2980

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL CASE NO. 54 OF 2011

ATEI OTIENO ………………………….APPELLANT

VERSUS

1. LEONARD MUTHAMA MBONDO
2. JOHN OYUGI...RESPONDENTS

RULING

By an application dated and filed in court on **2nd June, 2011**, **Atei otieno,** hereinafter *"the applicant"* sought the following substantive prayer:

a) "That this Honourable Court do order a stay of execution in Machakos CMCC No. 269 of 2009, aforesaid, pending the hearing and determination of the appeal herein upon such terms and conditions as this Court deems fair and just in all the circumstances.

The application was premised on Order 42 rule 6 and 7 of the Civil Procedure rules, Section 63(e) of the Civil Procedure Act and all other enabling Provisions of the law.

The grounds upon which the application is hoisted are that;

a) "That on 24th March 2011 judgment was delivered by the trial magistrate in Machakos CMCC No. 269 of 2009, in favour of the 1st Respondent for the sum of Kshs. 100,000.00 in general damages plus cost and interest".

b) That the appellant being wholly dissatisfied with the entire judgment has lodged an appeal to the High Court of Kenya at Machakos H.C.C.A No. 54 of 2011.

c) That the Appellant is ready and prepared to lodge the decretal sum into this Honourable Court as security for due performance of the decree in the said Machakos CMCC No. 269 of 2009 or as the Honourable Court may direct.

d) That it is highly improbable that the Respondent would be able to refund the decretal amount in the event this appeal was to succeed.

e) That the Appellant has a strong appeal with high chances of success considering that the lower court wholly misapplied the holding in the case as there was no accident or at all and it is only fair and just that this Honourable Court determines and re-evaluates the evidence upon hearing the appeal which involves substantial questions of law.

f) That there has been no delay on the part of the applicant/appellant considering that the application for stay was not allowed though the appeal had already been lodged.

In support of the application, the applicant deponed where pertinent that on 24th March, 2011, the trial magistrate delivered judgment in Machakos CMCC No. 269 of 2009 in which he awarded **Leonard Muthama Mbondo** and **John Oyugi** hereinafter "*the respondents*" a sum of Kshs. 100,000/= as general damages plus costs and interest. Dissatisfied with the judgment and decree aforesaid he had lodged the instant appeal. Prior to that he had filed a similar application for stay of execution before the trial court which was dismissed. It was then that he decided to file this application. He was ready and willing to deposit the decretal amount in court.

The Respondents appears to have filed a replying affidavit going by their submissions. However, for reasons that I cannot fathom, the replying affidavit is not on record. However, since the decision on the application will turn on law, the existence or lack of the respondents' replying affidavit should not be an impediment to the determination of the application.

When the application came up for inter-partes hearing before ***Kihara Kariuki, J*** on 27th June, 2011, he directed that the same be canvassed by way of written submissions. Parties subsequently, filed and exchanged written submissions. However, before he could craft and deliver the ruling, he relocated from the station. On **26th October, 2011**, the application found its way to me. Both **Mr Bw'omote** and **Mr. Wambua,** learned counsel for the applicant and respondents respectively agreed that I proceed with the application from where ***Kihara Kariuki,J*** had stopped. Essentially, what I was being told is that I should act on the submissions, craft and deliver the ruling. A direction on that basis was duly issued.

I have anxiously considered the material placed before me on this application, in particular the written submissions of the learned counsel as well as the authorities which I was referred.

The law on stay of execution of a judgment and or decree pending the hearing and determination of an appeal is well settled now. It is to be found in the unambiguous wording of Order 42 rule 6 and 7 of the Civil Procedure rules and several authorities to wit:-

§ **Butt v Rent Restitution Tribunal [1982] KLR 417**

§ **Kenya Shell Ltd v Kibiru [1986] KLR 410**

§ **Halai & Another v Thornton & Turpin [1963] Ltd [1990] KLR 365**

§ **United Builders v Standard Chartered Bank Ltd, HCCC No. 41 of 1995 [UR]**

§ **Diamond Trust (K) Ltd v Peter Mailanyi , HCCC No. 177/02 [UR)**

§ **Patani & Another v Patani [2003] KLR 518**

The provisions of Order 42 rule 6 and 7 of the Civil Procedure rules read together with the above authorities lay it out that for the applicant to succeed in an application for stay of execution, he must show that he will suffer irreparable and or substantial loss, that the application has been made timeously, security must be offered and that at the end of the day, whether or not to grant stay is an exercise in discretion. Infact substantial loss, in its various forms is the cornerstone of granting a stay. That is what has to be presented and proved. Otherwise without such evidence it is difficult to see why a Judgment Creditor should be kept out of the fruits of his judgment. *See* **Kenya Shell** (supra). Again as I stated in the case of **Halai & Another** (supra),

"***the superior court's discretion to order stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay".***

The Applicant to my mind has not satisfied me that he will suffer substantial loss if the stay is not granted. All that the applicant has said in this regard in his application is that ***"it is highly improbable that the respondent would be able to refund the decretal amount in the event this appeal was to succeed".*** It is instructive though to note that, the applicant made this statement as a ground in support of the application. He has not deponed to that fact in his supporting nor in the further affidavit. In the absence of any deposition to that effect, that ground means nothing. In any event that ground as framed does not equal or amount to substantial loss. The applicant is merely dealing with probabilities. A stay cannot be granted on probabilities. The applicant having not stated in his two affidavits and even his submissions that he would suffer substantial loss unless the application is allowed, which is the cornerstone of granting stay of execution, the application must of necessity collapse.

I note though, that the applicant deposited the whole decretal sum in court thereby meeting the other condition necessary for the granting of stay. I also note that the application was made without undue delay. However all those efforts are in vain since without meeting the first condition of substantial loss, the applicant cannot have the court's discretion in his favour.

Accordingly, the application is dismissed with costs to the respondents.

RULING DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **NOVEMBER 2011.**

ASIKE - MAKHANDIA
JUDGE