



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Appeal 247 of 2009

MWANGI KAGUTHA.....APPLICANT

VERSUS

JANE WAIRIMU KUNGU.....RESPONDENT

RULING

On 21st October, 2009 judgment was entered against the respondent in an accident claim in the sum of Kshs.257,108/= in favour of the applicant. The applicant has preferred this appeal and at the same time sought that the execution of the decree in respect of that judgment be stayed pending appeal. The applicant contends that he will suffer substantial loss if the application staying execution is not granted as the respondent will not be in a position to reimburse the decretal sum if paid to her and the appeal were to succeed. The application is also made on the ground that the offending motor vehicle was insured by United Insurance Company Limited, under statutory management, in which capacity a general order of stay of execution against all the insured have been granted and extended in **Nbi H.C.Misc.Civil Application No.1345 of 2005 (O.S.)**.

The respondent has responded to this application arguing it is only meant to deny her the fruits of the judgment. She also asserts that she has sufficient means to reconstitute should the decretal sum be paid over to her and in the event this appeal succeeds. That the application has not been brought in good faith. That the stay granted in **Nbi. H.C.Misc. Civil Application No.1345 of 2005 (O.S.)** has no application in this claim as she was not a party to that other application.

I have considered the application and the replying affidavit. The application is premised on one ground, with two limbs namely, that the applicant stands to suffer substantial loss because the respondent is impecunious and secondly because of the moratorium extended by the order in **Nbi. H.C.Misc. Civil Application No.1345 of 2005 (O.S.)** on all payments to claimants and creditors of United Insurance.

The conditions to be satisfied for an order of stay of execution to issue are settled. **Order 41 rule 4(1) and (2) of the Civil Procedure Rules** requires the applicant to satisfy the court that he may suffer substantial loss unless the order is made; the application for stay must be brought timeously and the applicant must also undertake to provide security as may be ordered by the court.

The applicant has averred that if the decretal sum is paid over to the respondent and this appeal was to succeed, she will not be in a position to refund. The respondent on the other hand maintains that she co-owns parcel of land known as GITHUNGURI/ GATHANGARI/914.

Where an allegation is made, as is the case here, that the respondent cannot reconstitute, the burden of rebutting that allegation shifts to the respondent to satisfy the court that she is capable of restitution. See **National Industrial Credit Bank Ltd. Vs. Aquinas F. Wasike. C.A.No.NAI.258 of 2005.**

The court must ensure that there is no loss to the applicant and also that the respondent is not denied her right to the fruits of the judgment. Has the respondent discharged the burden of rebutting the allegation that she is incapable of refunding the decretal sum? The respondent relies on a title deed for LR. NO.GITHUNGURI/GATHANGARI/914. The land measures 0.92 Ha and is jointly owned by the respondent and another.

For these reasons, that form of security may not secure the applicant's interests. Can this matter be stayed on account of the moratorium issued in **Nbi.H.C. Misc. Civil Application No.1345 of 2005(O.S)**? The respondents in that matter appealed to the Court of Appeal in **Civil Appeal No.4 of 2008** in which an order staying execution was granted. **Nbi.H.C. Misc. Civil Application No.1345 of 2005(O.S)**?, on that ground alone and bearing in mind that the applicant herein was not a party, cannot be a basis of staying execution. The judgment being challenged in this appeal was passed on 21st October, 2009 while this application was brought on 30th November, 2009, approximately one month later. The application has been brought without unreasonable delay.

The applicant has not offered security arguing that it would go against the order in **H.C.Misc. Civil Application**

No.1345 of 2005(O.S.). I have found that I am not bound by that order and the applicant ought to have offered to provide security.

In the result and for all the reasons stated, it is ordered that subject to the applicant depositing the decretal sum in an interest earning account in the joint names of his counsel and the respondent's counsel within 21 days from the date hereof, there will be a stay of execution pending the determination of this appeal. In default of provision of security as ordered, execution will proceed without further orders. Costs in the cause.

Dated, Signed and Delivered at Nakuru this 7th day of June, 2010.

W. OUKO
JUDGE