

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 109 OF 2009

MORRIS OTUNGA

INDENJE.....APPELLANT

V E R S U S

MILTON ANDAYE

LISAMBILI.....RESPONDENT

R U L I N G

The appellant was aggrieved by the decision of the trial magistrate in Kakamega CMCC No.376 of 2009 – Milton Andaye Lusambili vs Morris Otunga Indeche by which the trial magistrate declined to set aside an interlocutory judgment. The appellant duly filed an appeal to this court. Contemporaneous with filing the appeal, the appellant filed an application under the former **Order XLI Rule 4** (now **Order 42 Rule 6**) of the **Civil Procedure Rules** seeking orders of this court to stay the execution of the decree of the subordinate court pending the hearing and determination of this appeal. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the appellant. The application is opposed. The advocate for the respondent, Javan Mukavale, swore a replying affidavit in opposition to the application.

At the time the appellant moved this court for appropriate orders in the application, the respondent had already commenced the execution process. Lenaola J. granted temporary stay of execution pending the hearing of the application. The appellant was ordered to deposit the sum of KShs.60,000/- (being half of the decretal sum) in court. The appellant complied with the orders and has since deposited the said amount in court. Counsel for the parties to this application filed written submissions in support of their client's respective opposing positions. At the hearing of this application, it was agreed that this court would render its ruling on the basis of the said written submissions.

Having carefully read the pleadings filed by the parties herein in support of their respective opposition positions, and having considered the submissions filed, the issue for determination by this court is whether the appellant made a case for this court to grant the order staying the execution of the decree as craved for pending the hearing of the appeal. The principles to be considered by this court in determining an application such as the present one are well settled. In Butt vs Rent Tribunal [1982] KLR 417. It was held that the court ought to exercise its discretion in favour of allowing an appellant to ventilate his appeal so as not to render the appeal nugatory by refusing to grant stay of execution. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** provides that stay of execution would only be granted if the appellant established that he would suffer substantial loss and further that he would be ready to provide security for the due performance of the decree.

In the present application, it is evident that the appellant established that he would suffer substantial loss if stay of execution is not granted. The decree issued is a money decree. The respondent did not put forward a case that he would be able to refund the decretal sum ordered by the subordinate court if the appeal were to succeed. It is apparent that if the respondent is allowed to execute, the appellant is unlikely to recover the decretal sum paid to the respondent. The appellant has shown his willingness to provide security for the due performance of the decree pending the hearing of the appeal by depositing in court half of the decretal sum. This court is of the considered opinion that the appellant established a suitable

case for allowing the application staying execution of the decree of the subordinate court.

In the circumstances therefore, this court grants the appellant's application seeking stay of execution of the decree of the subordinate court pending the hearing and determination of the appeal. The sum of KShs.60,000/= shall remain deposited in court or in a joint interest-earning account in the names of both counsel in a reputable bank to be agreed upon by the parties. Costs of the application shall be costs in the cause.

DATED AT KAKAMEGA THIS 26TH DAY OF JULY 2011

L. KIMARU
J U D G E