



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL APPEAL NO. 13 OF 2008

- BETWEEN -

J. M. NYAMWATA.....APPELLANT/APPLICANT

-AND -

TABITHA NDUKU MUNUVE.....RESPONDENT

RULING

The appellant came before the Court by Notice of Motion application dated **26th June, 2009**, brought under Orders **XLI** (Rule 4) and **L** (Rule 1) of the Civil Procedure Rules, with one main prayer:

“THAT there be a temporary stay of execution and/or proceedings in Mombasa RMCC No. 1088 of 2003, Tabitha Nduku Munuve v. J. M. Nyamwata, pending the hearing and determination of the appeal herein.”

The application rests on the following grounds:

- (i) there is a Judgment passed against the appellant/applicant in Mombasa RMCC No. 1088 of 2003;**
- (ii) the applicant is dissatisfied with the said Judgment, and he has since appealed to the High Court;**
- (iii) the respondent has commenced execution proceedings against the appellant in the said RMCC No. 1088 of 2003;**
- (iv) the appellant has a “good and arguable appeal with high chances of success”;**
- (v) the appellant stands to suffer irreparably if the execution proceedings in the lower Court are not stopped;**
- (vi) the appellant is ready and willing to abide by any conditions and/or terms such as this Court may deem fit to impose, in granting the orders sought.**

The appellant in his supporting affidavit sworn on **26th June, 2009** depones that in the lower Court’s judgment of **10th January, 2008**, the respondent was awarded general damages in the sum of Kshs. 50,000/=, which decision aggrieved him, and consequently he lodged an appeal; and in that behalf, his Advocate has already applied for certified copies of proceedings, for the purpose of lodging an appeal; the said Advocate has advised the deponent that he has “a good and arguable appeal with high chances of

success.” The deponent avers that the respondent has already served upon him a notice-to-show cause, in an attempt to have the deponent committed to civil jail, as part of the execution process. The deponent deposes that the respondent is “a person of straw”, and he is “apprehensive that if the decretal amount is paid out [he] may not be able to recover the same in the event of [the] appeal being successful”; and that the appeal would be rendered nugatory, causing him substantial loss, unless the orders sought are granted. The deponent avers that “no prejudice whatsoever would be occasioned to the respondent” if the orders sought are granted.

The respondent filed grounds of opposition (dated 4th May, 2010), contending, *inter alia*, that —

- (i) the applicant has no appeal on record;**
- (ii) the applicant failed to prosecute the application timeously after it was certified urgent;**
- (iii) if the stay sought is to be granted, then the decretal sum of Kshs. 93,147/= should first be deposited by the respondent in a joint interest-earning account.**

When the matter was mentioned on 12th July, 2010 learned counsel **Mr. Mokaya** represented the applicant, while learned counsel, **Mr. Gichana** represented the respondent. It was on that occasion recorded that **Mr. Mokaya** had not yet filed and served any written submissions, whereas **Mr. Gichana** had done so. In the presence of both counsel, I assigned 19th November, 2010 as the date for the delivery of ruling. It was, however, not possible to deliver the ruling as scheduled, owing to high depletion in Bench-strength at the Mombasa High Court Station, at a time when the volume of work was substantial. The appellant has not benefited from this delay to file a set of written submissions.

Learned counsel **Mr. Gichana**, in his submissions, urged that the application be dismissed: for, though it has been certified as urgent on 29th June, 2009, “the appellant went into deep slumber” until mid-2010, and then failed to file and serve any written submissions; he “has only been awakenedby the warrant of arrest which is in force”.

Counsel urged that the applicant’s Notice of Motion had not been served as required by Order L, Rule 2 of the Civil Procedure Rules: and so, the application amounted to an abuse of process.

Counsel contested the claim by the applicant that the intended appeal has any chances of success. He asked the Court to take into account the delay in prosecuting the application, in a matter in which the sum awarded was only Kshs. 50,000/=, in respect of a dog-bite incident; and submitted that no arguable appeal had been shown.

Counsel cited this Court’s [**Porter, J.**] decision in **New Stanley Hotel Limited v. Arcade Tobacconists Limited** [1986] KLR 757 in which it was held (p.757) that –

“Before making an order staying the execution of the judgment, the Court has to be satisfied that substantial loss may result to the applicant unless the order was made and that the application was made without unreasonable delay”.

The fact-terrain, at this interlocutory stage, is clear enough: the respondent had won judgment in a matter of personal injury, and the decretal award was the modest figure of Kshs. 50,000/=; the respondent did not pay up, for a period close to one year; he did not, for many months lodge an appeal, or seek stay of execution of the decree; but he now belatedly moves the Court to stay the respondent’s hand, as he prepares to prosecute an appeal.

It is clear that the Court has a wide discretion in making an order for stay of execution of a decree that has emerged from a lawful judgment. It is a rule of constant application that, those who seek such discretion must not have a limping case, and must show due diligence in moving the Court to grant orders. In the instant case, I find that the applicant has made no case to persuade the Court to exercise a discretion in his favour.

Therefore, the Notice of Motion of 26th June, 2009 is dismissed, with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 6th day of May, 2011.

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J. B. OJWANG
JUDGE