REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 16 OF 2009

MOHAMED ABBAS M. SOMJI……..……..APPLICANT

VERSUS

JAMES JAPHETH OTIENO……..RESPONDENT

RULING

I have before me an application by way of Notice of Motion dated 24th January 2009 by Mohamed Abbas M. Somji (hereinafter "the applicant"). The application is expressed to be brought under Order L Rule I, Order XXI Rule 22 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. As the primary prayer is for stay of execution pending the hearing and determination of Civil Appeal No. 3 of 2009, the applicant should have invoked Order XLI Rule 4 of the Civil Procedure Rules. I will therefore consider the application under that rule.

The main grounds for the application as expressed on the face of the application are that the applicant has preferred an appeal against the decision made against him in CMCCC No. 769 of 2008 and unless the stay is granted the respondent may execute against the applicant thereby occasioning him irreparable loss and damage.

The application is supported by an affidavit sworn by the applicant. In the affidavit, it is deponed, *inter alia*, that the applicant's appeal is arguable and if stay is not granted the same will be rendered nugatory because there is no guarantee that if the appeal succeeds, and the decree has been paid, the respondent will be able to repay the same. The applicant further swears that he is willing, able and ready to abide by any condition which the court may impose as a condition for stay.

When the application came up for hearing on 4th March 2009, counsel agreed to file written submissions, which were in place by 21st April 2009. In his written submissions, the applicant's counsel contended that the applicant had demonstrated the conditions for the grant of a stay and his application should be allowed. On his part counsel for the respondent contended that the application is incompetent as no application for stay had been first made in the Lower Court and that it was not proper for the applicant to seek stay in a miscellaneous application when he had already lodged an appeal in which such an application should have been made.

As to merits, counsel contended that no where had the applicant stated that he would suffer substantial loss unless the stay was granted and he had also not furnished security as mandatorily required under

Order XLI Rule 4 of the Civil Procedure Rules.

I have now considered the application, the affidavit in support thereof, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. It is appropriate to first consider what should in my view have been argued as preliminary objection by counsel for the respondent in his written submissions.

On the contention that the application for stay of execution ought first to have been made in the court which passed the decree the short answer is found in Order XLI Rule 4 (1) of the Civil Procedure Rules. The relevant part reads as follows:

"…**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 and make such order thereon as may to it seem just……"**

Order XLI of the Civil Procedure Rules does not state that the application should be in the appeal itself although the application is ordinarily made in the appeal if one has been filed. There is however no legal impediment to seeking the stay in a miscellaneous application. In the premises, I cannot strike out the applicant's Notice of Motion on the basis that the stay was not first sought before the Chief Magistrate's Court or that it has been brought by way of a Miscellaneous application. The application must therefore be considered on its merits.

For the applicant to succeed, in his application, he had to show that there is sufficient cause to order stay of execution. He had also to show that he would suffer substantial loss unless stay is ordered and that the application had been lodged without unreasonable delay. The last condition the applicant had to meet is that of security.

With regard to delay, it is noted that the decision appealed from was delivered on 15th December 2008 and the appeal therefrom was lodged on 14th January 2009. This application was then filed on 26th January 2009. The delay involved was slightly over one month. That delay in my view is not inordinate. I therefore find and hold that the application has been made without unreasonable delay.

With regard to the establishment of sufficient cause, I have perused the applicant's memorandum of appeal and note that the respondent's claim was founded on malicious prosecution and was commenced and concluded without joining the Attorney General. Prima facie therefore, the applicant's appeal cannot be said to be frivolous. By demonstrating that his appeal is arguable the applicant has, in my view, demonstrated sufficient cause.

With regard to the establishment by the applicant, that substantial loss may result to him unless an order of stay is granted, I note that the applicant has, in paragraph 8 of his supporting affidavit, deponed that if stay is not granted, the appeal will be rendered nugatory as there is no guarantee that he will be able to redeem the decretal sum from the respondent in the event the decretal amount is paid. Although the applicant has not specifically alleged that he will suffer substantial loss unless stay is granted, the respondent has not demonstrated that the decretal amount, if paid over to him and the appeal eventually succeeds, he will be able to pay back the decretal amount. The applicant's fear that his success in the appeal will be worthless is therefore not without basis. In the premise, the applicant has demonstrated that he will suffer substantial loss unless stay is granted.

The last requirement is that of security. The applicant has deponed that it is ready to abide by any conditions which may be set by the court regarding security. In his written submissions, counsel for the applicant contends that the applicant is willing, able and ready to deposit the entire decretal amount as security.

In the premises, the applicant has satisfied all the conditions set in Order XLI Rule 4 of the Civil Procedure Rules. I will therefore make the following orders:

1) The applicant to deposit the decretal amount in an interest earning bank account in the joint names of the advocates of the parties within fourteen (14) days from the date hereof.

2) I order that there be a stay of execution if the applicant complies with (1) above.

3) In default of compliance with (1) above, the applicant's Notice of Motion shall stand dismissed with costs.

4) Costs of the application shall otherwise abide the results of the Civil Appeal No. 3 of 2009.

5) Each party has liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Adhoch for the Applicant and Egunza holding brief for Waweru for the Respondent.

F. AZANGALALA

JUDGE

18TH MAY 2009