

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 81 OF 2012

ARWINGS KOYOSON.....APPELLANT/APPLICANT

VERSUS

PAUL KAMAU KARIUKI.....1ST RESPONDENT

BUTTLER SAFARIS.....2ND RESPONDENT

RULING

By his Notice of Motion dated 17th April 2012 and filed on 18th April 2012, the Applicant sought inter alia a stay of execution in Molo SPMCC No. 203 of 2009 pending the hearing and determination of the appeal. He relied upon the grounds on the face of the Application and the Applicant's Supporting Affidavit sworn on 17th April 2012.

On 18th April 2012, this Court granted a temporary stay pending the hearing of the application between the parties. The stay was granted on terms that the Applicant deposits the sum of Ksh 92,000/= that is to say the decretal sum into court within 14 days.

In opposition to the Application, the Respondent's counsel filed five grounds of opposition, the most relevant of which is that the Applicant had not satisfied the mandatory conditions for grant of a stay pending appeal, and sought dismissal of the Application with costs.

The application was argued before me on 5th June 2012, and both counsel relied upon authorities for and against the grant of a stay pending appeal. I have considered the rival arguments by Miss Wangia (for the Applicant) and Mrs Gatei (for the Respondent).

The conditions for granting a stay of execution pending appeal are set out in Order 42, rule 6(1) and (2) of the Civil Procedure Rules.

Firstly no appeal operates as a stay of execution, and secondly the grant of such stay is in the unfettered discretion of the court (rule 6(1).) Thirdly, and more importantly, no stay of execution pending appeal may be granted unless the conditions set out in rule 6(2) of that order are fulfilled. These conditions are - substantial loss may be suffered by the applicant unless the order is made, the application must be made without undue delay – IYE MOHAMED BAKARI VS. MAWENI ESTATES LIMITED & 2 OTHERS [2006]eKLR.

The applicant offers such security as may be ordered by the court.

The Judgment being appealed against was delivered on 23rd March 2012. The application for stay was not filed until 18th April 2012, some twenty-five (25) days later. Noting that Order 42 rule 6(3) allows for an oral application for stay pending the filing of a formal application, the filing of the application after over 21 days later was certainly a delay, but I cannot say it was an undue delay, taking into account the time it takes counsel to obtain typed proceedings from our courts. I would therefore hold that the application was filed without undue delay.

There is no response from the Respondents, and in particular the first Respondent to the Applicant's averment that he would suffer substantial loss if the decretal sum is paid to the 1st Respondent and it may not be recoverable. In the absence of any such response, it may indeed be that the applicant may suffer substantial loss if the decretal sum is paid to the Respondents, or the 1st Respondent in particular.

The Applicant has paid the decretal sum into court as security binding him should he be unsuccessful in his appeal.

The Applicant has satisfied the conditions for grant of a stay of execution pending appeal.

Counsel for the Respondent however asked the Court to order the Applicant to also secure the costs of the Respondents, particularly in the lower court should the appeal be unsuccessful. The costs in the lower court were not however assessed. I direct that such costs be assessed by the lower court, if not

agreed by the parties, and paid into court within 30 days after such assessment or agreement.

There shall therefore be a stay of execution herein subject to the deposit of the decretal sum and the costs into court within the period stated above.

The costs herein shall however abide the outcome of the appeal.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of July, 2012

**J. ANYARA EMUKULE
JUDGE**