



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal Case 50 of 2008**

**CHARLES MUTETHIA MUTEA ..... 1<sup>ST</sup> APPELLANT/APPLICANT**

**JULIUS MURIUNGI ..... 2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**IBRAHIM MUTURA (*Suing as Legal Representative of the Estate of*)**

**NAOMI KAWIRIA – (*Deceased*) ..... RESPONDENT**

**RULING**

Judgment in the sum of Kshs. 437,967 was given in favour of the respondent against the applicants by the court below. The applicants being aggrieved have filed this appeal.

In the meantime, the applicants are seeking, in the instant application, that execution of the decree be stayed pending the determination of the appeal. It is the applicant's contention that the decretal sum is large and if paid over to the respondent, who is a man of straw, it may not be refunded in case the appeal succeeds. The applicants have further averred that they are ready to offer security as may be ordered by the court and finally that the application for stay has been brought without undue delay.

In reply to these averments, the respondent has deposed that he is not impecunious as he owns several parcels of land and therefore the applicants will not suffer any loss if the decretal sum is paid to him and in the event the appeal succeeds.

The three conditions to be fulfilled under Order 41 Rule 4 of the Civil Procedure Rules before an order of stay can be granted are, first, that the applicant stands to suffer substantial loss unless the order of stay is granted. Secondly, the application for stay must be brought without unreasonable delay and finally, the applicant must give an undertaking as to security.

The applicants have deposed that they are ready and willing to offer security for satisfaction of such decree or order as may be made by the court. The judgment being challenged in this appeal was delivered on 22<sup>nd</sup> May 2008 while the instant application was filed on 13<sup>th</sup> June 2008, barely a month later. That in my view was timeous.

But the critical consideration is whether the applicants may stand to lose should they pay the decretal sum over to the respondent and eventually the appeal were to succeed. It is this loss that must be prevented. How does this loss occur? It will occur when the decretal sum is paid over to a party in whose favour

judgment has been passed, who has no means to refund the same in case the appeal is successful

In other words, if the person in whose favour a judgment has been passed is capable of refunding the decretal sum, then the courts will normally not stay execution.

The other consideration in balancing the interests of the parties is whether the payment of the decretal sum will have the effect of crippling the operations or business of the applicant. It is now settled that once the applicant raises doubt about the respondents' financial status, the legal burden remains on the applicant but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed.

The Court of Appeal in ABN AMRO BANK, N.V. V. Le Monde Foods Ltd, Civil Application No. NAI. 15 of 2002 said of the evidential burden on the respondent as follows:-

*“This evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has such as land, cash in the bank and so on.”*

Earlier before the above decision, the Court of Appeal in the case of Kenya Posts and Telecommunication Corporation V. Paul Gachanga Ndama, Civil Application No. NAI. 367 of 2001 stated the law as follows:-

*“But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the corporation may not reasonably be expected to know them.....”*

I can only add that section 112 of the Evidence Act also places the burden upon a party in respect of any fact which is especially within that party's knowledge. The respondent has deposed that he is the owner of some four (4) parcels of land and several grade cows as well as poultry.

Although the standard of proof required of the respondent is on a balance of probabilities, it was not enough for him to simply state that he owns the said property without any other evidence, especially with regard to land. As was held in The Standard Ltd V. G.N. Kagia T/A Kagia & Co. Advocates, Civil Application No. NAI. 193 of 2003, the value of land may depreciate, or may be disposed of or it may be difficult to sell by the time the appeal is determined. I may add that without certificates of title it is difficult to tell if the said parcels of land have any restrictions or encumbrances or whether indeed they are registered solely in the name of the respondent. In the result, I come to the conclusion that the respondent has failed to discharge the burden to show that he is capable of refunding the decretal sum should the appeal succeed after the decretal sum has been paid over to him.

For that reason, there will be a stay of execution pending the hearing and determination of this appeal on condition that the applicants deposit Kshs. 250,000/= in an interest-earning account in the joint names of their advocate and the respondent's advocates within thirty (30) days of this order, failing which execution will proceed without further orders. Costs to be costs in the appeal.

Dated and delivered at Meru this 10<sup>th</sup> day of June 2009.

**W. OUKO**

**JUDGE**