



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.50 OF 2011

GILBERT GITONGA NGATIA.....APPLICANT/APPELLANT

VERSUS

PAUL GICHURU KAIRU.....RESPONDENT

(Being appeal against the ruling of S. Wekesa, District Magistrate II (Prof), in Nyeri Chief Magistrate's Civil Case No. 22 of 2011 delivered on 13th May 2011)

RULING

Gilbert Gitonga Ngatia, the Applicant herein, took out the Motion dated 26th May 2011 pursuant to the provisions of *Order 42 rules 6 and 7* of the Civil Procedure Rules and *Sections 1A, 1B and 3A* of the Civil Procedure Act in which he applied for the following orders:

- (a) That this application be heard ex-parte in the first instance.**
- (b) That there be a stay of execution of the “decree of the court” pending the hearing and determination of the appeal herein.**
- (c) That the honourable court be pleased to order, as condition for stay, the deposit of the decretal sum/costs in a joint interest earning account in the names of both advocates to endure until determination of the appeal herein.**
- (d) That costs be provided for.**

The Applicant swore an affidavit he filed in support of the Motion. Paul Gichuru Kairu, the Respondent herein, opposed the Motion by filing the replying affidavit he swore on 6th June 2011.

The history behind the Motion can easily be deduced from the facts deponed in the affidavits filed for and against the Motion. The Applicant was sued by the Respondent before the Subordinate court vide **Nyeri C.M.C.C.C. No. 22 of 2011**. The Respondent had sought for a refund of Ksh.39,000/= in respect of undelivered building stones. It would appear the Respondent had initially served upon the Applicant a demand notice before filing the suit. Annexed to the supporting affidavit is a copy of the delivery book showing that the Respondent acknowledged receipt of the Applicant's letter on 9th February 2011 in which the Applicant admitted owing to the respondent a sum of Ksh.39,000/=. On 14th February 2011, the respondent filed the suit. The Applicant filed a defence in which he further admitted the debt. By a Motion dated 15 April 2011, the respondent applied to be awarded costs based on the suit sum. The Applicant opposed the Motion by filing grounds of opposition. The Applicant's main ground of objection was that since there was no judgement then the order on costs cannot be made. The court gave the order

on costs in favour of the Respondent on 13th May 2011. The Appellant was dissatisfied with the order hence this appeal.

The Appellant/applicant is now before this court seeking for a stay of execution of the order pending the hearing of the Appeal. It is the Applicant's submission that unless the order for stay of execution is given he will suffer substantial loss in that his goods may be carried away by the auctioneer and that his appeal may be rendered nugatory. The Respondent on the other hand is of the view that the order for stay of execution should not be granted because it will serve no useful purpose since the Applicant has paid the auctioneers fees this in case and was even allowed to deposit post-dated cheques for the amount claimed as costs. I have perused the grounds set out on the Memorandum of appeal and I am of the view that the appeal raises serious points of law. Some of the issues raised include a question as to whether or not the respondent was entitled to costs in the first place? The other question is whether an order of costs can be given where there was no judgment? If at the end of the appeal, the court finds that the Respondent was not entitled to costs, then the Applicant will have suffered substantial loss if he now pays costs as demanded by the Respondent. It is admitted by the respondent that he was given post-dated cheques to settle the amount. The Applicant has stated that he has counter-manded those cheques because he drew them under duress to avoid his goods being taken away by the auctioneer. In the end I am convinced it is necessary to grant the orders to maintain the status quo pending appeal.

I grant the order for stay on condition that the Applicant deposits the sum of Ksh.21,680/= in an interest-earning account in the joint names of the advocates within 15 days from the date hereof. In default, the Motion shall stand as dismissed and the Respondent will be at liberty to execute the order. Costs of the Motion to abide the outcome of the decree.

Dated and delivered at Nyeri this 15th day of July 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Mr. Muthoni for the Respondent and Mr. Karweru for the Appellant/Applicant.