

REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 37 of 2012

MOMBASA MAIZE MILLERS.....APPELLANT

VERSUS

1. HASSAN SURA DELE

2. MOHAMED JALEH & CO. LTD.....RESPONDENTS

Coram:

Mwera, J.
Ajigo for Appellant
Oduor for Respondents

RULING

Under Order 42 rule 6(2), Order 51 rule 1 of the Civil Procedure Rules and sections 1A, 3A of the Civil Procedure Act the appellant filed a notice of motion dated 5th September, 2012 praying:

(i) that there be a stay of execution until the appeal herein is heard.

The reasons advanced for that prayer were that the appeal had good chances of success. Without filing an affidavit of means, it was contended that the respondents were bodies without means with which to refund the sum in case it was paid out and the appeal succeeded. That the applicant company stood to suffer irreparable loss in the event the stay order was not granted; it was willing to abide by an order regarding security for the performance of the decree.

The Human Resources Officer of the applicant filed a supporting affidavit that judgment was entered in the lower court on 10th December, 2012 against which the present appeal was filed. A stay application in the lower court was refused. So this application has been laid and if not granted and execution takes place, the applicant will suffer substantial loss. A notice to execute had been served. The judgment sum if paid will be hard to recover in case the appeal succeeds. What was produced before court was not anything to do with execution e.g. a decree (i.e. judgment sum plus certified costs) or application to execute or warrants for attachment and sale, or a proclamation or attachment of the goods. The applicant produced a letter of demand from the respondents' lawyers indicating the liability as apportioned in the lower court (40:40-20) in favour of the respondents, the awarded damages and itemized costs. In essence this application was brought not because execution was in the offing but on the basis of apprehended execution. So as at this juncture one would be minded to opine that there being no execution in progress, this application is pre-mature and ought not to be entertained. Carolyne Mboku, advocate for applicant filed another supporting affidavit. There was a replying affidavit sworn by the advocate for the respondents, Mr. Michael Maundu, in response to the supporting affidavits. He averred that after judgment the appellant filed a stay application before the lower court but the same was struck out on 15th June, 2012. By this application, the matter had been brought here after an inordinate delay and without explanation. Litigation must come to an end by refusing the stay order sought. Either side submitted and each repeated more or less what the affidavits contained. However, the respondents added that the appellant/applicant had not demonstrated what substantial loss it stood to suffer if the stay order was not granted and there being no decree to execute, this application was considered premature. In that connection the case of Illiana Ingasiali Regina & Another vs. Likhanga Shikani & Another (2005)

eKLR was cited in that Order XLI Civil Procedure Rules, (now Order 42) could only be invoked where a decree/order has been issued and therefore execution was imminent. And thus where neither a decree has been extracted nor the order extracted, such an application as presented by the applicant is premature and ought to be dismissed. That was the view of Gacheche J on 18th July, 2005 sitting at Eldoret. This court concurs with that position and accordingly dismisses this application with costs.

Delivered on 17th October, 2012.

J. W. MWERA

JUDGE