



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 25 OF 2008

DAVID MULIUNTU.....APPELLANT

VERSUS

JULIUS MATI MUNGATHIA.....RESPONDENT

CIVIL PROCEDURE AND PRACTICE

Stay of Execution – Grounds of grant Stay in the High Court –

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RULING

By a Notice of Motion dated 25th April 2008 and filed the same day, the Appellant/Applicant sought the stay of execution of the decree in Maua RMCC No. 34 of 2006 pending the hearing and determination of the appeal herein. The Motion was premised upon the provisions of Order XLI rule 4 of the Civil Procedure Rules and was supported by Affidavit of the Applicant, and the grounds on the face of the application.

The Respondent filed grounds of opposition and also filed a Replying Affidavit sworn on 4th July 2008.

Rule 4 (1) of Order XLI, sets out the power and discretion vested in this Court to stay execution of orders or decrees of Court. Rule 4 (2) then says :-

(2) No order of stay of execution shall be made under sub-rule 1 unless-

- (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made,**
- (b) the application has been brought without unreasonable delay,**
- (c) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.**

On the first criteria whether the Applicant would suffer substantial loss, the Applicant depones in paragraph 17 of the Supporting Affidavit that he would suffer irreparable loss and damage if a stay is not granted. However in opposition to the application, the Respondent Julius Mati Munyathia depones in his Replying Affidavit that it was the Applicant who breached the share agreement for plucking his miraa

between him and the Applicant. He sued him and obtained judgement in Maua PMCC No.34/2006. The order of Court in that suit was enforced through the sale of the rights to pluck miraa to the highest bidder.

The right to pluck the miraa was given to one **Phineas Mwenda** through a local mercantile arrangement called "auction." The respondent recovered his money of Kshs.20,000/= and **Phineas Mwenda** acquired the right to pick the miraa from 2nd October 2006 to-date. The Applicant however made the application to set aside the Court's Orders on 1.12.2008, one year and 2 months after the orders of Court and execution of the Court orders and sale of the Miraa rights. The application to set aside the orders of court was dismissed by the learned Principal Magistrate on 14.02.2008, observing that "**the proper procedure was followed before the applicant's miraa trees were sold in a public auction.**"

It seems to me that a party who enters into an agreement and breaches it, and upon being sued ignores Court summons, and comes to court one year after execution of the orders of Court cannot be said to likely to suffer irreparable loss. He has brought to himself the deserts he deserves. This is loss the Applicant has brought to himself. He was paid Shs.20,000/= and having breached the agreement with the Respondent he cannot be heard to be saying he would suffer irreparable loss. The Application fails for a stay fails on this ground.

Although the application for stay was filed on 11th March 2008, just over three weeks following the Ruling of the lower Court on 14-02.2008 and can be said to have been brought without unreasonable delay, the decree for which the stay was sought had already been executed per the auction sale which had taken effect from 29th September 2006, and there was no decree to stay. I think the learned Principal Magistrate was correct in his finding that all process of court had been observed, and that the application to set aside had no merit. The Applicant had known for over one year that the miraa rights had been acquired by a third party – "**Pheneas Mwenda.**"

I therefore hold that the application here has been brought after an inordinate period of time. The delay is besides not explained at all.

Finally on the last ground, the Applicant was willing to deposit, such security as the Court may order. I do not think such an order would be of any help to the Applicant. The respondent having surrendered his miraa rights to a third party, it does not do the Applicant any credit to pursue the respondent without joining the third party, perhaps not in these proceedings, but in a fresh and direct suit against him and the Respondent. I do not see the efficacy of an order for security having found that the Applicant has not satisfied any of the other conditions for an order of stay of execution.

For those reasons, I would dismiss the appellant's Motion dated 2^{5th} April, 2008 and vacate any interim order of stay. The Respondent shall have the costs of the application herein.

There shall be orders accordingly.

Dated, delivered and signed at Meru, this 26th day of June 2009.

M. J. ANYARA EMUKULE

(JUDGE)