



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 45 OF 2002

JASPER JUMA NZUKI PLAINTIFF

VERSUS

JAMES WANYAMU MATH..... 1ST DEFENDANT

MUTUKU WANYAMU..... 2ND DEFENDANT

RULING

1. The Application dated 26/11/2008 is premised on Order XLI Rule 4 of the Civil Procedure Rules and the simple prayer sought is that of stay of execution pending appeal.
2. The background to the Application is that on 17/9/2008 I delivered judgment in favour of the Plaintiff/Respondent and I awarded Kshs.1.39 Million as damages. The Defendants/Applicants were dissatisfied and I note that a Notice of Appeal dated 25/9/2008 was filed and served. On the same day certified copies of proceedings were sought and the present Application filed 60 days later.
3. Both advocates agree that the law on the subject is clear and uncontested; a party seeking discretion under Rule 4 (1) and (2) of Order XLI aforesaid must show that;
 - a.substantial loss will be occasioned if the order of stay is not granted.
 - b.that the application for stay was made without undue delay.
 - c. the applicant is ready to deposit such security as the court may order.
4. In the present case, the Applicants has argued that the sum of Kshs.1.39 Million is substantial **“and more particularly in these gloomy times”** and that in fact the advocates for the Plaintiff in their letter dated 3/11/2008 demanded payment of Kshs.2.6 Million which is said to be a **“whooping”** sum of

money. Further, that the Plaintiff resides in Switzerland and it is doubtful whether any part of the decretal sum can be recovered in such circumstances and should the appeal succeed, the Applicants will then suffer substantial loss.

5. The response by the Plaintiff is that although the Plaintiff has been resident in Switzerland for close to 10 years, he has properties in Kenya and Switzerland and he can refund the said sums should the appeal succeed.

6. On this point, I wholly agree with the advocate for the Defendant that this court's discretion to grant or refuse to grant a stay order is unfettered save that the conditions set out in Order XLI Rule 4 (2) of the Civil Procedure Rules must be met (see generally **Butt vs Rent Restriction Tribunal (1982) KLR 417**). Further, substantial loss is the cornerstone of any application for stay of execution and in the present case, the decretal sum is certainly a large one by any standard and crucially, although the Respondent/Plaintiff may well have the means to repay it he is not resident in Kenya and the properties he has in Kenya are not disclosed. Should the appeal succeed, recovery may be difficult and in the circumstance, substantial loss may result to the Applicants.

7. It is not denied that the Applicants brought the present application 2 months after judgment because it was filed on 26/11/2008. However, he took steps 9 days after the judgment to lodge his Notice of Appeal and to secure the typed copies of proceedings. I cannot in the event look at them as indolent litigants.

8. Lastly, the advocate for the Plaintiff/Respondent in submissions on the issue of security to be deposited stated as follows:

“...the most fair and reasonable security for both parties would be to have the entire decretal sum of Kshs.2,639,983.65 deposited in an interest earning account in the names of the advocates for the parties...”

9. While I agree with the principle proposed, I do not understand the basis for the sum of Kshs.2.63 Million. I have looked at the record and if it relates to costs and interest, I am yet to rule on the issue of interest as the judgment was silent on the issue. As to costs, the same has not been computed on the record.

10. In the end therefore, while I will certainly grant a stay of execution pending appeal, the final order is this;

Let the stay of execution pending appeal be granted pending appeal on condition that Kshs.1.4 Million being the judgment sum to the nearest higher whole figure be deposited in an interest earning account in the joint names of the advocates for the parties within 45 days of this order. In default, execution to issue.

11. Costs shall abide the appeal.

12. Orders accordingly.

Dated and delivered at Machakos this **12th** day of **May** 2009.

ISAAC LENAOLA

JUDGE

In the Presence of: Mr Mutia h/b for Mr Tindika for Plaintiff

N/A for Defendant

ISAAC LENAOLA

JUDGE