



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 139 OF 2003

DAVID MUGO MWANGI.....APPELLANT/APPLICANT

VERSUS

ELVIS KINYANJUI MBURU.....RESPONDENT/PLAINTIFF

RULING

The Notice of Motion dated 16/12/2010 is brought by the applicant herein, David Mugo Mwangi, under **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010**. The appellant seeks a stay of the decree of the High Court, upholding the decree of the subordinate court, pending hearing and determination of the appeal. The application is premised on grounds found on the face of the application and others found in the appellant's affidavit, dated 16/10/2010.

The brief facts of the case are that the appellant appealed in NKU HCCA 139/03 from the lower court's decision in CMCC No. 763/2001 where he had been condemned to pay damages. Since the appellant was dissatisfied with the judgment, he instructed his counsel to file a second appeal and an application for stay but his advocate then on record, Mr. Mungai Mbugua passed away. He had to change counsel which occasioned delay. The new advocate on record upon taking instructions had to apply for proceedings to enable him prepare the record of appeal and in the meantime, the respondent proceeded with execution and has applied for warrants of attachment and notice of attachment (AMN2 AND 3). That is why the appellant has moved this court for stay as the appeal may be rendered nugatory if the order is not granted. He is willing to provide whatever security the court will require. The applicant's counsel was Hari Gakinya.

In opposing the application Mr. Nyaramba advocate for the respondent submitted that the respondent had not been served with notice of change of advocate and that an application dated 19/6/2007 has been pending for the last 4 years, and it is only when the respondent went to execute that the applicant rushed to court with the instant application. It was his contention that this application is made in bad faith and the respondent is being denied his fruits of judgment.

As regards whether or not Mr. Gakinya is properly on record as counsel for the appellant, I have seen a notice of appointment on record, dated 17/12/2008. Mr. Mutonyi had come on record in place of Mungai Mbugua advocate. Mr. Gakinya claims to have agreed with Mr. Mutonyi advocate but no such consent is on record.

When this application came up for hearing, the application dated 19/6/07 seeking stay of execution, filed by the appellant's former advocate Mungai Mbugua was still on record. Mr. Gakinya applied to withdraw it during his submissions. Two similar applications cannot remain on record at the same time and there

having applied to withdraw the application, the application dated 19/6/07 is hereby withdrawn with costs to the respondent.

It is not clear when the appellant's counsel died. However, Mr. Mutonyi came on record in place of the late Mr. Mungai by a notice of appointment dated 15/4/2008. By then the application dated 19/6/07, seeking stay of execution was already pending on record. Mr. Gakinya then came on record on 24/4/2008 in place of Mutonyi Advocate. Since then, counsel has done nothing towards prosecution of the application that was pending nor did he bring a fresh application for stay of execution. It is not until the respondent started the execution process and issued a notice of attachment dated 7/12/2010, that the appellant rushed to this court seeking an order of stay of execution. Counsel did not explain why he did not move the court for stay of execution for that last 2½ years since he filed the notice of change. For an order of stay to issue, the applicant has to demonstrate that if the order is not granted, substantial loss may result and the application must be brought within reasonable time. Thirdly the applicant has to provide security for due performance.

In the instant case, the applicant has not satisfactorily explained the delay for about 2½ years. The delay is unreasonable in the circumstances and this court will not assist the indolent. Whereas this court takes into account the fact that the applicant has of right of appeal, the respondent too, has a right to enjoy the fruits of his judgment. This court has a duty to balance both rights. Delay in receiving record of appeal is no excuse for the delay in seeking of an order of stay. Even if the court were to allow deposit of the security the respondent would still suffer from the inordinate and unexplained delay occasioned by the applicant. I do find that this application was made hurriedly to stop and further delay the execution process and it continues to deny the respondent the fruits of his judgment. The application is declined and dismissed. The appellant to pay costs of this application.

DATED and DELIVERED this 11th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Kamau holding brief for Mr. Gekonga for the appellant.

N/A for the respondent.

Kennedy – Court Clerk.