



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL APPEAL NO. 28 OF 2011.

**REBECCA MUTURI &
HON. A.G ::::::::::::::::::::::::::::::::::: APPELLANTS.**

VERSUS

JAMES MULINGE KIMONGO ::::::::::::::::::::::::::::::::::: RESPONDENT.

R U L I N G.

1. The notice of motion dated 12th May, 2011 is brought by the Attorney General who seeks for a stay of execution of the warrant of arrest of the money decree issued on 30th March, 2011 against **Rebecca Muturi**, the 1st appellant. That decree was issued in Kitale CMC 129 of 2006 where the respondent filed a suit against the 1st and 2nd appellant. Judgment was entered against the applicants. The applicant's application for stay of execution was also dismissed on 11th May, 2011.
2. The applicants contend that they have filed an appeal against the issuance of the warrant of arrest. The 2nd applicant also undertakes to ensure the decretal sum in CMCC No. 129 of 2006 is expedited on priority basis. It is also contended that if the 1st applicant is arrested, she will suffer psychological trauma because she is an expectant mother. Moreover the appellants have an arguable appeal in view of the provisions of section 21 (4) of the Government Proceedings Act. This application is supported by the affidavit sworn by Joseph Ngumbi, state counsel who represented the applicants.
3. This application was opposed; **M/s. Munialo**, learned counsel for the respondent relied on the replying affidavit sworn by the respondent on 20th May, 2011. It was submitted that the application is fatally defective because it is supported by the affidavit of the Mr. Ngumbi who attested to the matters of facts. Mr. Ngumbi has not explained how he got the information that the 1st respondent was an expectant mother. She urged the court to strike the supporting affidavit. Secondly, it was urged that the appeal cannot be rendered nugatory if execution takes place because this is a money decree and the money can always be returned. The application before the Chief Magistrate's Court came up for hearing on 11th May, 2011 when Mr. Ngumbi failed to attend court.
4. The application seeking for the stay of execution was dismissed for want of prosecution. The applicants have not explained to court why they failed to attend court. This application is meant to delay the respondent from enjoying the fruits of his judgment which was entered one year ago. Regarding the issuance of warrant of arrest, it was issued against the 1st applicant who was sued in her own capacity. Execution can proceed against any party sued in a suit because the 1st applicant was sued jointly and severally with the A.G. Moreover, it is the 1st applicant who committed the illegal acts that gave rise to the suit. Counsel urged the court to dismiss the application.
5. The principles to guide the court on whether or not to grant an order for stay of execution are well set out under provisions of order 42 (6) (2) of the CPR which provides:-

“No order for stay of execution shall be made under sub rule (1) unless:-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Besides the Civil Procedure Rules, the applicants are a government officer and the A.G. who were sued in their official capacities. Thus the provisions of section 21 of the Government Proceedings Act (Cap 40) regarding execution of a decree also come into play.

6. Although counsel for the respondent submitted that the first applicant was sued jointly and severally, thus execution can be undertaken against her by issuance of a warrant of arrest. Although this is within the province of the appeal court, a mere glance at the provisions of section 21 of Cap 40 shows that even a suit against a Government officer, the provisions of section 21 are applicable. The execution sought to be stayed is a warrant of arrest. I am of the view the execution will definitely cause prejudice to the 1st applicant who is a government officer. Moreover, the 2nd applicant undertakes to process the decretal sum on priority basis.

7. In addition to the provisions of the civil Procedure Rules, this court has discretion to grant an order of stay if the appeal will be rendered nugatory. I have looked at the memorandum of appeal and the order sought to be appealed against is the one where the learned Principal Magistrate issued a warrant of arrest against the 1st appellant. It follows therefore if an order of stay is not issued, that appeal will be rendered nugatory. For those reasons, I will allow the application for stay of execution in terms of prayer No. 3. This order shall remain in force for a period of one year within which the applicant should have prosecuted the appeal failure to do so the order of stay will lapse.

Costs of this application shall be in the cause.

Ruling read and signed this 29th day of July, 2011.

**\MARTHA KOOME.
JUDGE.**