



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 121 of 2009

SILAS KIPLIMO.....1ST APPLICANT/APELLANT

FRANCIS D. ERSKINE.....2ND APPLICANT/APELLANT

VERSUS

KENNEDY MAINGI.....RESPONDENT

RULING

This is an application for stay of execution pending the hearing and determination of the appeal herein.

The applicants being aggrieved by the award of Kshs.300,000/= in general damages and Kshs.2,500/= in special damages, preferred this appeal.

By consent of counsel of the parties, it was agreed that there be a stay of execution on condition that the decretal sum amounting to Kshs.331,455/= be deposited by the applicants within 14 days in an interest earning account in the joint names of counsel for the parties and in default execution would issue. It appears there was no compliance with that order and on 27th January, 2010, property allegedly belonging to the applicants was proclaimed in execution. The applicants have brought the instant application as I have stated, to stay execution.

The 2nd applicant on behalf of the 1st applicant has sworn an affidavit in which he has averred that a cheque in the sum of

Kshs.331,450/= was delivered to the applicants' erstwhile advocates, M/s. Njuguna & Company Advocates to be deposited in an interest earning account as ordered by the court below. He was therefore surprised that there was execution.

On confronting the advocate, Mr. P. K. Njuguna, it became apparent that no account had been opened. Mr. P.K. Njuguna then moved the court by an application dated 11th February, 2010 for extension of time within which to deposit the decretal sum and for stay of execution. That application was not heard due to the absence of the trial magistrate, hence the instant application. The applicants have confirmed their readiness to deposit the decretal sum as ordered.

The respondent has opposed the application on the grounds that it has been made in bad faith and after inordinate delay; that the applicants have made a similar application in the court below and subsequently withdrew it with costs, which costs have not been paid; that the applicants ought to have known from their bank account that the cheque had not been paid.

I have considered the foregoing submissions. An order of stay under **order 41 rule 4** of the **Civil Procedure Rules** will issue if the applicants demonstrate to the satisfaction of the court that substantial loss may result to them unless the order is made.

The applicants must also give an undertaking to provide security as may be ordered by the court. Finally, the application for stay must be brought without unreasonable delay.

In view of the events, prior to the bringing of this application, namely, the failure by the applicants erstwhile advocates to comply with the consent order, attempts to extend time within which to deposit the decretal sum and stay execution, the delay has in my view been adequately explained.

At paragraph 15 of the applicants' supporting affidavit, they have averred that they do not know the respondent's source of income. They have consequently expressed apprehension that should the decretal sum be paid over to him, he may not be able to reconstitute in the event the appeal was allowed. Having so expressed such reservation on the ability of the applicant to refund Kshs.331,450/= the burden to rebut that allegation shifted to the respondent to satisfy court that indeed he has the means to satisfy any loss that may result of the applicant in the event the appeal were to succeed after the decretal sum has been paid over to him (the respondent). The respondent has failed to present evidence of his means. There is clear commitment by the applicants to provide security.

Indeed other than the failure of their advocate to open a joint account and deposit the decretal sum, the applicants have allocated in good faith

and the failure of their then advocate cannot be visited upon them.

For these reasons, it is ordered that there will be an order of stay pending hearing and determination of this appeal on condition that the decretal sum is deposited within 14 days from the date of this order in an interest earning account in the joint names of the parties' advocates.

The respondent raised procedural points which in my view do not go to the substance of this dispute and as such I do not intend to address them. The applicants to pay to the respondent the costs of this application.

Dated, Signed and Delivered at Nakuru this 15th day of July, 2010.

W. OUKO

JUDGE