on record. The applicant's submissions were filed on 31<sup>st</sup> January 2012, while the respondent's submissions were filed on 14<sup>th</sup> February 2012. I have perused both submissions.

On the hearing date, Mr Makau for the applicant and Mr Mung'ata, for the respondent relied on written

submissions filed.

Order 42 Rule 6 (2) of the Civil Procedure Rules provides the parameters under which stay of execution of a decree or order can be granted pending appeal. It provides:-

**“6(2) 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 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.”**

There is no argument advanced alleging that the present application was filed after delay. I find that it was filed without any inordinate delay.

On whether if the order of stay is not granted, the applicant might suffer irreparable loss, I find so as the money if paid to the respondent may never be recovered. I may add that the appeal is not frivolous.

On security, I find that the applicant having actually deposited in court an amount of Kshs.210,000/= as security herein in compliance with a previous court order, the interests of the respondent have been secured pending determination of the appeal. I see no reason to change that position.

For the above reasons, I allow the application and grant prayer 3. Costs will be determined in the appeal.

Dated and delivered this **24<sup>th</sup>** day of **July** 2012.

.....  
**George Dulu**

**Judge**

**In the presence of:**

Nyalo – Court clerk

Mr Asiyo holding brief for Mr Nguli for Appellant/Applicant

Mr S.M. Makau holding brief for Mr Mung’ata for Respondent