



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL 143 OF 2009

KENSILVER EXPRESS LTD APPELLANT

VERSUS

JOHN MWITI KABIRA RESPONDENT

RULING

The lower court entered judgment for the respondent herein in PMCC Maua No. 117 of 2006. The decretal amount in that case is Kshs. 267,131/=. The respondent had sued the appellant for special and general damages following burning that he suffered after the appellant’s vehicle emitted steam. Following that judgment, the appellant filed an application before the magistrate court seeking stay pending an appeal in the Court of Appeal being Civil Appeal No. Nai. 4 of 2008, **Commissioner for Insurance and 2 others Vs. Kensilver Express Limited.** The background of the appeal pending before the Court of Appeal is that the appellant had filed before the High Court a constitutional reference challenging the placement of United Insurance Company under statutory management. The High Court’s decision in that constitutional reference is the subject of the pending appeal before the Court of Appeal. The magistrate on hearing the application for stay pending the hearing of the appeal in the Court of Appeal dismissed the application for stay. That dismissal was on 3rd December 2009. The appellant has filed the present appeal against that rejection by the magistrate rejecting the application for stay pending appeal in the Court of Appeal. In this appeal, the appellant has once again sought stay of execution of the judgment in PMCC Maua No. 117 of 2006 pending the appeal in the Court of Appeal. That application is by Notice of Motion dated 3rd May 2010. It is brought primarily under Sections 3 3A and 63 (e) of the Civil Procedure Act. Although various issues were raised before me relating to that application for stay, I believe what is before me is essentially the application for stay pending appeal. Even if the appellant did not rely on Order XLI Rule 4 of the Civil Procedure Rules, the reading of the prayers that he seeks clearly shows that the application is premised on that Rule. Order XLI Rule 1 (1) in the pertinent part of it provides:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order and whether the application for 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, to consider such application.”

What is abundantly clear from the provisions quoted above is that stay is sought when the decree or order is the subject of an appeal. In other words, stay is sought in the very file where appeal is filed. That is not so here. The appellant has not appealed against the judgment in PMCC Maua No. 117 of 2006. The appellant had a case with the Commissioner of Insurance which is presently the subject of an appeal before the Court of Appeal. That appeal in the Court of Appeal does not involve the respondent nor does it relate to PMCC Maua No. 117 of 2006. The application of the appellant for stay dated 29th April 2010 is misconceived for that reason. Order XLI Rule 4 is the Order that gives relief sought by an appellant. Because the appellant is not appealing against the decision of Maua, he cannot get relief provided under Order XLI Rule 4. That being my finding, it follows that the appellant’s application which was also argued before me dated 3rd May 2010 seeking orders to lift the attachment of the appellant’s motor vehicle has no foundation and must fail. In the end, the appellant’s applications dated 29th April and 3rd May 2010 are dismissed with costs to the respondent. The stay orders issued by this court on 6th May 2010 are vacated.

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO
JUDGE