



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 546 of 2011

#### Editorial Summary

1. *Civil Appeal*
2. *Civil Practice & Procedure*
3. *Subject of main suit*
  - I *Not known*
  - II *Issue in a civil suit of extension of summons*
    - 3.1 *Application to dismiss suit granted to represent.*
    - 3.2 *Applicant/appellant appeals to High Court.*
    - 3.3 *Respondent commences execution proceedings.*
4. *Application dated 15<sup>th</sup> June 2012*
  - 4.1 *Certified urgent.*
  - 4.2 *Stay of execution of proclamation of attachment ...  
movable property by auctioneers dated 18<sup>th</sup> May 2012.*
  - 4.3 *Stay of execution of orders of SRM delivered  
30<sup>th</sup> September 2011.*
  - 4.4 *To declare proclamation illegal.*
  - 4.5 *...*
  - 4.6 *A refund of auctioneer's charges.*
  - 4.7 *Stay of execution till determination of appeal.*

5. *Submission by appellant*

- 5.1 *Issue was the extension of memorandum to enter appearance. This summons expired before service.*
- 5.2 *A magistrate extended the validity of summons to enter appearance for 12 months.*
- 5.3 *The orders were challenged and the issue of that extension. The effect was that the suit was struck out.*
- 5.4 *The appellant filed appeal on 30<sup>th</sup> September 2011.*
- 5.5 *The respondent proceeded to tax and executed.*
- 5.6 *The appellant wants a stay of execution order to be heard.*

6. *Submission by the respondents*

- 6.1 *That the respondent sought leave to have suit dismissed.*
- 6.2 *Application granted in ruling of 30<sup>th</sup> September 2011.*
- 6.3 *Appeal filed when execution was being processed.*
- 6.4 *Relied on order 42 r 6(1) Civil Procedure rules that no appeal be stayed or second appeal can operate as stay.*
- 6.5 *Decision is discretionary.*

7. *Held:*

- 7.1 *Application granted.*
- 7.2 *Costs are not executed until the finalization of an appeal.*

8. *Case Law:*

9. *Advocates :*

- i) *S.W. Ngugi instructed by M/s Mose, Mose & Milimo & Co Advocates for*

applicant/appellant

ii) C.M. Chege instructed by M/s Kimani & Michuki & Co Advocates for respondent

**JUANCO TRADING CO. LTD ..... APPELLANT/  
APPLICANT**

**VERSUS**

**MASAKU LUCY WEAR LTD CRISSCROSS LTD .....RESPONDENTS**

## **RULING**

### **Ruling For Stay of Execution**

#### **I.PROCEDURE**

1. The appellant/original plaintiff had filed suit against the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant. Summons to enter appearance appear to have expired. The magistrate's court granted extension of these orders. The defendant was able to come to court and set aside the said orders of extending the time to file summons to enter appearance. The effect of so doing meant that the suit was duly dismissed with costs.
2. The respondent executed for the said costs that did amount to a little more than Ksh. 30,000/- but came to Ksh. 50,000/- at the time of proclamation of the said suit.
3. The appellant filed appeal on the 26<sup>th</sup> October 2011 against the decision of 30<sup>th</sup> September 2011. The application of 15<sup>th</sup> June 2012 (almost a year later) was thereafter filed seeking orders of stay of execution.

#### **II SUBMISSION**

4. The applicant/appellant prayed that:

**4.1 The application be certified as urgent.**

**4.2 That a stay of execution of proclamation of attachment ... movable property by the auctioneers dated 18<sup>th</sup> May 2012 be made.**

**4.3 That the stay of execution of the orders of the Senior Resident Magistrate delivered on 30<sup>th</sup> September 2011 also be made.**

**4.4 That to declare the proclamation illegal.**

**4.5 ....**

**4.6 That a stay of execution be granted till the determination of the appeal.**

5. The arguments put forward by the appellant/applicant is that there is now execution taking place. There is no judgment or bill of costs for such execution to occur.

6. The respondent replied that they were successful in having the suit dismissed. (See ruling of 30<sup>th</sup> September 2011).

7. That they were executing their costs lawfully.

8. In the rules of Order 42 r 6 Civil Procedure Rules no appeal is to operate as a stay of execution. The

decision of the court is discretionary.

9. The issue before me is whether there should be stay of execution of the costs due and owing to the respondent?

10. There are warrants taken out, yet according to the appellant, an appeal lies. The issue here is of costs not a decree of a judgment of the court that is to be executed. This is in essence illegal and the court should not uphold this. I would agree to this.

11. The suit in the subordinate court was indeed dismissed. As a result of this, should the appellant have known to wait till the determination of the appeal or should the respondent execute its costs before the appeal is heard.

12. I believe the issue herein is that of costs. The respondent should await the completion of the appeal before executing for his costs if successful. That is the reason that the court at all times in completion of its appeal would award costs not only at the appeal court level but the subordinate court level where a party is successful.

13. I would agree that execution herein was not a decree/award of the court but basically costs that must await the appeal.

14. Order 42 provides the security of this court's to be provided and at the court's discretion, I order to such security of costs.

15. I would accordingly allow this application for stay of execution of costs of the subordinate court's suit.

16. That I further order that assessed costs Ksh. 36,465/- be deposited as security in a joint interest earning account of the two advocates. I would agree that charges paid to the auctioneers of Ksh. 11,600/- be refunded to the appellant within 30 days.

17. The costs of this application be awarded to the applicant.

DATED THIS 16<sup>TH</sup> DAY OF OCTOBER 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

iii) *S.W. Ngugi instructed by M/s Mose, Mose & Milimo & Co Advocates for applicant/appellant*

iv) *C.M. Chege instructed by M/s Kimani & Michuki & Co Advocates for respondent*