



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 74 OF 2011

WAYUA MWASI APPELLANT

VERSUS

SAMUEL NOAH NZAMU RESPONDENT

RULING

Before me is a Notice of Motion dated 8th August 2011 filed by Wayua Mwasi. It was filed under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules as well as Section 1A and B and Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya). The application was filed under certificate of urgency. Prayers 1 and 2 of the application have already been spent. The prayers that are alive and for my decision are 3 and 4 as follows:-

1. (spent)
2. (spent)
3. **THAT there be a stay of execution of the judgment entered on 21st April 2011 by honourable District Magistrate Mr V.A Otieno and the decree issued on 25th July 2011 in Senior Resident Magistrate's Court at Mwingi Civil Case Number 20 of 2005 pending the hearing and determination of the appeal herein.**
4. **THAT the costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are *inter alia* that the Applicant has already appealed against the decision of the subordinate court made on 21st April 2011; that the Respondent had already issued notice to execute on 9th August 2011; that the appeal has a good chance of success and will be rendered nugatory if stay is not granted; that the Applicant was willing to provide security; and that the application was filed without unreasonable delay.

The application was filed with a supporting affidavit sworn by WILFRED NYAMU MATI advocate for the Applicant. It was deponed *inter alia* that judgment for defamation was made for a figure of Kshs.50,000/= as damages plus costs; and that unless stay of execution is granted the appeal is likely to be rendered nugatory and the Appellant will suffer irreparable loss and damages.

The application is opposed. A replying affidavit sworn on 2nd September 2011 by the Respondent SAMUEL NOAH NZAMU was filed. It was deponed, *inter alia*, that the application was not filed without unreasonable delay as it was filed close to four months after judgment and only a day after the

notice to execute was to lapse; that this was a money decree; that the Applicant had not demonstrated what irreparable loss and damages he would suffer if the decree is executed and that the Respondent was a person of means and a businessman engaged in wholesale business at Mwingi town.

On the hearing date counsel for the Applicant Mr Mambiri and counsel for the Respondent Mr Mutia addressed the court.

This is an application brought under Order 42 rule 6 of the Civil Procedure Rules. The application is for stay of execution pending appeal. The application was filed after a notice to execute decree was served. In the subordinate court however, the Applicant had already filed an application for stay on 24th May 2011. That application appears not to have been heard todate.

Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, there is no dispute that an appeal has already been filed. I have myself seen the Memorandum of Appeal raises triable issues. Indeed, the decree is a money decree. However, in my view, the Applicant has shown that he will suffer loss if execution is not stayed. There is no evidence that there was inordinate delay in bringing this application, as the Applicant had filed an application in the subordinate court for stay. Though the court will be slow in staying a monetary decree, I am persuaded that in this defamation matter, a stay of execution is justified. I see no need for ordering provision of security.

Consequent, I allow the application and grant prayer 3. Costs will follow the results of the appeal.

Dated and delivered at Machakos this **6th** day of **December** 2011.

George Dulu

Judge

In presence of:-

For the Applicant: Ms Mambiri

For the Respondent: Mr Mungai

Court clerk: Nyalo.