



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT ELDORET**

**Civil Appeal 201 of 2009**

**RULING**

SWAN CARRIERS LIMITED.....APPELLANT/ORIGINAL

DEFENDANT/APPLICANT

VERSUS

SAMUEL KOSKEI KIBET.....DEFENDANT/ORIGINAL

PLAINTIFF/RESPONDENT

**RULING**

**(APPLICATION FOR STAY OF EXECUTION)**

**Background**

1. The subject of the Original suit in the Subordinate Court is TORT. It is a running down matter whereby a male adult driver was involved in a Motor Vehicle Accident between two Motor Vehicles. He sustained injuries and sued for damages. The Subordinate Court gave award. The appellant (Original defendant) being aggrieved filed appeal to this court on 14<sup>th</sup> December, 2009.

2. The appellants then returned to the magistrates court and applied for “stay of execution.” This was struck out. On admission by the applicant, the said application was dismissed because the affidavit had been deponed to by an advocate instead of the defendants.

3. The appellant/applicant then proceeded to this high court and prayed for stay of execution. This application was strongly opposed by the respondent/ respondent on grounds that the application of 19<sup>th</sup> April, 2010 was RES-JUDICATA

## II. Application 19<sup>th</sup> April, 2010

4. This application was applied for stay of execution as the auctioneer had purchased the goods of the appellants. The appellants wished to be heard on their appeal and if the execution is carried out it would render the appeal nugatory.

5. The application was opposed on several points but the main point brought out is that the same was Res Judicata. Once the application for stay of execution was dismissed/struck out in the subordinate courts it cannot not be filed again in the High Court for the same prayer as this is Res-Judicata.

6. The court would wish to deal with this point to clarify the relationship between the subordinate courts and the High Court.

7. The rule in question is Order XLI r 4 Civil Procedure Rules that reads:

**“no appeal or several appeal shall operate as a stay of execution or proceedings under a decree or order appealed from an order that the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application of such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made and to make such orders to the court of first instance”**

8. This order previously read:

**“The application shall in every case be made in the first instance to the court from whose decree or order the appeal is taken....”**

9. The law prior to the amendments was that it was compulsory that if a case is in the subordinate court the aggrieved party must first seek orders for stay of execution in the court of first instance, in this case the subordinate courts. If the prayer for stay of execution is granted by that court, the issue of stay of execution ends there. If the prayer for stay of execution is dismissed and or struck out then where it is dismissed, the rules required that the aggrieved party applies to the High Court for the same order.

10. I would just like to distinguish between a dismissal and striking out. Once a matter or application is dismissed, there is finality to it. If a matter or application is “struck out” on technicalities then the said aggrieved party is permitted to file a court application in the same court.

11. In this case, the applicants had an option to file the application struck out a fresh before the magistrate's court where the application was struck out on technicalities. They choose to come to the High Court. Is this Res Judicata?

**III. Arguments by the Respondent:**

12. The respondent argued that the matter was res-judicata and therefore must be struck out and or dismissed.

**IV. Opinion:**

13. The Original rules was as stated earlier that application he applied first to the court of first instance. If it is refused then a similar application he applied to the High Court.

14. The rules changed when this Hon. Judge began implementing the same whilst in change of the duty judge portfolio at the High Court Nairobi in 1998/1999. Most advocates would come directly to the High Court without first going to the subordinate court as required. The rules committee then changed the rules to state that there was no bar for the applicant to come directly to the High Court to be heard first.

15. As that is now the rule, an applicant may apply for stay of execution either at the court of first instance, in this case, the subordinate magistrate's court or at the High Court. The applicants may also have an option to apply to the subordinate courts. Failure to be granted orders to bring another application to the High Court.

16. The matter therefore is not Res JUDICATA.

17. I therefore find that this argument is dismissed.

18. On the merit of the application, the applicants are aggrieved. They want to be heard on their appeal recently filed. They ask that there be a stay of execution pending the appeal being heard. They state the respondent is a man of straw, but in a money declaration it was held in the **Kenya Shell Case - VS- Karuga E.A.** that in a money decree there be no stay of execution.

19. This present case, a tort, the applicants are willing to deposit the decretal sum to court. They are willing also to offer security. The respondents advocate argued that the fees due to him should be paid.

20. In this, I find that a system has developed of the payment of advocate fees and half of the decretal sum before an appeal is heard. This to my mind is irregular. My only explanation being the delay in hearing of appeals in these courts to the extent that a litigant is deprived of their fruits of their award.

21. The correct position is that the decretal sum should be deposited in an interest earning account in the joint names of the advocates or alternatively be deposited to court till the finalization of an appeal.

22. I would therefore grant the application for stay of execution for the CMCC 933/07 court case pending the determination of this appeal.

23. I further order that the applicant do deposit the decretal sum in an interest earning account in the joint names of both advocates with the bank to be chosen by both advocates.

24. I award costs to the applicant.

**Dated this 3<sup>rd</sup> day of May, 2010 at Eldoret.**

**M.A. ANG'AWA**  
**JUDGE**

**Advocate**

D.L. Were Advocate instructed by the Firm of M/s. Were & Were & Company Advocate  
for the Respondent,

R.O. Otieno Advocat instructed by the Firm of M/s Amit Gadhia & Company Advocate  
for the Applicant

**3<sup>rd</sup> May, 2010**

Coram : Hon. Lady Justice M.A. Angawa

Court Clerk : Oscar Limisi

D.L. Were, an advocate from the Firm of M/s Were & Co. Advocate for the Respondent :

Present

R.O. Otieno an Advocate from the Firm of M/s Amit Gadhia & Co. Advocate for the Applicant :

Present

Interpretation : English

**Court:**

Ruling signed, read and delivered in Open Court.

Dated this 3<sup>rd</sup> day of May, 2010 at Eldoret

**M.A. ANG'AWA**  
**JUDGE**

**Court as before**

**“By consent of the parties the decretal sum of Kshs.**

**1,059,712/- awarded by the Subordinate courts in CMCC**

**933/07 be deposited within ten days of to-days date in the Co-**

**operative Bank Eldoret these be liberty to apply” costs in the**

**Cause.”**

**Dated this 3<sup>rd</sup> May 2010 at Eldoret**

D.L. Were for D.L. Were & Were Co. Advocates for the Respondent - Signed.

R.Otieno for Amet R. Gadhia & Associates Advocates for the Applicant - Signed.

Application granted and orders accordingly.

**M. A. ANG'AWA**  
**JUDGE**

**3.5.2010**

**Position of file**

1. Deputy Registrar to ensure Lower Court records typed and in this file.
2. File to comply with Section 79 (admission)
3. There after Deputy Registrar to comply with order 41 r 1A 8A and B Civil Procedure Rules.

**M. A. ANG'AWA**  
**JUDGE**

**3.5.2010**