

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 69 of 2008

MARY MWOMAITHA APPELLANT

VERSUS

JOSHUA KIMAMANCHA RESPONDENT

RULING

The applicant in this motion on notice filed on 23rd September, 2008 seeks an order to stay execution of the decree in Tigania SRMCC No. 134 of 2006.

Judgment in the above case was entered against the applicant and two others in the sum of Kshs. 30,000/= in general damages for malicious prosecution.

The applicant was aggrieved and has filed this appeal. He is in the meantime seeking stay of execution of the decree arising from the said judgment.

It is an application brought pursuant to order 41 Rule 4 (1) & (2) of the Civil Procedure Rules. The applicant must for that reason prove that he stands to suffer substantial loss if the order of stay is not granted. The applicant must also be ready to comply with any orders as to security. The court must be satisfied that there has been no unreasonable delay in bringing the application for stay.

The respondent in his reply contends that the application is an abuse of the court process as a notice to show cause has been issued and in the light of the meager decretal sum involved.

After all the respondent avers, he is capable of refunding the same in the event the appeal succeeds after the decretal sum has been paid over to him.

I have considered these submissions and the single authority cited by counsel for the applicant, **Blue Shields Insurance Co. Ltd V. George Thurania**, Misc. Civil Application No. 3 of 2008.

The judgment in the lower court was delivered on 19th June 2008 while this application was filed on 23rd September 2008, three months later. That, in my view, is not unreasonable delay.

The applicant has deposed that she is willing to provide security as may be ordered by the court. But the more fundamental question is whether the applicant stands to suffer substantial loss should the relief sought be rejected.

The amount involved is immaterial so long as it is shown that the respondent is the kind of person who cannot retribute should the funds be paid to him and eventually the appeal was to succeed. The court in an application for stay of execution will be more concerned with the loss more than anything else. Put differently, it is the probable loss to the applicant that must be prevented while considering also the interest of the respondent who has a judgment in his hand.

It follows from this that the onus is upon the respondent to demonstrate that he is capable of refunding the decretal sum should the need arise. The respondent in this matter has merely stated that he is capable of refunding. He has given the example that he has engaged an advocate to show that capability. That is not sufficient proof of means. See **ABN AMRO Bank N. V. Le Monde Foods Ltd**, Civil Application No. NAI. 15 of 2002. See also **Blue Shields Co. Ltd** Case (supra). He ought to have demonstrated what those means are comprised of.

The respondent having failed to convince the court that the applicant's apprehension regarding his financial ability are misplaced, this application succeeds and is allowed subject to the respondent depositing Kshs. 30,000/= in the joint names of his counsel and the respondent's counsel in an interest-earning account within thirty (30) days from the date of this order, failing which execution shall proceed without further orders.

Costs to be costs in the appeal.

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

W. OUKO