



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 203 of 2005**

**GEORGE E. NYANJA.....APPELLANT**

**VERSUS**

**FRANCIS K. HINGA.....RESPONDENT**

**R U L I N G**

1. On the 21<sup>st</sup> April, 2009, a ruling was delivered by a Deputy Registrar, High Court, in which he rejected the reasons given by George E. Nyanja, (hereinafter referred to as the appellant), as to why a warrant of arrest should not issue against him in execution of a decree issued pursuant to an arbitral award adopted by the court as judgment in High Court Misc. Cause No.472 of 2004.

2. Being dissatisfied by that ruling the appellant has filed an appeal in this court. The appellant has now brought a notice of motion under Order XXI Rule 21(1), Order XLI Rule 4(1) & (6) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking to stay the orders made by the Deputy Registrar pending the hearing of his appeal. The appellant explains that the warrant of arrest has already been issued against him and unless an order for stay of execution is granted the warrant of arrest will be executed and the appellant will suffer irreparable loss as his constitutional rights will be violated.

3. Mr. Machira who appeared for the appellant maintained that if the order sought is not granted the appellant's appeal will be rendered nugatory. He urged the court to avert this possibility by granting the orders sought. In this regard, Mr. Machira relied on the following authorities:

**(i) *Cooperative Bank of Kenya vs Victoria Insurance Brokers Ltd [2006] eKLR.***

**(ii) *David Irungu vs Richard Wachira [2006] eKLR.***

**(iii) *Milton K. Njuki vs Edward Ileri Mugo [2005] eKLR.***

4. Francis K. Hinga who is the respondent to the appeal, has filed a replying affidavit objecting to the application. The respondent maintains that in actual fact there is no appeal or intended appeal before this court against the decree issued in Misc. Cause No.472 of 2004, but that in actual fact, the appellant intends to appeal against the orders of the court issued on 29<sup>th</sup> October, 2008 in which the court refused to set aside the order adopting the arbitrator's award. The respondent maintains that the order of 21<sup>st</sup> April, 2009 is a simple order in proceedings of the execution for the money decree whose purport is to enforce

payment in settlement of the award. The respondent further maintains that all the appellant needs to do to avoid arrest and committal to civil jail, is simply to settle the decretal sum. It was maintained that the allegation that the intended appeal will be rendered nugatory has not been substantiated.

5. Mr. Wamiti who appeared for the respondent submitted that there was a lawful decree in force and setting aside the orders made on 21<sup>st</sup> April, 2009 would not bar the respondent from executing the decree. Mr. Wamiti argued that the appellant having filed an application for stay of execution of the decree in the Court of Appeal, that was the right court which could order stay of the execution of the decree. The court was therefore urged to dismiss the application.

6. I have carefully considered the application before me. I have also had the benefit of looking at the ruling of the Deputy Registrar delivered on 21<sup>st</sup> April, 2009, which is subject of the appeal. The gist of the ruling is contained in the last paragraph of the ruling wherein the Deputy Registrar states:

***“Since Mr. Machira’s submissions were largely based on the erroneous view that there was an order for stay of execution and given that the judgment-debtor did not appear in court to show cause why execution should not be granted I find that the judgment-debtor did not show any cause as required and I accordingly order a warrant of arrest to issue against the judgment-debtor as prayed in the Notice to Show Cause dated 17<sup>th</sup> March, 2009.”***

7. In effect, that is the order which this court is being asked to stay execution of. Under Order XLI Rule 4(2) of the Civil Procedure Rules, the most crucial factor upon which an appellate court can issue an order for stay of execution pending appeal, is where it is satisfied that substantial loss will result to the applicant unless an order for stay of execution is granted.

8. In this case, the applicant argues that if the orders sought are not granted, he will be arrested and committed to civil jail. This will cause him loss as it will be against his constitutional rights. In my view, arrest and committal to civil jail is a legal remedy provided to a successful litigant. Therefore, as long as the warrants of arrest and committal to civil jail are issued by a court of competent jurisdiction, the issue of violation of constitutional rights does not arise. Moreover, the applicant can easily avert his threatened arrest by paying the decretal sum.

9. Further, it is evident from the affidavits in support and in reply to this application, that the issue of execution of the warrants was dealt with by Khaminwa J. who granted an order for stay of execution for 60 days which has since lapsed. The matter is now pending before the Court of Appeal in HC.Misc. App. No. Nai 43 of 2009. The authorities cited by Mr. Machira are all distinguishable as the circumstances herein are different.

10. In the circumstances, I find that the applicant has failed to satisfy the conditions upon which an order for stay of execution can be granted. There is no just cause for granting the orders sought and the application is accordingly dismissed.

Dated and delivered this 19<sup>th</sup> day of May, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Machira for the appellant

Wamiti for the respondent